Supreme Court Online Bulletin

(Law Report)

August, 2015

Editors
Justice Moyeenul Islam Chowdhury
Justice Sheikh Hassan Arif

Citation
1 SCOB [2015] AD
1 SCOB [2015] HCD

Supreme Court of Bangladesh

Published by
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Justice Surendra Kumar Sinha
Chief Justice of Bangladesh

Supreme Court of Bangladesh
Dhaka-1000

Message

With the advancement and development of science and technology, the outer layer of the society changes. But sometimes some inventions of the scientists or some new findings by the researchers give a thrust to the society to change its color, decor or even roots to such an unfathomable degree that the basic fabric of it starts knitting afresh. "Information and Communication Technology" (ICT) is that magic wand of the 21st century which uprooted all our obsolete ideas regarding way of life and installed a new outlook and dimension in every nook and cranny of our daily life. Supreme Court Online Bulletin (SCOB) is aimed at to achieving that target in delivering justice through the potentials of ICT.

We are now, by any measure, at the crossroads of significant change in the dissemination of ideas about law and justice. As a part of this change, it is very pertinent to expect that this Online bulletin, consisting of Judgments delivered by the Supreme Court, would enrich the knowledge of the legal community, and enhance legal skills of present and future law professionals. At the same time, this compilation of Judgments and legal works would contribute to create broader and newer legal interpretation. And, eventually, this will lead to develop a more augmented legal jurisprudence.

I extend my sincere thanks to the editors, Mr. Justice Moyeenul Islam Chowdhury and Mr. Justice Sheikh Hassan Arif, the research associates, IT personnel and also to everyone who has been associated with the preparation and launching of this online bulletin. At the end, I wish the very best for this bulletin.

(Justice Surendra Kumar Sinha)
Chief Justice of Bangladesh

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Editorial

Justice Moyeenul Islam Chowdhury [*]
Justice Sheikh Hassan Arif [*]

After a few days of preparation, we are now proud of presenting an online law bulletin – Supreme Court Online Bulletin, in short **SCOB**, in order to provide for ready case references to the Hon'ble Judges, learned Advocates, other members of the legal community, media and the people at large. A surfeit of case laws are generated every year by both the Divisions of the Supreme Court of Bangladesh having far-reaching effect and impact on the functioning of the Judiciary as well as other vital organs and pillars of a democratic State, e.g., the Executive, Legislature and the Media. However, even the Judges of the Supreme Court find it difficult to cope with such quick legal developments due to the lack of proper communication apparatus which may, sometimes, be the cause of inconsistent and/or contradictory decisions by different Benches of the High Court Division on a particular legal issue. These inconsistencies, though rare, draw criticisms and harsh strictures from the Appellate Division, particularly when some Benches of the High Court Division issue Rules and/or pass orders which evidently transgress the legal parameters as set by the Appellate Division from time to time. In such cases, litigant people also get confused as to the real position of law regarding a particular issue. Considering these aspects, amongst others, the Supreme Court has taken the initiative to launch this online bulletin under the direct patronization of the Hon'ble Chief Justice of the Bangladesh and guidance from the Judicial Reform Committee of the Supreme Court. This purpose of dissemination is the **raison d'etre** of this Supreme Court Online Bulletin (SCOB).

In the struggle to establish the rule of law, the Supreme Court of Bangladesh, through its numerous judicial pronouncements on various issues of law and constitutional importance, has already made its presence heavily felt by the concerned stakeholders in this country. Having successfully grappled with different important constitutional issues such as the separation of the Judiciary from the Executive, restrictions on the amending power of the Parliament in respect of certain Articles of the Constitution touching the basic structures of the same, issuance of *Suo Motu* Rules by the High Court Division, power of the Appellate Division to review the judgments passed by it on the appeals preferred by the war-crime convicts, are some examples by which the Supreme Court has endeavoured to act in true sense and spirit as the guardian of the Constitution and principal protector of the rule of law. Nevertheless, the aforesaid huge accomplishments of the Supreme Court are not effectively known to the concerned players of the society because of a long-standing vacuum in the dissemination process. This law bulletin will, no doubt, try to bridge that vacuum to a great extent, knowing very well that it would be a daunting task altogether.

Though, initially, the plan was to publish one bulletin in each month, yet, considering the generation of voluminous case laws in future, we are keeping it open for the editors of tomorrow to publish, if necessary, more than one bulletin in a month. Accordingly, the word "Monthly", before the word "Bulletin" has been taken off and as such the name of this bulletin has been chosen as "Supreme Court Online Bulletin", in short – "**SCOB**".

At the end, while we express our gratitude to the Hon'ble Chief Justice of Bangladesh, Judicial Reform Committee of the Supreme Court, our research associates, IT personnel and all others who have extended co-operation in preparing and publishing the SCOB, we welcome comments, constructive criticisms and suggestions in order to improve the quality of the SCOB from the legal fraternity and the media through our contact e-mail (scob@supremecourtcourt.gov.bd).

Thank you all.

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[*] At present, Presiding Judge of a Division Bench of the High Court Division of the Supreme Court of Bangladesh.

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Appellate Division

High Court Division

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APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha, Chief Justice
Mrs. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.116 OF 2010.
(From the judgment and order dated 2.3.2010 passed by the High Court Division in Writ Petition No.8283 of 2005.)

WITH

CRIMINAL PETITION FOR LEAVE TO APPEAL NO.374 OF 2011.
(From the judgment and order dated 25.5.2011 passed by the High Court Division in Death Reference No.13 of 2006 with Criminal Appeal No.453 of 2006 with Jail Appeal No.131 of 2006.)

AND

JAIL PETITION NOS.18 OF 2008, 03 OF 2009, 01 OF 2010, 08 OF 2010, 16 OF 2010, 2-3 OF 2011, 05 OF 2012 & 7-8 OF 2012.

Bangladesh Legal Aid and Services Trust (BLAST) and others:	Appellants. (In C.A. No.116 of 2010)
Shafiqul Islam:	Petitioner. (In Crl. P. No.374 of 2011)
Masuk Miah:	Petitioner. (In Jail P. No.18 of 2008)
Md. Nazrul Islam:	Petitioner. (In Jail P. No.3 of 2009)
Abdur Rashid @ Raisha @ Haji Shab:	Petitioner. (In Jail P. No.1 of 2010)
Raju Ahmed @ Raja Miah:	Petitioner. (In Jail P. No.8 of 2010).
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Idris Sheikh:	Petitioner (In Jail P. No.7 of 2012).
Shahjahan @ Haider @ Kutti:	Petitioner In Jail P.No.8 of 2012.

=Versus=

Bangladesh, represented by the Secretary, Ministry of Home Affairs, Dhaka and others:	Respondents. (In C.A. No.116 of 2010)
The State:	Respondent. (In all the petitions)
For the Appellants: (In C.A. No.116 of 2010)	Mr. M. I. Farooqui, Senior Advocate (with Mr. A.B.M. Bayezid, Advocate), instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.
For the Petitioner: (In Crl. P. No.374 of 2011)	Mrs. Sufia Khatun, Advocate-on- Record.
For the Petitioner: (In Jail P. Nos.18 of 2008, 3 of 2009, 8 of 2010, 2-3 of 2011, 5 of 2012, 7 of 2012 and 8 of 2012)	Mr. A.B.M. Bayezid, Advocate.
For the Petitioner: (In jail P. Nos.1 of 2010 and 16 of 2010)	Mr. Helaluddin Mollah, Advocate.
For the Respondent: (In C.A. No.116 of 2010)	Mr. Mahbubey Alam, Attorney General, (with Mr. Momtazuddin Fakir, Additional Attorney General).

For the Respondent: (In Crl. P. No.374 of 2011)	Mr. Mahbubey Alam, Attorney General, instructed by Mrs. Mahmuda Begum, Advocate-on-Record.	Date of hearing: 18th February, 2015, 3rd March, 2015 and 5th May, 2015. Date of Judgment: 5th May, 2015.
For the Respondent: (In all the Jail Petitions)	Mr. Mahbubey Alam, Attorney General.	

We would like to point out here that whenever the High Court Division grants certificate it ought to have formulated the points on which the certificate is granted containing *inter alia* that the case involves a question of law as to the interpretation of the Constitution or that the question is a substantial one.

...(Para 3)

Abolition of Death Penalty is not Possible:

Our social conditions, social and cultural values are completely different from those of western countries. Our criminal law and jurisprudence have developed highlighting the social conditions and cultural values. The European Union has abolished death penalty in the context of their social conditions and values, but we cannot totally abolish a sentence of death in our country because the killing of women for dowry, abduction of women for prostitution, the abduction of children for trafficking are so rampant which are totally foreign to those developed countries. ...(Para 5)

Rule of law is the basic rule of governance of any civilized society. The scheme of our Constitution is based upon the concept of rule of law. To achieve the rule of law the Constitution has assigned an onerous task upon the judiciary and it is through the courts, the rule of law unfolds its contents. One of the important concept of the rule of law is legal certainty. Judicial review of administrative action is an essential part of rule of law and so is the independence of judiciary. ...(Para 10)

Only provision in which the court cannot exercise the discretionary power in awarding the sentence is section 303, which provides that "whoever, being under sentence of imprisonment for life commits murder shall be punished with death". I find no rational justification for making a distinction in the matter of punishment between two classes of offenders, one is, under the sentence of life imprisonment, who commits murder whilst another, not under the sentence of life imprisonment. ...(Para 15)

In sub-section (3) of section 6 of the Ain of 1995, if similar offence is committed by more than one person all of them will be sentenced to death. Suppose 5 persons are involved in the commission of the crime of them two directly participated in the commission of rape and other three persons abeted the offence. If these three persons are sentenced to death with other two, it will be contrary to norms and the sentencing principles being followed over a century. .... (Para 46)

A law which is not consistent with notions of fairness and provides an irreversible penalty of death is repugnant to the concepts of human rights and values, and safety and security.

... (Para 46)

A provision of law which deprives the court to use of its beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence cannot but be regarded as harsh, unfair and oppressive. The legislature cannot make relevant circumstances irrelevant, deprive the court of its legitimate jurisdiction to exercise its discretion not to impose death sentence in appropriate cases. Determination of appropriate measures of punishment is judicial and not executive functions. The court will enunciate the relevant facts to be considered and weight to be given to them having regard to the situation of the case. Therefore we have no hesitation in holding the view that these provisions are against the fundamental tenets of our Constitution, and therefore, *ultra vires* the Constitution and accordingly they are declared void.

...(Para 50)

In section 11(Ka) of the Ain of 2000, it is provided that if death is caused by husband or husband's, parents, guardians, relations or other persons to a woman for dowry, only one sentence of death has been provided leaving no discretionary power for the tribunal to award a lesser sentence on extraneous consideration. This provision is to the same extent *ultra vires* the Constitution. ...(Para 51)

Since we hold that Sub-Sections (2) and (4) of Section 6 of the Ain, 1995 and Sub-sections (2) and (3) of Section 34 of the Ain of 2000 are *ultra vires* the Constitution, despite repeal of the Ain of 1995, all cases pending and the appeals pending under the repealed Ain shall be regulated under the said law, but on the question of imposing sentence, the sentences prescribed in respect of those offences shall hold the field until new legislation is promulgated. I hold that there was total absence of proper application of the legislative mind in promulgating those Ains, which may be rectified by amendments. In respect of section 303 of the Penal Code, the punishment shall be made in accordance with section 302 of the Penal Code. It is hereby declared that despite repeal of Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, the pending cases including appeal may be held under the repealed Ain, while dealing with the question of sentence, the alternative sentences provided in the corresponding offences prescribed in the Nari-O-Shishu Nirjatan Daman Ain, 2000 shall be followed. ...(Para 52)

J U D G M E N T

Surendra Kumar Sinha, CJ:

1. The constitutionality of section 6(2) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, (Ain XVIII of 1995) and section 34 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (Ain VIII of 2000) has been called in question by the appellant Md. Sukur Ali, a death row convict, who has been convicted by the Nari-O-Shishu Nirjatan Daman Bishesh Adalat, Manikgonj for sexually assaulting to death of Sumi Akhter, a minor girl aged at about 7 years. The Bishesh Adalat sentenced him to death and the High Court Division also confirmed the death sentence and this Division also affirmed the sentence. A review petition was also filed before this Division. This review petition was also dismissed. Thereafter the appellant along with another moved the High Court Division challenging the mandatory death penalty provided in section 6(2) of the Ain as *ultra vires* the Constitution.

2. The High Court Division upon hearing the parties though declared section 6(2) of the Ain, 1995 ultravires the Constitution, refrained from declaring section 34 of the Ain of 2000 unconstitutional and also did not declare the sentence of the condemned prisoner to be unlawful. It was observed that the provision of mandatory death penalty is ultra-vires the Constitution, inasmuch as, when the legislature prescribes any punishment as mandatory, the hands of the court become a simple rubberstamp of the legislature and that this certainly discriminates and prejudices the court's ability to adjudicate properly taking into account all facts and circumstances of the case. The High Court Division granted a certificate under Article 103(2)(a) of the Constitution without, however, formulating any point observing that "in the light of the decision of this court and since the constitutional right of the convict petitioner is still in question". It was further observed that 'the punishment prescribes in section 6(2) of the Ain is such that if the Bishesh Adalat finds the accused guilty it can do no more than to impose the mandatory punishment of death".

3. We would like to point out here that whenever the High Court Division grants certificate it ought to have formulated the points on which the certificate is granted containing inter alia that the case involves a question of law as to the interpretation of the Constitution or that the question is a substantial one. In arriving at the conclusion it has considered an unreported case of the Judicial Committee of the Privy Council in Patrick Reyes V. The Queen in Privy Council Appeal No.64 of 2001 and Bachan Singh V. State of Punjab, (1980) 2 SCC 375, Matadeen V. Pointu (1999) 1 AC 98 and some other cases. It has been held that where the offender is not a habitual criminal or a man of violence "then it would be the duty of the court to take into accounts his character and antecedents in order to come to a just and proper decision". It held that the court must have always discretion to determine what punishment a transgressor deserves and to fix the appropriate sentence for the crime he is alleged to have committed. The court, it is observed, "may not be degraded to the position of simply rubberstamping the only punishment which the legislature prescribed". The substance of the opinion of the High Court Division is that the legislature cannot prescribe only one mandatory period of sentence leaving no discretion of the court to award a lesser sentence in the facts and circumstances of the case. The High Court Division was of the view that any provision of law which provides a mandatory death penalty cannot be in accordance with the Constitution as it curtails the court's jurisdiction to adjudicate on all issues brought before it including the imposition of an alternative sentence upon the accused if he is found guilty of such offence. A pertinent question of public importance as to the constitutionality of two sections of the Ains of 1995 and 2000 has surfaced which requires to be addressed in the context of our constitutional dispensation.

4. Before we consider the question, it is to be noted that over the violence of women, the first legislation introduced on this soil is Cruelty to Women (Deterrent Punishment) Ordinance, 1983. Under this law the offences of kidnapping and abducting women for unlawful purposes, trafficking of women, causing death of women for dowry, causing rape to death of women, attempts to causing death or causing grievous hurt in committing rape to women and abetement of those offences are included as schedule offence under the Special Powers Act, 1974. This piece of legislation is followed by another legislation namely, Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995. In this piece of legislation, 'children' within the meaning of the Children Act, 1974 is included as the victims with women and the horizon of offences is also widened, that is to say, offences relating to death with corrosive substances, causing grievous hurt with corrosive substances; rape; causing death by sexual assault or causing injury by sexual assault or attempt to commit rape, women trafficking; abduction of women for immoral purposes, causing death for dowry or attempts to commit offence for dowry; causing grievous injury for dowry; child trafficking; abduction of child for the purpose of ransom and instigation to commit any of the offences were included in the said Ain. The Cruelty to Woman (Deterrent Punishment) Ordinance was repealed by this Ain. Another piece of legislation on the same subject matter has surfaced namely; Nari-O-Shishu Nirjatan Daman Ain, 2000. In this Ain also the horizon of offences has been expanded and alternative sentences in respect of almost all offences except one has been provided. However, in section 34, it was provided that the cases instituted or pending for trial under the repealed Ain including the appeals pending against any order, judgment or sentence shall continue as if the Ain of 1995 has not been repealed. Although the Ain of 1995 was repealed, by this saving clause the pending cases initiated under the Ain of 1995 have been kept alive and the trials and the punishment have to be guided under the repealed Ain.

5. Our social conditions, social and cultural values are completely different from those of western countries. Our criminal law and jurisprudence have developed highlighting the social conditions and cultural values. The European Union has abolished death penalty in the context of their social conditions and values, but we cannot totally abolish a sentence of death in our country because the killing of women for dowry, abduction of women for prostitution, the abduction of children for trafficking are so rampant which are totally foreign to those developed countries. In some cases we notice the killing of women or minor girls by pouring corrosive substances over petty matters, which could not be imagined of to be perpetrated in the western countries. We would not incorporate principles foreign to our Constitution or be proceeding upon the slippery ground of apparent similarity of expressions or concepts in an alien jurisprudence developed by a society whose approach to similar problems on account of historical or other reasons differ from ours. We cannot altogether abolish the sentence of death taking the philosophy of European Union.

6. It was argued that the irrevocability of the death sentence should be looked at a moral approach, that is to say, the severity of capital punishment and the strong feelings shown by certain sections of public opinion in stretching deeper questions of human value. On the advancement of technology which reached the doors of remote areas of the country, poor and uneducated people cannot control their temptation of riding a motorbike or passing leisure time enjoying television programmes with a coloured television, and the offenders resort to such inhuman acts when their demand for dowry of a motorbike or a coloured television is not met by the victims. Sometimes they demand cash for going abroad. They torture them to death as a tool to justify their claim. This apart, having regard to the variety of the social upbringing of the citizens, to the disparity in the level of education in the country, to the disparity of the economic conditions, it is my considered view that this country cannot risk the experiment of abolition of capital punishment. To protect the illiterate girls, women and children from the onslaught of greedy people deterrent punishment should be retained. Therefore, it is difficult to lip chorus with the activists regarding the opinion of abolition of death sentence.

7. Even in awarding a death sentence, it cannot be said that such sentence is awarded without safeguarding the offender. There are procedural safeguards in our prevailing laws. If an offender commits an offence which is punishable to death, who is unable to engage a defence lawyer, he is provided with a defence counsel at the cost of the State. He is also provided with all documents free of cost which are relevant for taking his defence before commencement of the trial. Even if he is sentenced to death, the sentence shall not be executed unless such sentence is confirmed by the High Court Division. As soon as a sentence of death is given to a prisoner, he is provided with a copy of the judgment free of cost so that he can prefer a jail appeal. In every Central Jail where the condemned prisoners are kept, the jail authorities provide them sufficient facilities to prefer jail appeals. Besides, in course of hearing of a death reference and the jail appeal, if there be any, if the High Court Division finds that the convict has not engaged a lawyer, it directs the State to appoint a State defence lawyer on his behalf free of cost. Similar facilities are available in this Division. Even after confirmation of death sentence, the condemned prisoner can prefer an appeal as of right in the Appellate Division. Therefore, there are sufficient safeguards provided to an offender who is facing trial of an offence punishable to death or is sentenced to death.

8. Now the question is whether section 6(2) of the Ain, 1995 and section 34 of Ain of 2000 *are ultra* vires the Constitution. In this connection Mr. M. I. Faruqui, learned counsel appearing for the appellant argues that every citizen is guaranteed to enjoy the protection of law and to be treated in accordance with law, but in this case the condemned prisoner has not been treated in accordance with law because to safeguard his right guaranteed under the Constitution to be treated in accordance with law by the court, the court cannot exercise its discretionary power other than the one imposed by the legislature. He further submits that the Executive, the Judiciary and the Legislature being the creation of the Constitution, any transgression by any of the organs of the Republic can be assailed on the ground that such transgression is protected by Article 44 and in this case, the power of the judiciary has been transgressed by the executive by legislating a provision which is inconsistent with Articles 31 and 35(5) of the Constitution. It is finally contended that no action detrimental to the life, liberty, body and reputation of a citizen can be taken away except in accordance with law.

9. From the trend of the arguments it appears to me that the respondent is seeking quashment of his sentence as being inconsistent with the fundamental tenets enshrined in certain clauses in Part III of the Constitution which are as under:

> "27. All citizens are equal before law and are entitled to equal protection of law.
>
> '31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.
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> '32. No person shall be deprived of life or personal liberty save in accordance with law.
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> '35(1) .....
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> (2) .....
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> (3) .....
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> (4) .....
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> (5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."

10. The first safeguard is equal protection of law and no citizen should be deprived of enjoying the protection of law. The second protection is that the State or its machinery cannot take any action against a citizen detrimental to his life otherwise than in accordance with law. The third safeguard is that no citizen shall be deprived of life or personal liberty except in accordance with law and finally, no citizen shall be subjected to cruel or inhuman treatment. Rule of law is the basic rule of governance of any civilized society. The scheme of our Constitution is based upon the concept of rule of law. To achieve the rule of law the Constitution has assigned an onerous task upon the judiciary and it is through the courts, the rule of law unfolds its contents. One of the important concept of the rule of law is legal certainty. Judicial review of administrative action is an essential part of rule of law and so is the independence of judiciary. The principle of equal protection is almost in resemblance with the equal protection clause of the Fourteenth Amendment of the United States Constitution which declares that 'no State shall deny to any person within its jurisdiction the equal protection of the laws'. Professor Wills dealing with this clause sums up the law as prevailing in the United States that 'It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It only requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed'.

11. The second clause of Article 27 is also in resemblance with the last clause of section 1 of the Fourteenth Amendment of the Constitution of the United States of Amirica. Hughes, CJ. in West Coast Hotel Co. V. Parrish (1936) 300 US 379 in dealing with the content of the guarantee of equal protection of laws observed:

> "This court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature 'is free to recognize degree of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest'. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied'. There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms."

12. Mc. Kenna,J. in Heath and Milligan Mfg. Co, V. Worst (1907) 207 US 338 observed:

> "Classification must have relation to the purpose of the legislature. But logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in 'ill-advised, unequal, and

oppressive legislation ..... Exact wisdom and nice adaptation of remedies are not required by the 14th Amendment, nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it."

13. According to the learned counsel, though deprivation of life is constitutionally permissible, a sentence of death must be given according to the procedure established by law. Under this principle it is argued that the provision of sentence contained in sub-sections (2) and (4) of section 6 is draconian under severity, inasmuch as, it takes away courts legitimate jurisdiction to exercise their jurisdiction not to impose the death sentence in appropriate cases and compel them to shut its eyes to mitigating circumstances. Therefore, the provision is unconstitutional being violative to Articles 31 and 35(5).

14. If we look at the penal provisions contain in the Penal Code, except an offence punishable under section 303, in respect of other offences, though maximum sentences are provided, by the same time wide discretion has been given to the court in awarding the minimum sentences, for example, an offence of sedition is punishable under section 124A of the Penal Code - the maximum punishment prescribes for the offence is imprisonment for life and no minimum sentence is provided for. So, the court has ample power to exercise its discretion to award a sentence to the offender. In respect of offence of waging war against any government of Asiatic Power in alliance with Bangladesh, the maximum sentence is imprisonment for life and no minimum sentence is provided. Even in case of murder, there is provision for maximum and minimum sentence. In respect of causing grievous hurt without provocation if an injury is caused with any instrument which is punishable under section 325, the maximum sentence is seven years and no minimum sentence is prescribed, and if the grievous hurt is caused with any instrument of shooting or any sharp cutting weapon or by means of any poison or corrosive substance or explosive substance, the maximum sentence is imprisonment for life and no minimum sentence is provided. In respect of criminal breach of trust by a public servant, the maximum sentence is imprisonment for life and the minimum sentence is left with the discretion of the court so also in respect of an offence of forgery of valuable security. So it depends upon the facts and circumstances of each case.

15. We find wide discretion is given to a court in awarding sentence which attract aforesaid offences. The object of giving such discretionary power to the courts is obvious, say, if a grievous hurt is caused with a sharp cutting weapon which caused fracture of a finger, though the offence is grievous in nature and punishable under section 326, the court will not give the same sentence if the eyes of a victim is gauged by using similar instrument. In the earlier case the court can exercise its discretion in awarding a lesser sentence but in the latter case the court's discretion would be to award the maximum sentence prescribed in the section. Only provision in which the court cannot exercise the discretionary power in awarding the sentence is section 303, which provides that "whoever, being under sentence of imprisonment for life commits murder shall be punished with death". I find no rational justification for making a distinction in the matter of punishment between two classes of offenders, one is, under the sentence of life imprisonment, who commits murder whilst another, not under the sentence of life imprisonment.

16. The framers of the Penal Code while enacting section 303 had ignored several aspects of cases which attract the application of section 303 and of questions which are bound to arise under it. In those days jail officials were Englishmen and with a view to preventing assaults by the indigenous breed upon the white officers, they had in their mind one kind of case. That is why the Indian 42nd Law Commission Report observed that 'the primary object of making the death sentence mandatory for an offence under this section seems to be to give protection to the prison staff.' I have had no reason of doubt that the procedure by which the offence authorises the deprivation of life is unfair and unjust. The purpose and object of promulgating a provision of law has to be fair, just, not fanciful or arbitrary. More so, section 303 prescribes the sentence to be passed to an offender convicted of murder while undergoing sentence of imprisonment for life. Section 300 fastens the special requirements of murder upon the definition of culpable homicide. Culpable homicide sans special characteristics of murder is culpable homicide not amounting to murder. If any of the five exceptions attracts a case it will be culpable homicide not amounting to murder. For the purpose of fixing punishment proportionate to the gravity of the offence the Penal Code prescribes three degrees of culpable homicide. If we maintain the mandatory sentence, the exceptions provided in section 300 have to be ignored which will be illogical. So the courts must have the options to decide whether or not offence of a given case is culpable homicide amounting to murder.

17. Chandrachud, C.J. in Mithu V. State of Punjab (1983) 2 SCC 277 observed that murders can be motiveless in the sense that is a given case, the motive which operates on the mind of the offender is not known or is difficult to discover. But by and large, murders are committed for any one or more of a variety of motives which operate on the mind of the offender, whether he is under a sentence of life imprisonment or not. Such motives are too numerous and varied to enumerate but hate, lust, sex, jealous, gain, revenge and a host of

weaknesses to which human flesh is subject are common for the generality of murders. I fully endorse to the above views. Suppose, an offender was sentenced to imprisonment for life for any of the offences mentioned above was released from the custody either on bail or on parole and on reaching home he noticed that his wife was involved with immoral acts with her paramour. On seeing the incident he lost his self control and committed murder of that person. Would his act attract an offence of capable homicide amounting to murder? The answer is in negative. His case covers the Exception-1 of section 300 and his act attracts an offence of capable homicide not amounting to murder.

18. The authors of the Penal Code had, in many cases not fixed a minimum as well as maximum sentence. The Select Committee, however, questioned the propriety of the minimum sentence in all cases and was of the opinion that the prescribed minimum would be a matter of hardship and even injustice in view of the definition of the offences in general terms and of the presence of mitigating circumstances. Accordingly they had so altered the Code as to leave the minimum sentence for all offences, except those of the gravest nature, to the discretion of the court. But in respect of some heinous offences i.e. offences against State, murder, attempt to commit murder and the like, they had thought it right to fix a minimum sentence. (See proceedings of the Legislative Council of the Governor-General of India, Ed. 1856 P.718). The authors of the Penal Code had in mind, where there is a statutory maximum sentence, it should be reserved for the worst type of offence falling within the definition of the offence. The Code prescribes the minimum of seven years imprisonment for offences under section 397 and 398. In all other offences, there is no minimum. The maximum sentence even after commutation by the government fixed for a single offence is 20 years in section 55 while the lowest term for one offence is 24 hours in section 510.

19. Sentencing an offender is an important branch of the law. The International Union of Criminal Law of French group in 1905 recommended that 'there should be organised in the faculties of law special teaching theoretical and practical for the whole range of penal studies (and) the certificate in penal studies awarded should be taken into consideration for nomination to and advancement in the Magistracy'. (Radzinowiez, L. In search of Criminology, Ex. 1961 P.70). Subsequently the Ninth International Prison Congress in 1925 resolved at its London meeting that 'judicial studies should be supplemented by criminological ones. The study of criminal psychology and penology should be obligatory for all who wish to judge in criminal cases. Such Judges should have a full knowledge of prisons and similar institutions and should visit them frequently.' But they are wanting in our country as in many other countries.

20. The Supreme Court of India in B.G. Goswami V. Delhi administration, (1974) 3 SCC 85 has struck a balance between deterrence and reformation by following the golden means: 'The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an individual and as a member of the society. Punishment is designated to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law-abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining the question of sentence. In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentence both loose their efficaciousness. One does not deter and the other may frustrate thereby making the offender a hardened criminal'. The courts have always had in mind the need to protect society from the persistent offenders but by the same time, they are not oblivious to the system prevailing in the country for, it has not gone for in cutting out the risk of conviction of innocent persons because of the peculiar character of the people and of the law-enforcing agencies.

21. The Supreme Court of India struck-down section 303 as violative of Articles 14 and 21 of the Constitution on the philosophy that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law in Mithu V. State of Punjab, (1983) 2SCC 277. In Dilip Kumar Sharma V. State of M.P., (1976) 1 SCC 560, though the court was not concerned with the question of the vires of section 303, Sarkaria,J. observed that section 303 is "Draconian in severity, relentless and in inexorable in operation". While considering the contours of section 303 Y.V. Chandrachud, C.J. in Dilip Kumar Sharma while dealing with sentencing process observed that if the legislature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases and compels them to shut their eyes the mitigating circumstances is unconstitutional. He observed that the other class of cases in which, the offence of murder is committed by a life convict while he is on parole or on bail may now be taken up for consideration. A life convict who is released on parole or on bail may discover that taking undue a advantage of his absence, a neighbour has established illicit intimacy with his wife. If he finds them in an amorous position and shoots the seducer on the spot, he may stand a fair chance of escaping from the charge of

murder, since the provocation is both grave and sudden. But if, on seeing his wife in the act of adultery, he leaves the house, goes to a shop, procures a weapon and returns to kill her paramour, there would be evidence of what is called *mens rea*, the intention to kill. And since, he was not acting on the spur of the moment and went away to fetch a weapon with murder in his mind, he would be guilty of murder. It was further observed: 'It is a travesty of justice not only to sentence such a person to death but to tell him that he shall not be heard why he should not be sentenced to death. And, in these circumstances, now does the fact that the accused was under a sentence of life imprisonment when he committed the murder, justify the law that he must be sentenced to death? In ordinary life, we will not say it about law. It is not reasonable to add insult to injury. But, apart from that, a provision of law which deprives the Court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'theft', 'breach of trust' or 'murder'.

22. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. He concluded his argument as under: "The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hallmarks of justice. The mandatory sentence of death prescribed by Section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead."

23. In Jagmohan Singh V. State of UP, (1973) 1SCC 20, one Shivraj Singh, father of Jagbir Singh and cousin of Jagmohan Singh was murdered and one Chhotey Singh was charged for that murder but eventually he was acquitted by the High Court. The ill-feeling between Chhotey Singh and Jagbir Singh, father of Shivraj Singh continued. Both of them were minors at the time of the murder of Shivraj Singh. Jagmohan Singh armed with a pistol and Jagbir Singh armed with a lathi concealed themselves in a bajra field emerged there from as Chhotey passed by to go to his field for fetching fodder. Jagmohan Singh asked Chhotey Singh to stop so that the matter between them could be settled once for all. Chhotey Singh being frightened tried to run away but he was chased by Jagmohan Singh and shot in the back who died on the spot. Jagmohan Singh was sentenced to death. The High Court found no extenuating circumstances and confirmed the death sentence. Under the sentencing principle provided in section 367(5) of the Code of Criminal Procedure as stood in India by amendment by Act XXVI of 1955, to award a sentence of death was the normal and a life sentence for reasons to be recorded in writing. This provision was done away by the new Code of 1973, the corresponding provision is section 354(3) and it is left to the discretion of the court whether the death sentence or lesser sentence should be imposed. The judgment shall state the reasons for the sentence to be awarded and in case of sentence of death, the special reasons for such sentence is to be given. It was observed that in India this onerous duty is cast upon Judges and for more than a century the Judges are carrying out this duty under the Indian Penal Code. The impossibility of lying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment. That discretion in the matter of sentence as already pointed out, liable to be corrected by superior courts. Laying down of standards to the limited extent possible as was done in the Model Judicial Code would not serve the purpose. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused.

24. It was held:

> "If the law has given to the Judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime, it will be impossible to say that there would be at all any discrimination, since facts and circumstances of one case can hardly be the same as the facts and circumstances of another. ..... The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection unless there is shown to be present in it an element of intentional and purposeful discrimination ..... Further, the discretion of judicial officers is not arbitrary and the law provides for revision by superior courts of orders passed by the Subordinate courts. In such circumstances, there is hardly any ground for apprehending any capricious discrimination by judicial tribunals. Crime as crime

> may appear to be superficially the same but the facts and circumstances of a crime are widely different and since a decision of the court as regards punishment is depended upon a consideration of all the facts and circumstances, there is hardly any ground for challenge under Article 14."

25. The preponderance of the judicial opinion is that the structure of prevailing criminal law underlines the policy that when the legislature has defined an offence with sufficient clarity and prescribed the maximum punishment therefor, a wide discretion in the matter of fixing degree of punishment should be allowed to the court. The policy of the law in giving a very wide discretion in the matter of punishment to the court has its origin in the impossibility of laying down standards. In Jagmohan Singh, an example was given such as, in respect of an offence of criminal breach of trust punishable under section 409, the maximum sentence prescribed is imprisonment for life and the minimum could be as low as one day's imprisonment and fine. It was observed from the above that, if any standard is to be laid down with regard to several kinds of breaches of trust by the persons referred in that section, that would be an impossible task. All that could be reasonably done by the legislature is to tell the court that between the maximum and the minimum prescribed for an offence, it should, on balancing the aggravating and mitigating circumstances as disclosed in the case, judicially decide what would be the appropriate sentence.

26. The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection unless there is shown to be present in it an element of intentional and purposeful discrimination. The discretion reposed on a judicial officer is not arbitrary and the law provides for revision by superior courts. In such circumstances, there is hardly any ground for apprehending factious discrimination by a judicial tribunal. In Jagmohan, the Supreme Court declined to declare death sentence unconstitutional on the reasonings that the court is primarily concerned with all the facts and circumstances in so far as they are relevant to the crime and how it was committed and since at the end of the trial, the offender is liable to be sentenced, all the facts and circumstances bearing upon the crime are legitimately brought to the notice of the court.

27. In Maneka Gandhi V. Union of India, AIR 1978 SC 597, a seven member constitutional Bench of Supreme Court held that a statute which merely prescribes some kind of procedure for depriving a person of his life or personal liberty cannot ever meet the requirements of Article 21. Article 21 of the Indian Constitution provides no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 32 of our Constitution is couched with similar language.

28. The High Court Division has stressed upon the case of Bachan Singh V. State of Panjab, (1980) 2 SCC 684. The ratio in the above case is not applicable for, the question involved in that case was with regard to the constitutional validity of death penalty for murder provided in section 302 and the sencing procedure embodied in sub-section (3) of Section 354 of the Code of Criminal procedure corresponding to sub-section (5) of section 367 of our Code with the difference that in the Indian provision, in case of awarding death sentence 'the special reasons for such sentence' must be assigned. Bachan Singh was sentenced to death for the murder of three persons. His sentence was confirmed by the High Court. In course of hearing of the leave petition a constitutional point was raised as to the validity of death penalty provided in section 302. A constitutional Bench by majority held that death sentence provided in section 302 of the Penal Code is reasonable and 'in the general public interest, do not offend Article 19, or its 'ithos'; nor do they in any manner violate Article 21 and 14'. It was observed that 'In several countries which have retained death penalty, pre-planned murder for monetary gain, or by an assassin hired for monetary reward is, also, considered a capital offence of the first-degree which, in the absence of ameliorating circumstances, is punishable with death. Such rigid categorization would dangerously overlap the domain of legislative policy. It may necessitate, as it were, a redefinition of murder or its further classification'. Then, it is observed, in some decisions, murder by fire-arm, or an automatic projectile or bomb, or like weapon, the use of which creates a high simultaneous risk of death or injury to more than one person, has also been treated as an aggravated type of offence. No exhaustive enumeration of aggravating circumstances is possible. But this much can be said that in order to qualify for inclusion in the category of aggravating circumstances which may form the basis of special reasons in section 354(3), circumstance found on the facts of a particular case, must evidence aggravation of an abnormal or special degree.

29. The position in England as stated in the Halsbury's Laws of England, 4th Edition, Vol.11 page 287 Para 481 as follows:

> "A very wide discretion in fixing the degree of punishment is allowed to the trial judge except for the offence of murder, for which the court must pass a sentence of imprisonment for life, and for a limited number of offences in respect of which the penalty is fixed by law including those of offences for which the sentence of death must be pronounced.

As regards most offences, the policy of the law is to fix a maximum penalty, which is intended only for the worst cases, and to leave to the discretion of the judge the determination of the extent to which in a particular case the punishment awarded should approach to or recede from the maximum limit. The exercise of this discretion is a matter of prudence and not of law, but an appeal lies by the leave of the Court of Appeal against any sentence not fixed by law, and, if leave is given, the sentence can be altered by the court. Minimum penalties have in some instances been prescribed by the enactment creating the offence."

30. In awarding the maximum sentence in respect of an offence the position of law prevailing in our country is a bit different. It is provided in our Code of Criminal Procedure that if the prosecution wants to award the maximum/enhanced sentence of the offence charged with against an offender, it shall be stated in the charge the fact of his previous conviction of any offence or the punishment of a different kind for a subsequent offence, the date and place of previous conviction. However a statement of previous conviction in the charge is not necessary where such conviction is to be taken into consideration, not for the purpose of awarding enhanced sentence under section 75 of the Penal Code but merely for the purpose of the punishment to be awarded within the maximum fixed for the offence charged. This however does not deter the court or tribunal to award maximum sentence if the act of the offender is intentional and brutal one.

31. In 1974 the North Carolina State, USA, the general assembly modified to statute making death the mandatory sentence for all persons convicted of first decree murder. In James Tyone Woodson and Luby Waxton V. State of North Carolina, 428 US 280, the offenders were convicted of the first degree murder in view of their participation in an armed robbery of a food store. In the course of committing the crime a cashier was killed and a customer was severely wounded. The offenders were found guilty of the charges and sentenced to death. The Supreme Court of North Carolina affirmed the same. The U.S. Supreme Court granted leave to examine the question of whether imposition of death penalty in that case constituted a violation of the Eighth and Fourteenth Amendments of the U.S. Constitution. Stewart,J. speaking for the court held that the said mandatory death sentence was unconstitutional and violated the Eighth Amendment observing that:

"A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating frailties of humankind. It treats all persons convicted of a designate offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. ..... While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eight Amendment, see Trop V. Dulles, 356 US, at 100, 2 I.Ed.2d 630, 78 S Ct 590 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death .... This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

32. In Ong Aha Chuan V. Public Prosecutor, (1981) AC 648, for trafficking heroin in Singapore, the accused persons were sentenced to death and there was mandatory death sentence for trafficking drug in schedule II of section 29. The conviction was challenged on the ground that section 29 of schedule II providing mandatory death sentence for possession of such quantity of drug was unconstitutional. The Privy Council was of the view that there was nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantity of heroin holding that the quantity that attracts death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good hearted Samaritan out of the kindness of his heart as was suggested in the course of argument. It was on the basis of Singapore's Constitution that does not have a comparable provision like the Eighth Amendment of the American Constitution relating to cruel and unusual punishment. It was observed that:

"Whenever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated with equal punitive treatment for similar legal guilt."

33. So the Privy Council distinguished the case and was of the view that the accused deserved death sentence as they carried drug intentionally and that the social object of the Drug Act is to prevent the growth of

drug addiction in Singapore by stamping out the illegal drug trade, in particular, the trade of those most dangerously addictive drugs, heroin and morphine.

34. The High Court Division heavily relied upon the opinions expressed by the Judicial Committee of the Privy Council in Patrick Reyes. Patrick Reyes shot death of Wayne Garbutt and his wife Evekyn. He was tried on two counts of murder and sentenced to death on each count as required by the law of Belize. His appeal was dismissed and petition for special leave was also dismissed by the Judicial Committee, but it granted leave to raise constitutional points namely; the constitutionality of the mandatory death penalty, which is said to infringe both the protection against subjection to inhuman or degrading punishment or other treatment under section 7 of the Constitution of Belize and the right to life is protected by sections 3 and 4. Section 102 of the Criminal Code provided 'Every person who commits murder shall suffer death'. By section 114 of the Code proof of murder requires proof of an intention to kill and in succeeding sections defences of diminished responsibility and provocation are provided. A proviso was added to section 102 of the Code in 1994 as under:

> "Provided that in the case of a class B murder (but not in the case of a class A murder), the court may, where there are special extenuating circumstances which shall be recorded in writing, and after taking into consideration any recommendations or plea for mercy which the jury hearing the case may wish to make in that behalf, refrain from imposing a death sentence and in lieu thereof shall sentence the convicted person to imprisonment for life."

35. This section was further amended by adding two subsections:

> (2) The proviso to sub-section (1) above shall have effect notwithstanding the rule of law or practice which may prohibit a jury from making recommendations as to the sentence to be awarded to a convicted person.
>
> (3) For the purpose of this section-
>
> 'Class A murder means:-
>
> (a).....
>
> (b) any murder committed by shooting or by causing and explosion;
>
> (c).....
>
> (d).....
>
> (e).....
>
> (f).....

36. The Judicial Committee of the Privy Council observed that the provision requiring sentence of death to be passed on the defendant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the Constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death. The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no harm being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect.

37. It was further observed that Mercy, in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted, the former is a judicial, the latter an executive, responsibility ..... It has been repeatedly held that not only determination of guilt but also determination of the appropriate measures of punishment are judicial not executive functions. The Judicial Committed held as under:

> "It follows that the decision as to the appropriate penalty to impose in the case of murder should be taken by the judge after hearing submissions and, where appropriate, evidence on the matter. In reaching and articulating such decisions, the judges will enunciate the relevant factors to be considered and the weight to be given to them, having regard to the situation in Saint Lucia. The burden thus laid on the shoulders of the judiciary is undoubtedly heavy but it is one that has been carried by judges in other

systems. Their Lordships are confident that the judges of Saint Lucia will discharge this new responsibility with all due care and skill."

38. This question again was agitated before the Privy Council in Fox V. The Queen, 2002(2) AC 284. Fox was convicted by the High Court of Saint Chrisopher and Nevis on two counts of murder and he was sentenced to death on each count pursuant to section 2 of the offences against the Prison Act, 1873, which prescribed a mandatory death sentence for murder. His appeal against conviction and sentence was dismissed by the Eastern Caribbean Court of Appeal (Saint Christopher and Navis). His appeal before the Judicial Committee was also dismissed, but on the question of sentence the Privy Council held that section 2 of the offences against the Prison Act, was inconsistent with section 7 of the Constitution and accordingly his sentence was quashed and the matter was remitted to the High Court to determine the appropriate sentence having regard to all the circumstances of the case. The Privy Council followed the dictum in Rayes.

39. This point was again came for consideration before the Privy Council in Bowe V. The Queen (2006) 1 WR 1623. Two persons were convicted for murder and sentenced to death in terms of section 312 of the Penal Code of The Bahamas. This provision was challenged to the extent that the provisions that persons other than pregnant women charged for murder under section 312 of the Code must be punished to death was unconstitutional. In allowing the appeal, the Privy Council formulated the principles which are relevant for consideration in a case of mandatory death sentence as under:

"(I) It is a fundamental principle of just sentencing that the punishment imposed on a convicted defendant should be proportionate to the gravity of the crime of which he has been convicted.
(II) The criminal culpability of those convicted for murder varies very widely.
(III) Not all those convicted of murder deserve to die.
(IV) Principles (I),(II) and (III) are recognized in the law or practice of all, or almost all states which impose the capital penalty for murder.
(V) Under an entrenched and codified Constitution of the Westminster model, consistently with the rule of law, any discretionary judgment on the measure of punishment which a convicted defendant should suffer must be made by the judiciary and not by the executive."

40. The Conclusion of the Privy Council's opinion is as under:

"The Board will accordingly advise Her Majesty that section 312 should be construed as imposing a discretionary and not a mandatory sentence of death. So construed, it was continued under the 1973 Constitution. These appeals should be allowed, the death sentences quashed and the cases remitted to the Supreme Court for consideration of the appropriate sentences. Should the Supreme Court, on remission, consider sentence of death to be merited in either case, questions will arise on the lawfulness of implementing such a sentence, but they are not questions for the Board on these appeals."

41. In an unreported case in Barnard V. The Attorney General, Criminal Appeal No.10 of 2006, the above views have been approved by the Privy Council. In that case, the facts are that in Grenada, a revolutionary outfit was split into two factions, one of which was led by the accused Bernard Coard. In a violent accident Maurice Bishop, then Prime Minister of Grenada and others were executed by Coard's supporters. Over that incident, the accused persons were mandatorily sentenced to death for murder. The Privy Council allowed the appeal on the ground that the mandatory death sentence was unconstitutional and laid down the following principle:

"Fifthly, and perhaps most important, is the highly unusual circumstances that, for obvious reason, the question of the appellants' fate is so politically charged that it is hardly reasonable to expect any Government of Grenada, even 23 years after the tragic events of October 1983, to take an objective view of the matter. In their Lordships opinion that makes it all the more important that the determination of the appropriate sentence for the appellants, taking into account such progress as they have made in prison, should be the subject of a judicial determination".

42. The Supreme Court of Ugenda in Attorney General V. Susan Kigula, Constitutional Appeal No.3 of 2006, one of the questions was that the laws of Ugenda, which provide mandatory death sentence for certain offences was unconstitutional. The court held:

"Furthermore, the Constitution provides for the separation of powers between the Executive, the Legislature and the Judiciary. Any law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution. We also agree with Professor Sempebwa, for the respondents, that the power given to the court under article 22(1) does not stop at confirmation of conviction. The Court has power to confirm both conviction and sentence. This implies a power not to confirm, implying that court has been given discretion in the matter. Any law that fetters that discretion is inconsistent with this clear provision of the Constitution."

43. The Kenyan Court of Appeal in Godfrey Ngotho Mutiso V. Republic, (Criminal Appeal No.17 of 2008) expressed the similar view as under:

> "The imposition of the mandatory death penalty for particular offences is neither authorized nor prohibited in the Constitution. As the Constitution is silent, it is for the courts to give a valid constitutional interpretation on the mandatory nature of sentence.
>
> Mandatory death sentence is antithetical to fundamental human rights and there is no constitutional justification for it. A convicted person ought to be given an opportunity to show why the death sentence should not be passed against him.
>
> The imposition of a mandatory death sentence is arbitrary because the offence of murder covers a broad spectrum. Making the sentence mandatory would therefore be an affront to the human rights of the accused.
>
> Section 204 of the Penal Code is unconstitutional and ought to be declared a nullity. Alternatively the word 'shall' ought to be construed as 'may'."

44. In the above conspectus the question is whether sub-sections (2) and (4) of section 6 of Ain, 1995 passed the test of reasonableness on the question of sentence. It is on record that within a space of 12 years, the legislature promulgated this law prescribing a hard sentence leaving nothing for the courts to exercise its discretionary power on the question of awarding sentence. In the Ordinance of 1983 similar nature of offence was prescribed in section 7 providing for alternative sentence of death or imprisonment for life. What prompted the legislature to make a u turn in seizing the discretionary power of the tribunal in the matter of awarding the sentence is not clear? In the preamble nothing was mentioned to infer the intention of the legislature which prompted to promulgate such draconian law. It was simply stated that "নারী ও শিশু সম্পর্কিত কতিপয় ঘৃন্য অপরাধের জন্য বিশেষ বিধান প্রনয়ন করা সমীচীন" The legislature abruptly took away the alternative sentence. Sub-section (2) of section 6 provides "যদি কোন ব্যক্তি ধর্ষন করিয়া কোন নারী বা শিশুর মৃত্যু ঘটায় বা ধর্ষন করার পর কোন নারী বা শিশু মৃত্যু ঘটায় তাহলে উক্ত দন্ডে দন্ডিত হইবে" There are two parts in this sub-section - the first part carries a meaning that if someone causes the death of a child or woman in committing rape is discernable. The second part is that after the commission of rape, if the victim dies then also the offender will be sentenced to death. The legislature is totally silent under which eventuality if the death is ensured the offender will be convicted for the offence. If secondary causes intervened the death, the offender certainly cannot be held responsible for causing death by rape. There is totally lack of reasonableness in the provision that even if the offender is a minor or an old person the court will be left with no discretionary power in the matter of awarding alternative sentence on extraneous consideration, which is a core sentencing principle i.e. giving a sentence proportionate to the offender's culpability.

45. The rules for assessment of punishment are contained in sections 71 and 72 of the Penal Code and section 35 of the Code of Criminal Procedure. The Penal Code provides the substantive law regulating the measure of punishment and does not affect the question of conviction, which relates to the province of procedure. The court is given the discretion to pass sentences varying with the character of the offender and the circumstances aggravating or mitigating under which the offence is committed. And the responsibility for determining the permissible range of sentences in each case remains with the court.

46. In sub-section (3) of section 6 of the Ain of 1995, if similar offence is committed by more than one person all of them will be sentenced to death. Suppose 5 persons are involved in the commission of the crime of them two directly participated in the commission of rape and other three persons abeted the offence. If these three persons are sentenced to death with other two, it will be contrary to norms and the sentencing principles being followed over a century. Sub-section (4) also provided that if more than one person sexually assaulted a woman or a child causing death after such rape, they will also be sentenced to death. This provision is so vague and indefinite that the courts cannot have any discretionary power to exercise its discretion particularly in a case where there is no direct evidence for causing rape and the case rests upon circumstantial evidence. However, if the courts find that the circumstances are such that the offenders are responsible for causing the rape to the victim, it will be logical to award the death sentence to all in the absence to direct evidence. In all cases while awarding a sentence of death which is a forfeiture of life of a person, the court always insists upon the direct evidence. In the absence of direct evidence it is very difficult to come to the conclusion that all the accused had sufficient means rea in the act of rape. But since the only sentence is provided for the offence the courts will be left with no option other than to award the death sentence. This is totally inhumane and illogical. A law which is not consistent with notions of fairness and provides an irreversible penalty of death is repugnant to the concepts of human rights and values, and safety and security.

47. It appears from the above provisions to us that there was lack of contrivance in drafting the laws. If an enactment is sloppily drafted so that the text is verbose, confused, contradictory or incomplete, the court cannot insist on applying strict and exact standards of construction. There is need for precision in drafting a provision in

an enactment has been recognized by Stephen,J. as noticed by Lord Thring in Re Castioni (1891) 1 QB 149 as under:

> "I think that my late friend, Mr. John Stuart Mill, made a mistake upon the subject, probably because he was not accustomed to use language with that degree of precision which is essential to anyone who has ever had, as I have on many occasions, to draft Acts of Parliament, which, although; they may be easy to understand, people continually try to misunderstand, and in which, therefore, it is not enough to attain to a degree of precision which a person reading in good faith can understand, but it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to understand it."

48. The court always keeps in mind while construing a statute to prevent no clause, sentence or word be declared superfluous, void or insignificant. It is also the duty of the court to do full justice to each and every word appearing in a statutory enactment. However, the court should not shut its eyes to the facts that the draftmen are sometimes careless and slovenly, and that their draftmanship result in an enactment which is unintelligible, is absurd.

49. True, the concept of due process is not available in our Constitution but if we closely look at Articles 27, 31 and 32 it will not be an exaggeration to come to the conclusion that the expressions "be treated in accordance with law" and 'No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment' used in Article 35(5) are cognate nature. In Article 31 it is also stated that no action detrimental to the life, liberty, body of any person shall be taken except in accordance with law. It is not the same that a person's life has been taken away by a provision of legislation without conclusively determining as to his guilt in the commission of the crime. Again in Article 32 it provides that no person shall be deprived of his life save in accordance with law. These concepts are more or less akin to the concept of the due process law. The provisions of sub-sections (2) and (4) of section 6 deprive a tribunal from discharging it's constitutional duties of judicial review whereby it has the power of using discretion in the matter of awarding sentence in the facts and circumstances of a case and thus, there is no gainsaying that Sub-Sections (2) and (4) of Section 6 of the Ain of 1995 as well as section 303 of the Penal Code run contrary to those statutory safe-guards which give a tribunal the discretion in the matter of imposing sentence. Similarly, section 10(1) of the said Ain stands on the same footing.

50. No law which provides for it without involvement of the judicial mind can be said to be constitutional, reasonable, fair and just. Such law must be stigmatized as arbitrary because these provisions deprive the tribunals of the administration of justice independently without interference by the legislature. These provisions while purporting to impose mandatory death penalty seek to nullify those statutory structure under sub-sections (3) and (5) of section 367 of the Code of Criminal Procedure, though these provisions are contained in general law, in the absence of prohibition, in view of section 5(2) the Code of Criminal Procedure, they hold the field. A provision of law which deprives the court to use of its beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence cannot but be regarded as harsh, unfair and oppressive. The legislature cannot make relevant circumstances irrelevant, deprive the court of its legitimate jurisdiction to exercise its discretion not to impose death sentence in appropriate cases. Determination of appropriate measures of punishment is judicial and not executive functions. The court will enunciate the relevant facts to be considered and weight to be given to them having regard to the situation of the case. Therefore we have no hesitation in holding the view that these provisions are against the fundamental tenets of our Constitution, and therefore, *ultra vires* the Constitution and accordingly they are declared void.

51. While legislating the Ain of 2000 similar provisions have been provided in sub-sections (2) and (3) of section 9 providing alternative sentence. This shift in the attitude of the legislature, on the question of sentence within a space of five years justifies the unreasonableness in the repealed law. However, in section 11(Ka) of the Ain of 2000, it is provided that if death is caused by husband or husband's, parents, guardians, relations or other persons to a woman for dowry, only one sentence of death has been provided leaving no discretionary power for the tribunal to award a lesser sentence on extraneous consideration. This provision is to the same extent *ultra vires* the Constitution, inasmuch as, there is vagueness and uncertainty in determining the appropriate measure of punishment. It is said "স্বামীর পক্ষে অন্য কোন ব্যক্তি যৌতুকের জন্য উক্ত নারীর মৃত্যু ঘটায়" There is chance of victimizing any person to implicate in the offence and the tribunal will be left with no discretionary power to award an alternative sentence.

52. Since we hold that Sub-Sections (2) and (4) of Section 6 of the Ain, 1995 and Sub-sections (2) and (3) of Section 34 of the Ain of 2000 are *ultra vires* the Constitution, despite repeal of the Ain of 1995, all cases pending and the appeals pending under the repealed Ain shall be regulated under the said law, but on the question of imposing sentence, the sentences prescribed in respect of those offences shall hold the field until new legislation is promulgated. I hold that there was total absence of proper application of the legislative mind

in promulgating those Ains, which may be rectified by amendments. In respect of section 303 of the Penal Code, the punishment shall be made in accordance with section 302 of the Penal Code. It is hereby declared that despite repeal of Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, the pending cases including appeal may be held under the repealed Ain, while dealing with the question of sentence, the alternative sentences provided in the corresponding offences prescribed in the Nari-O-Shishu Nirjatan Daman Ain, 2000 shall be followed.

53. Let us now consider the merits of the case in Civil Appeal No.116 of 2010. The appellant was sentenced to death by the Bishesh Adalat. On consideration the evidence this Division found that the victim Sumi Akter's whereabouts could not be traced out. Her mother Rahima Begum along with P.W.6 Abdur Rob searched from door to door. The house of the condemned prisoner Sukur Ali was found under lock and key and on entering into the house, the deadbody of the of the victim was found inside the house and it was detected that her wearing ornaments were missing and marks of injuries with emission of reddish liquid from her genital organ were found. The appellant was caught read handed by the people from Tepra and he was brought to the place of occurrence and before the witnesses, he had admitted the incident of rape and killing of the victim. The victim Sumi Akter was only 7 years old. The killing was brutal and diabolical. There was no extenuating ground to commute his sentence and accordingly his sentence was confirmed. We find no ground to review his sentence.

54. The appeal is therefore allowed in part.

Jail Petition No.8 of 2010

55. Condemned prisoner Razu Ahmed was convicted under section 10(1) of Nari-O-Shishu-Nirjatan (Bishesh Bidhan) Ain, 1995 for killing his wife Aklima. P.Ws.4, 6 and 12 proved that accused demanded dowry to the victim on previous occasions and on the day of occurrence on 9th January, 1997, he came to his father-in-law's house where Aklima was temporarily staying with her parents. The prosecution has been able to prove that the accused and the victim stayed in one room and at 5.30 a.m., her deadbody was recovered from a low lying boro paddy field. Accused took the plea of alibi and claimed that the victim was a patient of epilepsy. The tribunal and the High Court Division disbelieved his plea and on consideration of evidence of P.Ws.1, 2, 4, 6, 10 and 12 and the extra judicial confession of the accused came to a definite finding that the accused killed his wife. We find no cogent ground to infer otherwise. The petition is accordingly dismissed.

Jail Petition No.3 of 2009

56. In this petition the condemned prisoner Nazrul Islam was sentenced to death under section 10(1) of the Ain, 1995 for killing his wife Sufia Begum. Md. Abdul Mazid (P.W.5) and Abdur Razzaq (P.W.6) saw the victim while he was beating the victim at 1 a.m. These witnesses also saw the deadbody of the victim at 4 a.m. The deadbody of the victim was recovered on the ghat of the Pond of the accused. P.Ws.4, 6, 7, 8, 9, 10, 11 and 13 corroborated the prosecution case that the accused killed his wife for dowry. We find no cogent ground to interfere with the conviction and sentence of the petitioner. The petition is accordingly dismissed.

Jail Petition No.18 of 2008

57. In this case, victim Kulsum Begum, a minor girl of 12 years old was raped and killed by her cousin Masuk Mia, a rickshaw puller, on 16th February, 1999, on 8.30 a.m. Accused made an extra-judicial confession. P.Ws.4 and 5 proved the extra-judicial confession that he raped the victim and killed her. He also made a judicial confession and P.W.16 proved the confessional statement. The confessional statement is corroborated by the medical evidence. The Tribunal believed the prosecution case and convicted him under section 6(2) of the Ain of 1995 and awarded him death sentence. The High Court Division has confirmed the death sentence. We find no reason to interfere with the conviction and sentence.

Jail Petition No.16 of 2010

58. In this petition convict Abdul Kader challenged his conviction and sentence under section 11(Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000. According to the prosecution case, accused was the husband of the victim Piyara Begum, who killed his wife by setting fire. P.Ws.6, 7, 9, 10 and 11 stated in one voice that the wife was done to death by her husband by arson by way of pouring kerosene oil. On the question of demand of dowry P.Ws.1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 corroborated each other. The High Court Division confirmed the sentence of death. We find no cogent ground to interfere with the conviction and sentence.

Jail Petition No.2 of 2011

59. In this case victim Most. Parvin was done to death by her husband Akidul Islam @ Akidul Sheikh for dowry. In this case P.Ws.1, 2 and 3 stated about the demand of dowry by the accused to the victim but there is no sufficient evidence on record that the victim was done to death for dowry. Though the cause of death was homicidal in nature, in the absence of the proof of demand of dowry for causing death, the conviction of the petitioner under section 11(Ka) of the Nari-O-Shishu Nirjatan-Daman-Ain is not justified. In view of the above, we convert his conviction to one under section 302 of the Penal Code and commute his sentence to imprisonment for life.

Jail Petition No.3 of 2011

60. In this case petitioner Md. Babul Mia along with Md. Salam @ Salam and one Md. Mozibur Rahman were convicted under section 6(4) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 and sentenced to death. All the accused persons absconded in course of the trial of the case and they were tried in absentia. P.Ws.2, 5, 8 and 9 saw the accused petitioner with the victim and they also saw the deadbody of the victim immediate after of his departure from the room. P.Ws.3 and 4 also saw the petitioner who was talking with co-accused Mozibur beside the bank of the pond of dwelling house, where the victim was raped and killed. The medical evidence proved that the victim was raped before she was killed. In view of the above, we find no reason to interfere with the conviction and sentence.

Criminal Petition No.374 of 2011

61. In this case victim Asmaul Husna, wife of the petitioner was killed on 16th July, 2004 for dowry. The High Court Division noticed that the accused petitioner did not take the plea of alibi. P.Ws.1, 2, 3, 7 and 8 corroborated the prosecution case. The High Court Division believed them as reliable witnesses. The High Court Division noticed that her marriage with the accused was solemnized on 3rd April, 1994 for a dower of Tk.30,000/- and gradually their relationship deteriorated. She was subjected to physical and mental torture constantly by her husband for dowry of Tk.50,000/-. The High Court Division confirmed his death sentence. We find no cogent ground to interfere with the judgment.

62. The appeal is allowed in part. Sub-sections 2 and 4 of Section 6 o the (Bishesh Bidhan) Ain, 1995 and sub sections (2) and (3) of section 34 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and section 303 of the Penal Code are declared ultratires the Constitution. However, sentence passed against the respondent Md. Shukur Ali is maintained. The Criminal Petition No.374 of 2011, Jail Petition Nos.18 of 2008, 3 of 2009, 8 of 2010, 16 of 2010, 2-3 of 2011 are disposed of. Jail Petition Nos.1 of 2010, 5 of 2012, 7 of 2012 and 8 of 2012 shall be heard separately. Until new legislation is made the imposition of sentence in respect of offences in sub-section (2) and (4) of section 6 of the Ain of 1995 shall be regulated by the Nari-O-Shishu Nirjatan Daman Ain, 2000.

63. **Operative Part:**

a) Sub-sections (2) and (4) of section 6 of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, sub-sections (2) and (3) of section 34 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and section 303 are declared ultravires the Constitution.

b) Despite repeal of the Ain of 1995, the pending cases and pending appeals in respect of those offences shall be tried and heard in accordance with the provisions of the Ain of 1995, but the sentences prescribed in respect of similar nature of offences in the Ain of 2000 shall be applicable.

c) There shall be no mandatory sentence of death in respect of an offence of murder committed by an offender who is under a sentence of life imprisonment.

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1 SCOB [2015] AD 17

APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha, Chief Justice
Mrs. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.73 OF 2012.

(From the judgment and order dated 04.5.2010 passed by the High Court Division in Writ Petition No.7942 of 2009.)

Government of Bangladesh, represented by the Secretary, Ministry of Home Affairs Bangladesh Secretariat, Dhaka and others: Appellants.

=Versus=

Md. Abdus Satter and others: Respondents.

For the Appellants: Mr. Murad Reza, Addl. A.G. (with Mr. Sheik Saifuzzaman, D.A.G.), instructed by Mrs. Mahmuda Begum, Advocate-on-Record.

For the Respondents: Mr. Abdur Rob Chowdhury, Senior Advocate (with Mr. Rokanuddin Mahmud, Senior Advocate), instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

Date of hearing: 10th March, 2015 and 11th March, 2015.

Date of Judgment: 11th March, 2015.

Article 102 and 117 of the Constitution of Bangladesh:
Clause (1) of Article 102 of the Constitution ordains that any person aggrieved may seek judicial review in the High Court Division for enforcement of fundamental rights conferred by Part III of the Constitution. Clause (5) of Article 102 puts an embargo to the seeking of such relief. It states that the person refers to in Article 102 includes a statutory public authority and any court or tribunal against whom such relief can be claimed, but it has excluded a court or tribunal established under a law relating to the defence services or a disciplined force or tribunal established in accordance with Article 117 of the Constitution. ... (Para 5)

Article 45 of the Constitution of Bangladesh:
The fundamental rights available in Part III of the Constitution cannot be invoked by a member of a disciplined force if any law prescribed a provision limited for the purpose of ensuring the proper discharge of his duty or maintenance of that force. ... (Para 6)

Writ petitioners did not challenge any disciplinary action taken against them by the Inspector–General of Police. The authority did not give the directions in accordance with the Police Act or the Bengal Police Regulations or the Ordinance of 1969. The writ petitioners also did not challenge the propriety of the imposition of black marks upon them. They have challenged the embargo imposed upon them by the Police Headquarter, which directly affected their right to be considered for promotion to the next higher post. Clause (5) of Article 102 does not stand in their way of making an application under Article 102(1) of the Constitution subject to the provision of Article 45 of the Constitution. ... (Para 9)

It appears from the impugned memo that it was issued from the Police Headquarters in the form of directives, of them, directive No.5 contains an embargo upon the promotion prospect in respect of those who have landed with three major punishments. In paragraph 6, it has been mentioned that the officers who have received less than three major punishments shall not be eligible for consideration for promotion before expiry of 3 years from the date of punishment. These are policy matters relating to the terms and conditions of service of a police officer and this power has not been given to the Inspector-General of Police by the Police Act or the Bengal Police Regulation or any other law. ... (Para 14)

The High Court Division has also directed to lift the curtain for enabling the writ petitioners to be considered for promotion. This cannot be done or declared by the court for, it is the police administration which shall consider as to whether or not under the prevailing laws the writ petitioners are eligible to be considered for promotion to the next higher post. ... (Para 15)

A legislature lacking legislative power or subject to a constitutional prohibition may frame its legislation so as to make it appear to be within its legislative power or to be free from constitutional prohibition. Such a law is colourable legislation, meaning thereby that while pretending to be a law in the exercise of undoubted power, it is in fact a law on a prohibited field. ... (Para 17)

J U D G M E N T

Surendra Kumar Sinha,CJ:

1. This appeal by leave is directed from a judgment of the High Court division making the rule absolute in part directing the writ respondents to lift the obstacle with a view to enabling the writ petitioner Nos.3, 4, 6, 8 and 11 to be considered immediately, writ petitioner nos. 2, 5, 7 and 10 after 18 months, and the writ petitioner nos. 1 and 9 after 22 months for promotion.

2. Short facts are that the writ petitioners, Sub-Inspectors of Police, have been deprived of promotion by reason of imposition of three major punishments (black marks) in their service career. It is stated that on 7th September, 1986, it was decided in a police conference held at Police Headquarter that the police Sub-Inspectors would not be considered for promotion as Inspector within two years after receiving major punishment (black marks). This decision was modified on 28th September, 1997 and provision was made for consideration for promotion after three years instead of two years. They were included in the Range Approved List (RAL) and had passed three more years after their last major punishments, but they were not considered for promotion. The Assistant Inspector General of Police sent a letter vide Memo dated 11th October 2007 intimating to all the concerned Ranges and Districts including their names in the RAL for promotion between 1997 and 2002, but they were not considered for promotion for having 3 black marks/major punishments. On 8th April, 2009, the Assistant Inspector General of police sent Memo dated 18th October, 2009, to all concerned Ranges and districts to forward the ACRs, service books and service statements for those Sub-Inspectors who were in the RAL but the writ petitioners were not considered for promotion. By memo dated 5th September, 2009, the Police Headquarter, issued a letter to the effect that no Sub-Inspector of police would be considered for promotion who has three black marks or major punishment in his service career. This condition is not based on any law and thus arbitrary.

3. Appellants contested the rule and claimed that under rule 3 of the Junior Police Service Rules, 1969, no officer would be nominated for promotion unless he possesses a clean record on honesty and efficiency; that because of this provision, the writ petitioners would not pass the test of eligibility to be considered for promotion, as their service records were not clean enough; that the embargo on their promotion was placed to ensure the high degree of integrity and professionalism in the force, which is not unreasonable or non-conducive to the legal norms; that major punishments are awarded by following due process of law; that the writ petitioners were given sufficient opportunities to defend themselves before the punishments were imposed upon them and that the writ petitioners being members of "disciplined force', the writ petition was not maintainable.

4. The High Court Division was of the view that the writ petitioners who were castigated with 3 black marks should be allowed to come out of the cloister for consideration for promotion without delay; that those who had four black marks involving no charge of corruption should earn their freedom after 18 months and that those who received black marks for corruption must wait for 22 months. It has been further held that the prohibition is to be exercised ordinarily, not invariably; and that the said restriction is discriminatory in that some officers got promotion despite getting marks.

5. The main contention of the learned Additional Attorney General is that the writ petition is not maintainable, inasmuch as, the writ petitioners being police officers are disciplined force within the meaning of Article 152(1)(b) of the Constitution and in view of clause (5) of Article 102, they are debarred from seeking judicial review of any decision taken by the authority. There is no dispute that the writ petitioners being police officers are disciplined force within the meaning of Article 152. Now the question is whether a member of any disciplined force can file a writ petition against any decision taken by the authority detrimental to his right or interest. Clause (1) of Article 102 of the Constitution ordains that any person aggrieved may seek judicial

review in the High Court Division for enforcement of fundamental rights conferred by Part III of the Constitution. Clause (5) of Article 102 puts an embargo to the seeking of such relief. It states that the person refers to in Article 102 includes a statutory public authority and any court or tribunal against whom such relief can be claimed, but it has excluded a court or tribunal established under a law relating to the defence services or a disciplined force or tribunal established in accordance with Article 117 of the Constitution.

6. There are two parts in clause (5) Of Article 102 - the first part contains inclusionary provision and the latter part contains exclusionary persons against whom such rights cannot be claimed. This clause has not debarred the High Court Division in entertaining a writ petition against any decision of a court or tribunal but it has impliedly debarred the High Court Division in entertaining a writ petition against any decision of a court or tribunal established under a law relating to the defence services or any disciplined force or a tribunal established under Article 117 of the Constitution. Such member of a disciplined force can be an aggrieved person and may seek judicial review in the High Court Division subject of the condition attached by Article 45 of the Constitution. The fundamental rights available in Part III of the Constitution cannot be invoked by a member of a disciplined force if any law prescribed a provision limited for the purpose of ensuring the proper discharge of his duty or maintenance of that force. Article 45 read:

"45. Nothing in this Part shall apply to any provision of a disciplinary law relating to members of a disciplined force, being a provision limited to the purpose of ensuring the proper discharge of their duties or the maintenance of discipline in that force."

7. It states that part III of the constitution shall not apply if a disciplinary law provides any provision to the disciplined force for the purpose of ensuring the proper discharge of its duties or the maintenance of discipline to which they are members of that force. Or in the alternative, if any law relating to a disciplinary force provides a provision for proper discharging duties or the maintenance of discipline of such disciplined force, no member of that force can claim any fundamental rights. In Col. Md. Hashmat Ali V. Government of Bangladesh, 47 DLR(AD)1, Col. Md. Hashmat Ali was placed at the disposal of Ministry of Health and Family Planning. He was promoted to the post of Director General of Family Planning to the rank and status of Joint Secretary. Thereafter by an order of Ministry of Defence, the government gave approval to the proposal for his compulsory retirement from the military service under section 16 of the Army Act and rule 12 of the Rules respectively. The maintainability of the writ petition was challenged on behalf of the government. This Division on construction of clause (5) of Article 102 was of the view that this provision does not stand in the way in entertaining a writ petition, inasmuch as, clause (5) does not define any 'aggrieved person' nor does it exclude a member of any disciplined force from being an aggrieved person and therefore, a member of any disciplined force will not be entitled to any remedy under Article 102 if he is aggrieved '(i) by any decision of a court or tribunal established under a law relating to the defence services unless that decision is *coram non judice* or malafide; or (ii) by an order affecting his terms and conditions of service passed by or by order of the President; or (iii) by any violation of fundamental right resulting from application of a disciplinary law for the purpose of ensuring the proper discharge of his duties or the maintenance of discipline in the disciplined force.'

8. In Bangladesh V. Md. Abdur Rob, 33 DLR(AD) 143, the respondent, a police officer, was dismissed from service for exercising abuse of power and corruption. His dismissal order from service was declared unlawful by the High Court Division in exercise of its writ jurisdiction. The High Court Division's propriety in entertaining the writ petition was questioned in this Division. This Division was of the view that a court or tribunal set up under a law to deal with any matter relating to a disciplined force cannot be directed under Article 102(5) nor can any act done or proceeding taken by a court or tribunal to be declared to have been taken without lawful authority. The exclusion of a 'person' is a bar to the maintainability of an application under Article 102(1) of the Constitution, though such person might otherwise claim to have come under the expression 'any person aggrieved' but his locustandi is gone due to the ouster clause in Article 102(5). It was argued on behalf of the police officer that his dismissal order having been made by the Screening Board, it cannot be termed a court or tribunal set up under a law relating to a member of the defence services or of any disciplined force - it does not come under the expression 'person' used in clause (5) of Article 102. This Division met the point as under:

'As the law which has set up the Screening Board permits it to exercise jurisdiction in relation to a member of any disciplined force, it must be considered a court or tribunal under a law in relation to a disciplined force, though such law is not meant exclusively for it.'

9. Writ petitioners did not challenge any disciplinary action taken against them by the Inspector–General of Police. The authority did not give the directions in accordance with the Police Act or the Bengal Police Regulations or the Ordinance of 1969. The writ petitioners also did not challenge the propriety of the imposition of black marks upon them. They have challenged the embargo imposed upon them by the Police Headquarter,

which directly affected their right to be considered for promotion to the next higher post. Clause (5) of Article 102 does not stand in their way of making an application under Article 102(1) of the Constitution subject to the provision of Article 45 of the Constitution. They are not entitled to a remedy under Article 102(1) if they are aggrieved by any decision of a court or tribunal established under The Police Act, 1861 or the Junior Police Service Rules, 1969 or the Police Regulations of Bengal. The ouster clause contains in clause (5) of Article 102 is one's being a member of disciplined force from challenging any decision of a tribunal or court or authority which deals with anything or matter relating to his discharging duty or the maintenance of discipline in that force.

10. Article 45 says that any member of a disciplined force cannot seek fundamental rights available in part III of the Constitution in respect of discharging his duty or the maintenance of discipline in that force. The Bengali provision is more clear which states that "আইন শৃঙ্খলা-বাহিনীর সদস্য-সম্পর্কিত কোন শৃঙ্খলামূলক আইনের যে কোন বিধান উক্ত সদস্যদের যথাযথ কর্তব্যপালন বা উক্ত বাহিনীতে শৃঙ্খলারক্ষা নিশ্চিত করিবার উদ্দেশ্যে প্রণীত বিধান বলিয়া অনুরূপ বিধানের ক্ষেত্রে এই ভাগের কোন কিছুই প্রযোজ্য হইবে না।" A plain reading of this provision is discernable, that is to say, if any disciplinary action is taken for maintaining the discipline of a member of disciplined force, he cannot seek fundamental rights available in Part III of the Constitution. Article 102(1) empowers the High Court Division to give such direction as are necessary for the enforcement of fundamental rights on the application of any aggrieved person. The writ petitioners are seeking fundamental rights on the ground that their cases for promotion to be considered by the authority have been curtailed by the impugned memo dated 5th August, 2009. This memo was issued by the Police Headquarters containing a prohibitory order that no Sub-Inspector of Police will be considered for promotion who has received 3 black marks or major punishment in his service career.

11. So apparently this office order does not relate to any disciplinary action relating to the maintenance of discipline or any disciplinary action taken against the writ petitioners rather it relates to an embargo put upon them to place their cases for consideration for promotion. The writ petitioners claim that this condition is not based on any law or Police Regulation and therefore, the Police Headquarters or in that matter, the Inspector General of Police had/has no authority to attach such condition to the detriment of their rights to be considered for promotion to the next higher post. The High Court Division held that "Article 45 of the Constitution would thwart the petitioners' attempt to explore their rights under Articles 102 and 44, for restrictive covenant of Article 45 applies to disciplinary laws and is limited to the purpose of ensuring proper discharge of their duties or the maintenance of discipline in that force" has no force at all.

12. Rule 4 of the 'Junior Police Service Rules, 1969' prescribes the method of recruitment in the rank of Inspector. Under this rule, vacancies in the rank of Inspector shall be filled in by promotion from the rank of Sub-Inspectors of Police or Surgeants. Lists of Sub-Inspectors or Surgeants fit to be appointed as Inspectors shall be prepared by the Police Directorate. The procedure for selection of Sub-Inspectors or Surgeants fit for promotion to be appointed as Inspectors in the approved list has been laid down in Appendices I and II. Paragraph 3 of Appendix – I provides inter alia that; 'In submitting nominations, Superintendents must clearly understand that ordinarily no officers should be nominated for promotion who has not a thoroughly clean record as regards honesty, and who is not of marked activity and efficiency and who has not completely passed the departmental examinations as laid down in annexure II.' Regulation 857 of the Police Regulations of Bengal shows that an award of black marks is treated as major punishment and it is understandable that being a member of disciplined force, a police officer who is not a thoroughly record as regards honesty is not eligible to promotion. Though a black marks is taken as major penalty, Regulation 874 prescribes the method of imposing a black marks. This provision shows that such punishments is awarded in lieu of other punishments when an officer absents himself without leave and if it is not thought desirable to grant him regular leave, the delinquent may be punished for misdemeanour, which is awarded in lieu of other punishments and they are intended to take place of fines which shall not be inflicted. Not more than one black marks may be awarded for any one specific offence, nor a black marks be awarded in addition to any other punishment.

13. The nomination for promotion to the post of Inspector is to be made by the Superintendents. But the Deputy Inspector General has discretionary power to fill in short vacancies in the rank of Inspector from the Sub-Inspectors who are unlikely to be considered fit on their record for eventual permanent promotion in exceptional circumstances under the rule 4(5) of the Rules of 1969. Not only this power has been curtailed but also a complete embargo has been placed on a future promotion by the impugned memo. This Regulation 857 simply states that 'award of black marks' is included as major punishment but it does not prohibit a police

officer having 2/3 black marks will not be eligible for promotion. True, the writ petitioners were awarded with 3 black marks but they were not dismissed or removed from the service or their rank was not reduced. The authority thought that awarding of 3 black marks was appropriate for violation of the discipline or service rules.

14. Section 12 of the Police Act, 1861 empowers the Inspector General of Police to make Rules in certain matters relating to framing such orders and rules as he shall deem expedient relative to the organization, classification and distribution of the police-force, the places at which the members of the force shall reside, and the particular services to be performed by them; their inspection, the description of arms, accoutrement and other necessaries to be furnished to them; the collecting and communicating by them of intelligence and information; and all such other orders and rules relative to be police-force as he shall, from time to time deem expedient for preventing abuse or neglect of duty, and for rendering such force efficient in the discharge of its duties. These Rules may be framed with prior approval of the government and he shall pass such orders which are relevant and expedient to the organization, classification and distribution of police force and some other allied matters for preventing abuse or neglect of duties by the members of the force. He has not been given any power to make any Rules affecting the right or interest of any police officer. It appears from the impugned memo that it was issued from the Police Headquarters in the form of directives, of them, directive No.5 contains an embargo upon the promotion prospect in respect of those who have landed with three major punishments. In paragraph 6, it has been mentioned that the officers who have received less than three major punishments shall not be eligible for consideration for promotion before expiry of 3 years from the date of punishment. These are policy matters relating to the terms and conditions of service of a police officer and this power has not been given to the Inspector-General of Police by the Police Act or the Bengal Police Regulation or any other law.

15. The High Court Division has endeavoured much to examine whether or not the black marks faced by the police officers for corruption oriented charges and on consideration of rule 3 of the Junior Police Rules, 1969 was of the view that this rule could not be invoked against the writ petitioners except the writ petitioner Nos.1 and 9 and accordingly distinguished their case from those of others. It is not an issue before the High Court Division. The High Court Division has traveled beyond the terms of the rule. The High Court Division has also directed to lift the curtain for enabling the writ petitioners to be considered for promotion. This cannot be done or declared by the court for, it is the police administration which shall consider as to whether or not under the prevailing laws the writ petitioners are eligible to be considered for promotion to the next higher post. The issue is whether the Inspector-General has power to give guidelines restricting the police officers who have obtained three major punishments to be eligible for consideration for promotion to the next higher post.

16. As observed above, the Inspector-General of Police has not been invested with such power neither under the Police Act nor under the Police Regulations or under the Rules of 1969. This memo has been issued by the police Headquarters presumably by the Inspector General of Police without any lawful authority or in the alternative, this memo has been issued in exercise of powers not vested by law and accordingly, this cannot be taken as the basis for imposing embargo upon the writ petitioner not to be considered for promotion to the rank of Inspector. Though the Police Headquarters issued the impugned memo in the form of directives, it is in substance an amendment to the existing Rules and Regulations relating to the promotion of police officers to the next higher post.

17. A legislature lacking legislative power or subject to a constitutional prohibition may frame its legislation so as to make it appear to be within its legislative power or to be free from constitutional prohibition. Such a law is colourable legislation, meaning thereby that while pretending to be a law in the exercise of undoubted power, it is in fact a law on a prohibited field.

18. Although apparently the Inspector General of Police in issuing the directives purported to act within the limits of his powers, yet in substance and reality, he transgressed those powers, the transgression being veiled by what appears on a proper examination to be a mere pretence or disguise. Accordingly, we declare the impugned memo to have been issued without lawful authority and of no effect. We further hold that the writ petitioners promotion shall be decided in accordance with rule 4 of the Rules of 1969. This appeal is disposed of with the above declaration and observations.

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1 SCOB [2015] AD 22

(APPELLATE DIVISION)

PRESENT:

Mr. Justice Md. Abdul Wahhab Miah
Ms. Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique

CIVIL PETITION FOR LEAVE TO APPEAL NO.1594 OF 2015

(From the judgment and order dated the 29th day of April, 2015 passed by the High Court Division in Writ Petition No.3930 of 2015)

Government of Bangladesh : ...Petitioner

-Versus-

Shireen Pervin Huq and others : ...Respondents

For the Petitioner : Mr. Mahbubey Alam, Senior Advocate instructed by Mr. Haridas Paul, Advocate-on-Record

For the Respondents : Mr. Aktar Imam, Senior Advocate instructed by Mrs. Madhu Malati Chowdhury Barua, Advocate-on-Record

Date of Hearing : The 13th day of August, 2015

Article 47(3) and 102(3) of the Constitution of Bangladesh:

In view of the clear bar under article 47(3) of the Constitution read with article 102(3) thereof, the High Court Division had no jurisdiction to entertain the writ petition in question and the same not being entertainable, it ought to have summarily rejected the writ petition on the ground of its maintainability. It is true that the High Court Division has not said anything as to the vires of the sections of the Act, 1973 challenged in the writ petition, but it disposed of the same in the manner as quoted hereinbefore after making some observations as stated earlier; there may be a misgiving in the mind of litigant people that a writ petition challenging a provision of the Act, 1973 or any action of the International Crimes Tribunal, is amendable to the writ jurisdiction of the High Court Division under article 102 of the Constitution. Moreso, the learned Judges cannot arrogate to themselves as advisors and it was not an act of discreet on their part to advise the writ-petitioners to redress their grievance by invoking article 104 of the Constitution. ... (Para 7)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This petition for leave to appeal has been filed by writ-respondent No.1 against the order dated the 29th day of April, 2015 passed by a Division Bench of the High Court Division in Writ Petition No.3930 of 2015 disposing the same.

2. From the facts disclosed in the petition, it appears that respondent Nos.1-12 herein as the petitioners (hereinafter referred to as the writ-petitioners) filed the writ petition challenging section 11(4) read with section 21 of the International Crimes (Tribunals) Act, 1973 (in short, the Act, 1973) to the extent that "these sections do not provide a right of appeal to accused contemnors" as unconstitutional and void being violative of the fundamental rights of the writ-petitioners as guaranteed in articles 26, 27, 31 and 39 of the Constitution.

3. From the impugned order, it appears that the learned Attorney General made candid submission before the High Court Division that in view of the provisions of article 47(3) of the Constitution, the writ-petitioners could not challenge the vires of sections 11(4) and 21 of the Act, 1973 invoking article 102 of the Constitution

in view of sub-article (3) thereof. It appears that the High Court Division noticed the provisions of articles 47(3) and 102(3) of the Constitution and itself observed *"Since having regard to Article 47(3) of the Constitution the petitioners are not entitled to challenge section 11(4) read with section 21 of the Act, 1973 to the extent that it does not provide right of appeal and that this Court while exercising jurisdiction under Article 102 of the Constitution cannot pass any order in view of Article 102(3) of the Constitution"* and then made further observation that in order to redress their grievance, the writ-petitioners were at liberty to invoke 104 of the Constitution before the Appellate Division "seeking complete justice." In the context, the High Court Division referred the case of Abdul Quader Mollah-Vs- the Chief Prosecutor, International Crimes Tribunal, Dhaka, 66DLR(AD)289 and after quoting the relevant portion from the said judgment where this Division spoke about its inherent jurisdictional power and its power of doing complete justice under article 104 of the Constitution, disposed of the application under article 102 of the Constitution in the following terms:

"Considering the above position of facts and law as well as the observations and findings this application is accordingly disposed of."

4. Mr. Mahbubey Alam, learned Attorney General, appearing for the petitioner submits that since the High Court Division had no jurisdiction to entertain an application under article 102 of the Constitution challenging any provision of the Act, 1973, it should have rejected the application summarily as being not maintainable, instead it disposed of the same with some observations and thereby impliedly made the writ petition maintainable.

5. Mr. Aktar Imam, learned Counsel, appearing for the writ-petitioner-respondents, on the other hand, has submitted that the High Court Division did not say anything as to the vires of the sections of the Act, 1973 challenged before it. It simply after noting his submissions and those of the learned Attorney General and the findings and observations made in the case of Abdul Quader Mollah (supra), disposed of the writ petition. Therefore, the writ-respondent-Government had no reason to be aggrieved; the petition should be dismissed for want of cause of action.

6. We have considered the submissions of the learned Attorney General and the learned Counsel for the writ-petitioner-respondents.

7. In view of the clear bar under article 47(3) of the Constitution read with article 102(3) thereof, the High Court Division had no jurisdiction to entertain the writ petition in question and the same not being entertainable, it ought to have summarily rejected the writ petition on the ground of its maintainability. It is true that the High Court Division has not said anything as to the vires of the sections of the Act, 1973 challenged in the writ petition, but it disposed of the same in the manner as quoted hereinbefore after making some observations as stated earlier; there may be a misgiving in the mind of litigant people that a writ petition challenging a provision of the Act, 1973 or any action of the International Crimes Tribunal, is amendable to the writ jurisdiction of the High Court Division under article 102 of the Constitution. Moreso, the learned Judges cannot arrogate to themselves as advisors and it was not an act of discreet on their part to advise the writ-petitioners to redress their grievance by invoking article 104 of the Constitution.

8. In view of the above, the last two words in the order of the High Court Division to the effect "disposed of" cannot be maintained and those two words need to be modified.

9. Accordingly, the order of the High Court Division stands modified to the effect that in place of "disposed of", it shall be read as "summarily rejected"

10. This petition is disposed of accordingly.

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1 SCOB [2015] AD 24

APPELLATE DIVISION

PRESENT
Ms. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CIVIL PETITION FOR LEAVE TO APPEAL NO.1585 of 2010
(From the judgment and order dated 10.05.2010 passed by the High Court Division in Writ Petition No.8525 of 2008.)

Aftab Automobiles Limited .....Petitioner

=Versus=

Superintendent, Customs, Excise and VAT, Tejgaon Circle-1, Banani, Dhaka
.....Respondent

For the Petitioner :Mr. A. M. Amin Uddin, Advocate instructed by Mr. Chowdhury Md. Zahangir, Advocate-on-Record.

Respondent : Not represented.

Date of hearing and judgment : 18.06.2015.

Value Added Tax Act, 1991
Section 9(2ka)/42:
The High Court Division observed:
"The present writ petition without preferring any objection/appeal under section 9(2ka)/42 of the VAT Act is not also maintainable."
We find no reason to interfere with the impugned judgment of the High Court Division.
...(Para 4&6)

J U D G M E N T

Nazmun Ara Sultana, J.-

1. This Civil Petition for Leave to Appeal is directed against the judgment and order dated 10.05.2010 passed by the High Court Division in Writ Petition No.8525 of 2008 discharging the rule.

2. The present leave-petitioner filed the above mentioned writ petition challenging the legality of the letter under Nothi No.4/Musok(1)Staniyo & Rajasha Audit/2007-2008/08/634 dated 08.09.2008 issued under the signature of respondent No.1, Superintendent, Customs, Excise and VAT, Tejgaon Circle, Banani, Dhaka asking the petitioner to adjust Tk.42,11,049.00 as unpaid Government Revenue (VAT) in current account Register through treasury challan (annexure-A to the writ petition) and challenging also the legality of the order dated 30.10.2008 passed by the respondent No.1 adjusting Tk.21,47,000.00 on the current account Register of the petitioner (annexure-C to the writ petition) and giving direction to the petitioner to deposit Tk.20,64,049.00 through treasury challan as Government Revenue.

3. Rule was issued in this writ petition. Ultimately, a Division Bench of the High Court Division, upon hearing both the parties and considering the facts and circumstances and the relevant laws discharged that rule finding the impugned letter as well as impugned order of adjustment and also direction to the writ-petitioner to deposit the unpaid Government Revenue lawful and also on the ground that the said writ petition was not maintainable as the writ-petitioner had other forum to challenge the impugned letter and orders.

4. The High Court Division observed:
"The present writ petition without preferring any objection/appeal under section 9(2ka)/42 of the VAT Act is not also maintainable."

5. Mr. A. M. Amin Uddin, the learned Advocate appearing for the leave-petitioner could not point out any wrong or infirmity in the impugned judgment and order of the High Court Division.

6. We find no reason to interfere with the impugned judgment of the High Court Division. The writ-petitioner, however, may approach other forum if law permits.

7. This civil petition for leave to appeal be dismissed.

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1 SCOB [2015] AD 26

APPELLATE DIVISION

PRESENT:
Ms. Justice Nazmun Ara Sultana.
Mr. Justice Syed Mahmud Hossain.
Mr. Justice Hasan Foez Siddique.

CIVIL PETITION FOR LEAVE TO APPEAL NO.1603 of 2013.
(From the judgment and order dated 26.02.2013 passed by the Administrative Appellate Tribunal, Dhaka in Appeal No.102 of 2009)

Janata Bank, represented by its Managing Director and another. : Petitioners.

-Versus-

Md. Minhaj Uddin Ahmed and another. : .Respondents.

For the Petitioners. : Mr. M. Khaled Ahmed, Advocated, instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.

For the Respondents. : Mr. Nurul Islam Bhuiyan, Advocate-on-Record.

Date of Hearing. : The 18th June,2015.

The Administrative Appellate Tribunal came into a finding that while passing the impugned decision the Administrative Tribunal failed to consider that the departmental proceeding against respondent No.1 was not initiated and disposed of legally and that the Administrative Tribunal arrived at a wrong finding in disallowing the case causing serious miscarriage of justice. The findings arrived at and the decision made by the Administrative Appellate Tribunal having been based on proper appreciation of law and fact do not call for interference. ...(Para 13 & 14)

JUDGMENT

SYED MAHMUD HOSSAIN, J.:

1. This civil petition for leave to appeal is directed against the decision dated 26.02.2003 passed by the Administrative Appellate Tribunal, Dhaka in Appeal No.102 of 2009 allowing the appeal and setting aside the decision dated 20.01.2009 passed by the learned Member, Administrative Tribunal No.1, Dhaka in A. T. Case No.129 of 2009.

2. The facts, leading to the filing of this petition, in a nutshell, are as follows :

3. Respondent No.1, Md. Minhaj Uddin Ahmed, filed A. T. Case No.129 of 2006 under section 4(2) of the Administrative Tribunals Act,1980 before the Administrative Tribunal, Dhaka, challenging the impugned order of dismissal from service dated 30.03.2006 passed by the authority.

4. The leave-petitioners herein contested the case by filing written objection denying all the material statements made in the application filed before the Administrative Tribunal.

5. The learned Member of the Administrative Tribunal No.1, Dhaka, by his decision dated 20.01.2009 dismissed the respondent's case.

6. Being aggrieved by and dissatisfied with the decision dated 20.01.2009 passed by the learned Member, Administrative Tribunal No.1, Dhaka, respondent No.1 preferred Appeal No.102 of 2009 before the

Administrative Appellate Tribunal, Dhaka. The Administrative Appellate Tribunal, upon hearing the parties, by its decision dated 26.02.2013 allowed the appeal setting aside the decision 20.01.2009 passed by the learned Member, Administrative Tribunal No.1, Dhaka.

7. Feeling aggrieved by and dissatisfied with the decision dated 26.02.2013 passed by the Administrative Appellate Tribunal, Dhaka, the leave petitioners have filed this instant civil petition for leave to appeal before this Division.

8. Mr. M. Khaled Ahmed, learned Advocate, appearing on behalf of the leave petitioners, submits that there was no irregularity in the departmental proceeding conducted by the Bank authority, which was conducted in accordance with law and that upon considering the inquiry report and other materials on record including the admission of respondent No.1, the Appellate Tribunal exceeded its jurisdiction and as such, the impugned decision should be set aside.

9. Mr. Nurul Islam Chowdhury, the learned Advocate-on-Record, appearing on behalf of respondent No.1, on the other hand, supports the impugned decision delivered by the Administrative Appellate Tribunal.

10. We have considered the submissions of the learned Advocates of both the sides perused the impugned decision and the materials on record.

11. The Administrative Appellate Tribunal came to the finding that instead of recording descriptive statement of the delinquent respondent No.1 at the time of holding departmental inquiry, the inquiry officer recorded his evidence in a given question and answer form and that as a result, respondent No.1 could not place his defence case before the investigating officer as he was bound to answer some selected questions which undoubtedly caused prejudice to him. The Administrative Appellate Tribunal noted that inquiry officer committed irregularities in conducting the departmental inquiry and that on receipt of such illegal inquiry report, the Bank authority took decision to punish respondent No.1 without lawful authority.

12. Having considered irregularities and illegality committed by the authority in punishing respondent No.1 on the basis of a perverse enquiry report submitted by the inquiry officer, the Administrative Appellate Tribunal was of the view that the imposition of penalty upon respondent No.1 was not only unjust but also unfair and without authority.

13. The Administrative Appellate Tribunal came into a finding that while passing the impugned decision the Administrative Tribunal failed to consider that the departmental proceeding against respondent No.1 was not initiated and disposed of legally and that the Administrative Tribunal arrived at a wrong finding in disallowing the case causing serious miscarriage of justice.

14. The findings arrived at and the decision made by the Administrative Appellate Tribunal having been based on proper appreciation of law and fact do not call for interference. Accordingly, this civil petition is dismissed.

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1 SCOB [2015] AD 28

APPELLATE DIVISION

PRESENT
Madam Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Mohammad Anwarul Haque
Mr. Justice Hasan Foez Siddique

CRIMINAL APPEAL NO. 07 OF 2004
(From the judgment and order dated 31st July, 2000 passed by the High Court Division in Criminal Appeal No. 1349 of 1996)

The State ... Appellant

= Versus =

Mostafizur Rahman and another ... Respondents

For the Appellant :Mr. Momtazuddin Fakir, Additional Attorney General, instructed by Mr. B.Hossain, Advocate-on-Record

For Respondents :Not represented

Date of hearing :The 17th September, 2013

Date of judgment :The 18th September, 2013

In the facts of the instant case, a 13 year old house maid has undoubtedly been raped and there is no reason why the victim, who suffered the trauma and the stigma that goes with it, should not be believed. She has put herself in an invidious situation where she will be shunned and marginalised for the rest of her life and yet she has been disbelieved. This is clearly a travesty of justice. ... (Para 28) (Minority View)

In facts, the story of rape itself gives rise to a grave suspicion implicating the accused, respondent; as such it will be fully within the domain of the appellate court to acquit the accused. Moreover, the reason of delay in lodging FIR even after the release of the victim from the clutch of the accused has not been properly described; so it is very difficult to consider the evidence of prosecutrix, P.W.2 as beyond any reasonable doubt which is the fundament requirement of conviction of an accused person.... (Para 45) (Majority View)

Judgment

Madam Justice Nazmun Ara Sultana, J:

1. I have gone through the judgments proposed to be delivered by my brothers, Muhammad Imman Ali, J. and Mohammad Anwarul Haque,J. I agree with the reasoning and findings given by Mohammad Anwarul Haque,J.

MUHAMMAD IMMAN ALI, J:-

2. This criminal appeal, by leave, is directed against the judgement and order dated 31.07.2000 passed by a Division Bench of the High Court Division in Criminal Appeal No. 1349 of 1996 allowing the appeal.

3. After conclusion of the appeal hearing the view of the majority members of this Division was to dismiss the appeal.

4. I have had the privilege of going through the draft judgement of my learned brother Mr. Justice Mohammad Anwarul Haque. Since I could not agree with the reasoning and findings as disclosed in the majority judgement, I propose to express my own views.

5. The facts of the case have been narrated in the judgement of my learned brother Mr. Mohammad Anwarul Haque, J. and I do not propose to repeat those. However, I shall reproduce facts of the case relevant for the purpose of my opinion.

6. Accused Mostafizur Rahman and Aleya Begum were charged and tried by the Nari-O-Shishu Nirjaton Daman Bishesh Adalat, Rajbari in Nari-O-Shishu Nirjaton Daman Case No. 13 of 1996 for offences under sections 6 (1)/14 of the Nari-O-Shishu Nirjaton Daman (Bishesh Bidhan)Ain, 1995. Upon finding the two accused persons guilty as charged, the learned judge of the Nari-O-Shishu Nirjaton Daman Bishesh Adalat sentenced them to suffer imprisonment for life and also to pay a fine of Taka 5000/- each, in default to suffer rigorous imprisonment for 1 (one) year more.

7. The victim Shefali Khatun was 10 or 11 years old when her mother, step father and half sister Aleya (accused in the case) sent her to work as a house maid. The evidence and records disclose that at various times she worked as maid servant in the house of Proshanto, Chand Ali, Montu and lastly accused Mostafizur Rahman. At that time she was aged about 13 years. The prosecution case is that she worked in the house of accused Mostafizur Rahman for about 3 months and at that time she was kept in confinement under lock and key and was raped by accused Mostafiz on numerous occasions. She was unable to escape until 31.08.1995. On the day of her escape she met one Ruhul Parvez (P.W.5) on the way, who took her to the house of Komruddin Biswas @ Chand Ali (P.W.3). She narrated her story to P.W. 5, P.W. 3 and Maksuda Begum P.W.4, the wife of Chand Ali. The matter was disclosed to Abu Reza Ashraful Masud (Babu Mollik), the Publisher and Editor of a local Newspaper, namely Dainik Sahaj Katha. The report of the victim's torture was published in that newspaper on 07.09.1995. After seeing the newspaper report the informant Shamsunnahar Chowdhury (P.W.1), who is the Convener of the Mohila Parishad, Rajbari discussed the matter in their regular meeting on 30.09.1995 and according to the decision of the meeting the informant went to meet the victim on 08.10.1995 at the house of Chand Ali. After that the Mohila Parishad took out a procession on 11.10.1995 and, thereafter, went to the Police Station but the Officer of the Police Station declined to record the First Information Report (F.I.R.). A memorandum was handed over to the Deputy Commissioner and the Superintendent of Police. Ultimately on 24.10.1995 the police accepted the F.I.R. After investigation the police report was submitted on 17.02.1996 stating that the case against the accused persons was not proved, and recommending their discharge. However, the learned Judge took cognizance and after framing charge against accused Mostafizur Rahman under Section 6 (1) of the Nari-O-Shishu Nirjaton Daman (Bishash Bidhan) Ain, 1995 and against accused Aleya Begum under Section 6 (1)/14 of the said Ain, read the same over to the accused, who pleaded not guilty and sought trial.

8. The prosecution produced 12 witnesses of whom 3 were tendered. The two accused persons were examined under Section 342 of the Code of Criminal Procedure when they again pleaded their innocence. After hearing argument on behalf the defence and the prosecution and upon consideration of the evidence and materials of record the learned trial Judge convicted the accused persons and sentenced them as stated above.

9. Being aggrieved by and dissatisfied with the judgement and order of conviction and sentence the accused preferred Criminal Appeal No. 1349 of 1996 before the High Court Division, which was successful and the appellants were acquitted. Hence, the State as petitioner filed the Criminal Petition for Leave to Appeal No. 37 of 2001. Upon hearing the parties this Division granted leave to consider whether the High Court Division ought to have considered the fact that in the facts and circumstances of the case no eye witness is supposed to remain present at the time of commission of rape and the sole evidence of the victim and circumstantial evidence ought to have been considered, and also to consider whether the High Court Division illegally acquitted the accused without reversing the finding of the trial Court that all the prosecution witnesses supported the F.I.R. case and the evidence of the prosecution witnesses were believed and accepted upon giving cogent reasons.

10. The submissions of learned Additional Attorney General on behalf of the appellant have been reproduced in the majority judgement and I need not repeat them.

11. The High Court Division allowed the appeal on the grounds, firstly, that there was no corroborative evidence regarding rape committed by the accused Mostafizur Rahman. The learned Judges observed that expert examination of the person of the prosecutrix and garments she had worn at the time and place where the rape took place is *sine qua non*. Since the wearing apparels were neither produced to nor seized by the Investigating

Officer they have not been brought on record as material exhibits and "in such circumstances coupled with the evidence of P.W. 12 the Doctor who examined the victim led us to believe that the story of rape as alleged by the prosecution is not true inasmuch as the same is false." The learned Judges of the High Court Division disbelieved the evidence of the victim since she did not disclose her story to neighbours who sometimes visited the house where she was staying.

12. Secondly, the High Court Division disbelieved the story of the victim because her parents did not lodge the F.I.R. nor came to depose in court, and they asked the victim to stay in the house of the accused, who allegedly raped their daughter which is against human conduct.

13. Thirdly, the High Court Division observed that there was no reasonable explanation as to why the F.I.R. was lodged after inordinate delay "which makes a reasonable man suspicious about genuineness of the prosecution case."

14. The trial Court, on the other hand, had the benefit of observing all the witnesses who deposed in court and gave an elaborate judgement convicting the accused persons upon finding that the prosecution case was fully corroborated. The learned Tribunal Judge observed that the victim was taken back from her previous employer in Mirpur under false pretext and sent to the house of accused Mostafizur Rahman as a maid servant which was a preconceived plan of the victim's half sister, Aleya. He pointed out that the fact of death of her maternal grandmother was proved to be false. So she was taken from her place of work at Mirpur on false pretences so that she could work in the house of accused Mostifiz. He found P. Ws. 3-5 to be independent and disinterested witnesses and their evidence was corroborative. He also found that P.W. 1, the informant was neither related to the victim nor had any reason to bring a false case against accused Mostafizur Rahman and Aleya. He observed that the witnesses had no enmity with the accused.

15. In a case of this nature it is imperative to keep in mind certain social and moral aspects as well as the background of the victim for proper adjudication. Shefali was an illiterate village girl who at the time of occurrence was below the age of 13 years. She came from a poor family, who forced her to work as a maid servant from the age of about 10/11 according to the evidence of P.Ws. 4 and 5. In all, she worked in 4 households including that of accused Mostafizur Rahman, where she remained confined for about 3 months. Previously she had worked for about 18/20 months in the house of one Montu, at Mirpur. She also worked for Proshanto and Chand Ali. It is also noted that her mother had re-married and co-accused Aleya was her half-sister and that either the victim's father was dead or was not living with her. It was the half-sister Aleya and her step father and mother, who insisted that she came back from Mirpur where she had been working happily for a long period of time so that she could work for accused Mostafiz. The finding of the trial Court is that this was preplanned and that Shefali had been brought away from Mirpur under a false pretext. The evidence of the victim suggests that it was the family's plan that Shefali should marry Mostafiz and that in spite of the fact that Mostafiz raped her, the family forced her to stay with him as he paid them money. She stated in her evidence that because she refused to marry Mustafiz, he and Aleya used to beat her. Hence, one should not lose sight of the fact that Shefali was in a most vulnerable condition.

16. The High Court Division did not believe the story of rape by the accused as, according to their Lordships, there was no corroborative evidence. Clearly the learned Judges were in patent error since the facts of the instant case would show that it is a case of "statutory rape". Section 375 of the Penal Code provides as follows:

"A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following description.-

***First**.-Against her will.*

***Secondly**.- Without her consent.*

***Thirdly**.- With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.*

***Fourthly.**- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

***Fifthly**.- With or without her consent, when she is under fourteen years of age.*

Explanation.- *Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.*

Explanation.- *Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.*

17. Description "Fifthly" under section 375 clearly indicates that sexual intercourse with a child below the age of 14 is rape whether it is with consent or without consent. The medical report clearly shows that the victim was habituated to sexual intercourse and, therefore, whoever had sexual intercourse with the victim would be guilty of rape, even if sexual intercourse took place with her consent.

18. The learned Judges of the High Court Division were clearly of the view that any allegation of rape by the prosecutrix has to be corroborated. They went so far as to say "the evidence of a prosecution (sic. prosecutrix)" in a rape case is customarily received by the court with some suspicion. This is clearly perverse since the victim of rape should be dealt with and considered in the same way as a witness who was injured in the course of the occurrence. Referring to Modi's Medical Jurisprudence, the learned Judges implicitly required evidence of marks of violence on the body of the victim, which having been absent, they found the allegation of rape to be not substantiated. Again I must say that the existence of marks of violence is not a *sine qua non* of rape. The learned Judges further observed as follows:

"Expert's examination of the person of the prosecution (sic. prosecutrix) and garments she had weared (sic.) at the time and the place where the rape took place is *sine qua non* in such case."

19. This statement/requirement as pronounced by the learned Judges of the High Court Division is absolutely misconceived. It can never be said that a case of rape is not proved simply because the wearing apparel of the raped victim was not produced to the investigating officer and no expert examination took place. Clearly the views of the learned Judges are misconceived and perverse. Sexual intercourse with a girl below the age of 14 years is *ipso facto* rape.

20. The learned Judges of the High Court Division disbelieved the victim because she had not reported the occurrence of rape upon her to the people who were either living in the vicinity or visited the house where she was confined. From the evidence on record it appears that the learned Judges overlooked many important factors narrated by the victim in her deposition before the court, including the fact that she was kept under lock and key everyday; that the children of Joinal, a neighbour used to visit when Mostafiz was at home; that the children used to eat guava from Mostafiz's tree when he was at home; that the neighbours used to take water from Mostafiz's house when he was at home; that when Hashem was at home the victim was locked up; she used to play with children when Mostafiz was present. Mostafiz always kept the key with him and finally she stated also that she could not tell anyone through fear as Mostafiz had threatened her. Overlooking such important factors the Hon'ble Judges of the High Court Division disbelieved the testimony of the victim because she did not tell anyone about her plight, ignoring the social context and practical impediments in the way of a vulnerable child.

21. The learned Judges of the High Court Division disbelieved the story of the victim because her parents allowed her to continue to live in the house of Mostafiz in spite of the fact that he raped her, which, according to them, is against human conduct. However, they have overlooked the fact that the victim was not the real child of the father and not a full-sister of accused Aleya and that it was preplanned that the victim should stay in the house of accused Mostafiz so that he would marry her. The victim also stated in her statement before the Magistrate that her parents received money from Mostafiz and that Aleya would also beat her if she did not stay in the house of Mostafiz.

22. Clearly, the whole of that family was scheming against the victim, ensuring that she continues to live in the house of accused Mostafiz. It is, therefore, neither unusual nor surprising that any member of the victim's family did not come forward to lodge the F.I.R. or to depose in court.

23. With regard to the delay in lodging the F.I.R., the learned Judges of the High Court Division appear to have ignored the fact that the victim did not have the support of her family nor anyone else to whom she could turn for assistance. The informant runs an organization which admittedly assists victims such as Shefali, but at the same time was constrained by factors relating to the organization's business procedure. It is not unnatural

that the organization would be required to go through certain formalities before lodging any F.I.R. and those formalities require meeting of the other members which in turn requires fixing of dates for those meetings. In such circumstances delay in commencing the procedural process is inevitable. Moreover, it appears that the police were initially reluctant to accept any information and did so later upon intervention by higher authority. Hence, it cannot be said that the delay in lodging the F.I.R. is unexplained. Furthermore, one should not lose sight of the fact that in a case of this nature where the chastity of a maiden young girl is in question publicity and legal process is purposely avoided keeping in mind her future. There is no gainsaying that once it becomes known that a girl had been raped, she effectively becomes an outcast having no prospect of marriage. It takes a lot of bravery to publicise the fact of rape of an unmarried girl in a conservative society such as ours. This factor alone speaks of truthfulness of the victim.

24. With regard to the evidence of the witnesses, we note that the informant has deposed as P.W.1 in an official capacity as the Convener of the Rajbari Mohila Parishad, stating facts as they were reported to her. There is no question of any motive being present for her to file any false case against the accused. Moreover, it is noted that no question was put to her with regard to the delay in lodging the F.I.R. The evidence of P.W. 2, the victim gives a vivid description of her vulnerable condition and the tragic and horrendous events which she had to suffer. It is noted that there was no suggestion that she had had any sexual intercourse with anyone other than the accused Mostafiz. Her evidence shows that she was very happy in the house of Montu at Mirpur. There was no suggestion that she had had any sexual relationship with anyone in that household. P.Ws 3, 4 and 5 are independent witnesses who narrated their knowledge of the story and no suggestion was made as to any existence of enmity between the witnesses and the accused. I note from the evidence of P.W. 5 Ruhul Parvez that when he met her at 5:30 in the morning she was in fear and was crying. This appears to be quite natural in the attendant situation as described.

25. In the facts and circumstances discussed above, I am of the view that the discussion of the evidence and materials by the High Court Division indicates perversity, misconception and lack of appreciation of the surrounding circumstances leading to the occurrence. I may profitably refer to the decision of the Indian Supreme Court in the case of ***Md. Iqbal and anr. Vs. State of Jharkhand*** reported in ***AIR 2013 SC 3077.*** In that case the father of the prosecutrix as well as other witnesses, who had been examined as prosecution witnesses were declared hostile and did not support the case of the prosecution. No spermatozoa were found in the vaginal swab examination and there was no injury in the private parts. Their lordships held that:

> *"There is no prohibition in law to convict the accused of rape on the basis of sole testimony of the prosecutrix and the law does not require that her statement be corroborated by the statements of other witnesses."*

26. Their lordships went on to observe that no explanation had been furnished by either of the accused as to why the prosecutrix had deposed against them and involved them in such a heinous crime. *It was further held that:*

> *"Rape cannot be treated only as a sexual crime but it should be viewed as a crime involving aggression which leads to the domination of the prosecutrix."*

27. It was further held that:

> *"In case of rape besides the psychological trauma, there is also social stigma to the victim……..Social stigma has a devastating effect on rape victim. It is violation of her right of privacy. Such victims need physical, mental, psychological and social rehabilitation…… Rape is blatant violation of women's bodily integrity*."

28. In the facts of the instant case, a 13 year old house maid has undoubtedly been raped and there is no reason why the victim, who suffered the trauma and the stigma that goes with it, should not be believed. She has put herself in an invidious situation where she will be shunned and marginalised for the rest of her life and yet she has been disbelieved. This is clearly a travesty of justice.

29. In view of the above discussion it is my opinion that the appeal should be allowed.

30. Accordingly, the appeal is allowed. The judgement and order of the High Court Division is set aside and the judgement and order of conviction and sentence passed by the trial court is affirmed.

Mohammad Anwarul Haque, J:

31. This criminal appeal is directed against the judgment and order of acquittal passed on 31.07.2000 by Division Bench of the High Court Division, in Criminal Appeal No. 1349 of 1996 arising out of Nari-O-Shishu Nirjaton Daman Case No. 13 of 1996, Rajbari, acquitting the accused–appellant of the charge punishable under section 6(1)/14 of the Nari-O-Shishu Nirjatan (Bishes Bidhan) Ain, 1995 on setting aside the order of conviction and sentence of life imprisonment with fine of Tk.5000/-in default to pay to suffer one year imprisonment more passed by the judge of Nari-O-Shishu Nirjaton Daman, Bishes Adalot.

32. In short, the case of the prosecution for the purpose of disposal of the appeal is as follows:

33. Victim Shefali was appointed as domestic worker in a house, situated at Mirpur, Dhaka. While she was rendering her service there; her step sister accused Aleya, serving at Rajbari as maid servant in the house of accused Mostafizur Rahman, called her back from Dhaka to Rajbari but she did not respond but ultimately accused Aleya, step sister of victim P.W.2, brought her in the Rajbari on false plea of her maternal grand mother's death and engaged her as maid servant in the house of accused Mostafizur Rahman on 01.06.1996 where she was also there.

34. Taking such opportunity the accused Mostafizur Rahman began to ill-treat her and frequently committed rape on her who was at that time a minor girl of 13 years only.

35. To release herself from such an atmosphere P.W.2, victim Shefali, fled away from the house of the accused Mostafizur Rahman on 31.08.1995 and took shelter in the house of local businessman P.W.3, Chand Ali, where she previously worked as domestic-worker with the help of P.W.6 & 7 and others. Then victim disclosed the entire story of rape and related physical torture committed by accused Mostafizur Rahman which was published in the daily news paper "Soja Katha". Then local "Mohila Parishad" took up the matter and lodged the FIR on 24.10.1995 with the help of local administration, Rajbari showing the date of occurrence from 1.6.1995 to 31.8.1995.

36. During the course of investigation victim was produced before learned Magistrate who recorded the statement of the victim under section 164 of the Code of Criminal procedure and she was sent to doctor for physical examination.

37. However, on the conclusion of investigation a final report was submitted which was not accepted by the learned Judge of the Nari-O-Shishu Nirjaton Daman Bishesh Adalat rather took cognizance of the offence punishable under section 6(1)/14 of Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 and issued process to secure the presence of the accused to face trial.

38. On conclusion of the trial the learned Judge of the Nari-O-Shishu Nirjatan Daman Bishesh Adalat ensured the conviction of the accused–appellant–respondent for commission of the offence referred to above. Subsequently convicted accused preferred a criminal appeal to the High Court Division which was heard and allowed acquitting the convicted appellant of the charge punishable under section 6(1)/14 of the Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995.

39. Mr. Momtaz Uddin Fakir the learned Additional Attorney General submits that the High Court Division erred substantially in upsetting the sentence of imprisonment for life awarded under section 6(1)/14 of the Nari-O-Shishu Nirjaton Daman (Bishesh Bidhan) Ain, 1995 since it is

based on sound and sturdy reasons. Mr. Fakir further submits that the High Court Division has chosen to advance on fragile reason to upset a well resound conclusion of the trial court based on the evidence of the prosecutrix which is relevant one. Moreover, the High Court Division has given to much importance on the inordinate delay in lodging the FIR without considering the prevailing circumstances which was absolutely beyond the control of a minor victim. As such impugned Judgment of the High Court Division acquitting the accused cannot be sustained. In fact, the behavior of the victim of rape would depend upon the circumstances where she is placed. In the instant case since victim was kept confined she had no occasions to lodge the FIR with help of any one at an earliest opportunity. So the impugned judgment of acquittal passed by the High Court Division is to be set aside and the very judgment of conviction and sentence passed by the trial Court is to be maintained.

40. On the other hand, none is found on behalf of the accused–appellant who has been acquitted by the High Court Division.

41. We have gone through the FIR meticulously which has been lodged by P.W.1 Mrs. Shamsunahar Choudhury who has not given any plausible explanation about the inordinate delay in lodging such FIR.

42. It is evident that there is no eye witness of the occurrence. Even the victim, getting sufficient opportunity to disclose this type of alleged physical torture did not project it to any other requesting to release her from the hand of the accused persons.

43. It is equally interesting to note that in spite of getting this type of information from the victim her parent did not take any step rather asked her to remain in the job in the house of the accused persons. In this connection we are to quote an observation made in case of state of Panjab Vs Jagir Sing; reported in SCC(1974) PP 285-286:

> *A Criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is changed. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is exfacie trustworthy on grounds which are fanciful or in the nature of conjectures".*

44. In fact, materials placed before the court give rise to suspicion against the commission of the offence as narrated by the prosecution. The victim, being a minor, was not handed over to her parents who are her best well-wisher P.W.1 being convener of Mohila Parishad under took the matter for prosecution beyond the knowledge of her parent. As such High Court Division disbelieved the entire story of commission of rape on the person of a minor girl which deserves no interference.

45. In facts, the story of rape itself gives rise to a grave suspicion implicating the accused, respondent; as such it will be fully within the domain of the appellate court to acquit the accused. Moreover, the reason of delay in lodging FIR even after the release of the victim from the clutch of the accused has not been properly described; so it is very difficult to consider the evidence of prosecutrix, P.W.2 as beyond any reasonable doubt which is the fundament requirement of conviction of an accused person.

46. Considering the overall situation including the non-examination of the parent of the victim to whom she previously disclosed the entire alleged occurrence and other evidence, adduced by the prosecution, we find no ring of truth beyond any reasonable doubt in the case as narrated by the prosecution. In fact, we are not ready to accept or believe this infirm evidence of the prosecutrix which has rightly been discarded by the High Court Division. In this connection we may also refer the decision of a case Md. Abdul Hamid Mollah Vs. Ali Mollah and another reported in 13 BLD page 127 where their lordships of the Apex Court have observed that the High Court Division on proper assessment of the evidence both oral and circumstantial has taken a decision for acquittal which Appellate Division should not interfere on reevaluating the same available in the record.

47. As such we are not inclined to interfere with the decision of the High Court Division and considering the majority views as shown in the judgment this appeal is dismissed.

Mr. Justice Hasan Foez Siddique, J:

48. I have gone through the judgments proposed to be delivered by my brothers, Muhammad Imman Ali, J. and Mohammad Anwarul Haque, J. I agree with the reasoning and findings given by Mohammad Anwarul Haque, J.

COURT'S ORDER

49. The appeal is dismissed by majority decisions.

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1 SCOB [2015] AD 35

APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha,
Chief Justice
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CRIMINAL APPEAL NO.27 OF 2002
(From the judgment and order dated 18.07.2001 passed by the High Court Division in Criminal Miscellaneous Case No.4662 of 1999.)

Sree Gopal Chandra Barman: Appellant.

=Versus=

Md. Nasirul Hoque : Respondent.

For the Appellant: Ms. Madhumaloti Chowdhury on behalf of Mr. Chowdhury Barua, Advocate-on-Record on behalf of Mr.Md. Zahangir, Advocate-on-Record.

Respondent: Ex-parte.

Date of hearing : 22-04-2015

Penal Code, 1860
Section 406/420:
It appears from the petition of complaint that the respondent sent taka 6,00,000/- to the appellant through Bank with an understanding that he would supply the cloths at a reduced rate during Eid period. Though the appellant admitted that he had received the said amount but without supplying clothes he had repaid his loan by the said money, thereby, misappropriated the same. Lastly, he denied repaying the said money to the complainant. From the aforesaid facts and circumstances, it is difficult to accept that prima-facie ingredients of section 406/420 of the Penal Code had not been established against the appellant. ...(Para 5)

JUDGMENT

Hasan Foez Siddique, J:

1. This appeal is directed against the judgment and order dated 18.07.2001 passed by the High Court Division in Criminal Miscellaneous Case No.4662 of 1999 discharging the Rule.

2. The appellant filed aforesaid Criminal Miscellaneous Case in the High Court Division under Section 561A of the Code of Criminal Procedure seeking quashment of the proceeding of C.R. Case No.70 of 1999 pending in the Court of Magistrate, First Class, Nowabgonj stating that the complainant respondent and the accused appellant were close to each other in course of their business. On 27.12.1998, the appellant gave proposal to the respondent for purchasing cloths at a reduced price during the period of Eid. On good faith, the complainant respondent paid a sum of taka 600000/- through bank in the account of accused Sahadev on 28.12.1998 for payment of the same to the accused appellant. On quarry, Shahadev disclosed that the entire amount was made over to the accused appellant. The appellant also admitted that he had received taka 6,00,000/- from Sahadev and said that he had repaid his loan to the bank by the said amount. Lastly, he denied to repay the said amount on 03.01.1999.

3. The Magistrate, examining the complainant, took cognizance of offence against the appellant under Section 406/420 of the Penal Code and issued warrant of arrest against him. The appellant appearing before the court obtained bail. Thereafter, he filed application under Section 561A of the Code of the Criminal Procedure in the High Court Division and obtained Rule but finally the same was discharged. The High Court Division held that prima-facie ingredients of section 406/420 had been established against the accused appellant from the petition of complaint and other materials on record. Then, the appellant preferred this appeal after getting leave.

4. Mrs. Madhumalaoti Chowdhury Barua, learned Advocate-on-Record appearing on behalf of the appellant, submits that the High Court Division committed an error of law in discharging the Rule inasmuch as

prima-facie ingredients of Section 406/420 of the Penal Code had not been established against the appellant from the facts and circumstances of the case and that dispute between parties is civil in nature.

5. It appears from the petition of complaint that the respondent sent taka 6,00,000/- to the appellant through Bank with an understanding that he would supply the cloths at a reduced rate during Eid period. Though the appellant admitted that he had received the said amount but without supplying clothes he had repaid his loan by the said money, thereby, misappropriated the same. Lastly, he denied repaying the said money to the complainant. From the aforesaid facts and circumstances, it is difficult to accept the submissions made by Ms. Madumaloti Chowdhury that prima-facie ingredients of section 406/420 of the Penal Code had not been established against the appellant.

6. Facts and circumstances, prima-facie, establish that the appellant had no intention to purchase clothes to supply the same to the complainant respondent since receiving the said amount he used the same for his own purpose.

7. In view of the nature of allegations disclosed from prosecution papers, we do not find any wrong in the judgment and order of the High Court Division.

8. Accordingly, the appeal is dismissed.

9. The trial Court is directed to proceed with the case in accordance with law.

1 SCOB [2015] HCD 1

HIGH COURT DIVISION
(Criminal Miscellaneous Jurisdiction)

Criminal Miscellaneous Case No. 33311 OF 2011

Sheikh Ferozur Rahman …….....Petitioner

-Versus-

The State and another……..Opposite parties

Mr. Prabir Halder
…… For petitioner.

Ms. Sakila Rawshan, D.A.G. with
Ms. Sharmina Haque, A,A,G, and
Mr. Md. Sarwardhi,A.A.G
.....For opposite party.

Heard and judgment on 4th August, 2015.

It is the unanimous view of our Court that when a forged document is brought into a Court, private complaints subsequent to this are not maintainable. The documents in serial No.30 and 31 (Annexure-I to this petition) were not found to be forged by the Court where it was produced. In a proceeding where a forged document has been used, the Court concerned should make the complaint. Since the alleged forged document has been filed in a Civil Court, it is for the concerned Civil Court to lodge any complaint before the Criminal Court if it finds any forgery relating to the said document. ... (Para 6)

Judgment

SALMA MASUD CHOWDHURY, J.

1. This Rule arising out of an application under section 561A of the Code of Criminal Procedure at the instance of the accused petitioner was issued calling upon the opposite party to show cause as to why the proceedings of G.R. Case No.3 of 2000 (D.G.R. No.1 of 2000) arising out of Khulna Police Station Case No.3 dated 4.1.2000 under section 406/409/420/467/468/471/109 of the Penal Code read with section 5(2) of the Act II of 1947, now pending in the Court of Chief Metropolitan Magistrate, Khulna should not be quashed and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The prosecution case in short is that one Senior Manager of Agrani Bank, Rupsha Strand Road Branch, Khulna lodged a complaint petition on 25.6.1996 against the Petitioner along with 8 others under section 420/409 of the Penal Code read with section 5(2) of Act II of 1947 alleging that the accused petitioner was the Managing Director of Bagerhat Sea Food Industries Ltd. which is registered under Companies Act, and accused Nos.2-8 were the Directors of the Company and the Complainant on 16.11.1995 on inspection of the godown of the said Company found that the Shrimps were kept in heaps instead of packing those in cartoons and the complainant on 21.11.95 requested the petitioner for repairing godown No.3 and to keep the shrimps in an orderly manner but he refused to do and before filing Money Suit, the complainant scrutinised the relevant papers and detected that the accused in connivance with accused No.9 took loan from the Bank and the accused had no right and title for the land kept under mortgage and the said land was a vested property and the project was established over the vested property and knowing it fully well, he took huge amount of loan and misappropriated it and in the name of exporting 3200 master cartoons of shrimps, they took it out of the godown and sold it in the local market and misappropriated the sale proceeds and thereby committed offence and a complaint petition was filed and the Chief Metropolitan Magistrate, Khulna on receipt of the same passed orders directing the District Anti-Corruption Authority, Khulna for treating the said application as a first information report and to start a regular case under proper section of law and on receipt of the said complaint petition, the District Anti-Corruption Office, Khulna started DAB Khulna E. R. No.43 of 1996 but without treating the said Complaint Petition as a first information report, Mr. S.M. Shamia Iqbal, an Inspector of D.A.B. Khulna as Informant lodged a case being Khulna Police Station Case No.3 dated 4.1.2000 against as many as 10 (ten) accused persons inc1uding the petitioner, alleging, that the accused in collusion with each other for having illegal benefit on misuse of power and on committing criminal breach of trust by way of forgery created loan sanction letter against Bagerhat Sea Food Industries and took out shrimps kept under pledge in the godown of Agrani bank for export and without doing as such, by creating false export documents, misappropriated a sum of Tk.4,12,42,460.00 and thereby committed offence under section 406/409/420/467/468/471/109 of the Penal Code and in course of investigation in D. A. B., E. R. No. 43/96 it was found that

accused-petitioner on 4.10.1994 in favour of Bagerhat Sea Food Industries Bagerhat, applied to Agrani Bank for a loan of Tk.16,00,00,000.00 whereupon on the said date accused Firozur Rahman recommended for a loan of Tk.15,00,00,000.00 and the D. G. M. of Zonal Office of the Bank on 13.10.1994 recommended for sanctioning a loan of Tk.10,00,00,000.00 and the said recommendation, the concerned file on process was placed before accused Abdur Rahman on 22.10.94 and though the said loan was not sanctioned till then, the accused Bank Officials since 6.10.1994 had been making payment against the said proposal for loan and by that time, already Tk.4,00,19,420/- was paid and from 6.10.1994 to 22.10.1994, during process of the loan proposal, none of the concerned accused Bank Officials made any remark thereupon with regard to the payment of the loan money before sanctioning loan and thereby the said accused Bank Officials on misuse of their power gave an illegal favour to the accused-petitioner in withdrawing Tk.4,00,19,420/- and the accused-petitioner pursuant to a letter of credit from Osaka, Japan applied on 25.10.1994 for delivery of 1,650 cartoons of shrimps valued at Tk.91,37,400/- for the purpose of export to Japan to accused Sheikh Firozur Rahman being the Manager of Agrani Bank and the accused petitioner took delivery of the same vide stock Memo No.89514 dated 29.10.1994 by putting his signature but without exporting the same created false export bill and submitted it with the Foreign Exchange Branch of the Bank at Khulna and on getting negotiated the said Bill was sent to the Strand Road Branch of the Bank for depositing the same against Cash Credit Place Account and the accused withdrew the said money and when the fact of the said false export was revealed, the accused-petitioner was asked to deposit and/or pay back Tk.85,32,318/70 including interest and again as per the demand of the accused-petitioner, the accused Sheikh Firozur Rahman and accused R. M. Zahidul Islam vide D.O. No.11381 dated 14.11.1994 allowed the accused-petitioner to take delivery of 3200 master cartoons of shrimps vide stock Memo No.66358 dated 23.11.1994 but the accused without exporting the same again submitted false export bill and on negotiating the same withdrew Tk.1,87,45,118/20 and thereafter the officers of the Bank Clay Road Branch came to learn about the said export bill and vide letter dated 23.11.94 the accused-petitioner was asked to refund the said money but he did not, and by the aid of active co-operation of accused Sheikh Firozur Rahman and accused R.M. Zahidul Islam on creating false pledge stock documents showed pledge of 9449 master cartoons of shrimps out of which 3200 was of Bagda and at that time there was no mention for collecting so much shrimps and more over the machineries of the petitioner had no capacity of processing so much shrimps at a time and the accused in aforesaid manner in connivance with each other misappropriated a total sum of Tk.4,12,42,460.00 and committed the offence and in pursuance of the said case being Khulna Police Station Case No.3 dated 4.1.2000, G.R. Case No. 3 of 2000 (D.G.R. No.1 of 2000) has been started in the Court of Chief Metropolitan Magistrate, Khulna and the Metropolitan Magistrate vide his Process No.271/96 dated 25.6.1996 forwarded the complaint petition to the DACO, Khulna pursuant to which D.A.B. E.R. No.43/96 dated 26.6.1996, started and pursuant to the said memo of the Court, the DACO, Khulna vide memo No.2130/D.A.B. (Noo:) dated 30.11.1997 submitted a report to the Court informing vide paragraph 3(ka)(1) that no sanction was obtained from the Office of the Hon'ble Prime Minister for lodging any case against the accuseds and pursuant to an application dated 18.1.2000 the Metropolitan Magistrate vide order dated 19.1.2000 asked for an opinion of the Investigating Officer who vide Memo No.10S/D.A.B./Jukta dated 27.1.2000 submitted a report and the Magistrate vide order dated 6.2.2000 granted bail to the said accused Md. Firozur Rahman and thereafter the accused-petitioner surrendered before the Court on 9.2.2000 and the Magistrate by an order of the said date granted bail to the accused-petitioner. A suit being Money Suit No.4 of 1996 was also filed by the Manager Agrani Bank as plaintiff before Artho Rin Adalat, Khulna praying for a decree for realisation of money to the tune of Tk.21,15,88,728.69 stating the facts and allegation as has been stated and alleged in the first information report of Khulna Police Station Case No.3 dated 4.1.2000 and hence the present case.

3. Being aggrieved by the proceedings of the case, the petitioner filed an application under section 561-A of the Code of Criminal Procedure before this Court and obtained the present Rule.

4. Mr. Prabir Halder, the learned Advocate appearing on behalf of the petitioner submits that the documents of alleged false and forged export bill in connection with the alleged export of 1650 and 3200 master cartoons of shrimps having been produced in Court along with the plaint of Money Suit No.4 of 1996 filed by the Manager of the Branch as Plaintiff as per requirement of the provisions under Rule 14 of Order 7 of the Code of Civil Procedure, the impugned proceeding under section 467/468/471 of the Penal Code is barred under section 195(C) of the Code of Criminal Procedure. He next submits that since the Money Suit No.4 of 1996 has been decreed on compromise and the alleged forged documents i.e. the alleged forged export bill, having been produced therein, no Court can take cognizance of an offence of forgery defined in section 463 and punishable under section 468 or 471 of the Penal Code unless there is a complaint by the said Court is made in which documents were produced and there having been no such complaint by the Artho Rin Adalat till today, the present proceedings cannot continue. He also submits that since accused No.1 S.M. Amjad Hossain entered

into a contract with Agrani Bank, Strand Road Branch, Khulna, for establishing a Shrimps Processing and Exporting Industry in the year 1992 and since then he had been doing business with the Bank by taking loan and making payment there as per the terms and conditions of the contract, any breach of any term does not constitute any criminal offence either of criminal breach of trust or of cheating rather the dispute being a civil dispute in nature, the impugned proceedings is an abuse of the process of law. The learned Advocate then submits that since the Chief Metropolitan Magistrate directed the DACO, Khulna for treating the Complaint Petition filed by the then Manager of the Bank on 25.6.1996 (Annexure- A) as the First Information Report vide Annexure-B hereto having been made without any lawful authority, the same cannot be treated to be a First Information Report rather can be treated to be a statement under section 161 of the Code of Criminal Procedure and as such the impugned proceeding on the basis of second F.I.R. having been frivolous, vexatious and abuse of process of Court is liable to be quashed. Lastly the learned Advocate submits that accused No.1 S.M. Amjad Hossain filed Criminal Miscellaneous Case No.5251 of 2000 arising out of the same first information report under section 561-A of the Code of Criminal Procedure in which Rule was issued and on hearing, the said Rule was made absolute.

5. Ms. Sakila Rawshan, the learned Deputy Attorney General appearing on behalf of the State opposes the Rule but submits that Rule issued in Criminal Miscellaneous Case No.5251 of 2000 was made absolute on hearing by this Court.

6. We have heard the learned Advocate appearing on behalf of the petitioner and the learned Deputy Attorney General representing the State opposite party and perused the application under section 561A of the Code of Criminal Procedure along with other materials on record. It appears that the date of occurrence was from 4.10.1994 to 31.12.1994 and the judgment was delivered on 8.3.1997 and the decree was signed on 15.3.1997 in Money Suit No.4 of 1996 and by way of a solenama decree the Bank received the money on obtaining the judgment and decree and the present first information report was lodged on 4.1.2000, after a long time. It also appears that in the first information report allegation has been made that some bills were forged by M.O.C.A. No.810944 dated 27.10.1994 and M.O.D.A. No.891939 dated 2.11.1994 but these documents were produced before the Court below in Money Suit No.4 of 1996 by way of list of documents filed by the plaintiff Bank and came to our notice by Annexure-I that those documents were produced before the Court concerned in serial No.30 and 31. It is the unanimous view of our Court that when a forged document is brought into a Court, private complaints subsequent to this are not maintainable. The documents in serial No.30 and 31 (Annexure-I to this petition) were not found to be forged by the Court where it was produced. In a proceeding where a forged document has been used, the Court concerned should make the complaint. Since the alleged forged document has been filed in a Civil Court, it is for the concerned Civil Court to lodge any complaint before the Criminal Court if it finds any forgery relating to the said document.

7. The learned Advocate has referred Annexure-H, Criminal Petition for Leave to Appeal No.388 of 2006 wherein their Lordships of the Appellate Division found in a similar case that since the entire amount has been paid by the accused person in terms of the solenama arising from a Money Suit filed by the Bank, which ended in compromise and the money was adjusted in full, the further proceeding would be an abuse of the process of the Court and their Lordships affirmed the judgment passed by the High Court Division quashing the proceedings.

8. Considering the facts and circumstances of the case, we are of the view that the further proceedings of the present criminal case would be nothing but sheer abuse of the process of the Court and are liable to be quashed for ends of justice.

9. In the result, the Rule is made absolute. The proceedings of G.R. Case No.3 of 2000 (D.G.R. No.1 of 2000) arising out of Khulna Police Station Case No.3 dated 4.1.2000, now pending in the Court of Chief Metropolitan Magistrate, Khulna relating to the petitioner is hereby quashed.

10. The order of stay granted earlier by this Court stands vacated.

11. Communicate a copy of the judgment and order to the Court concerned.

1 SCOB [2015] HCD 4

HIGH COURT DIVISION
(STATUTORY ORIGINAL JURISDICTION)

In the matter of:
Applications under section 160 of the Income Tax Ordinance, 1984.

Income Tax Reference Application No. 159 of 2011
Rule No. 53(Ref.) of 2011
With
Income Tax Reference Application No. 160 of 2011
Rule No. 54(Ref.) of 2011
With
Income Tax Reference Application No. 161 of 2011
Rule No. 55(Ref.) of 2011
With
Income Tax Reference Application No. 162 of 2011
Rule No. 56(Ref.) of 2011

United International University
House No. 80, Road No. 8A (Old-15)
Dhanmondi Residential Area, Dhaka
… Applicant

Versus

The Commissioner of Taxes
Taxes Zone-3
Ayesha Manzil, Pioneer Road
Kakrail, Dhaka
… Respondent

With
Income Tax Reference Application No. 511 of 2004

Manarat Dhaka International College
represented by its Chairman
Shah Abdul Hannan
Plot-CEN-16, Road-104, Gulshan
Dhaka
… Applicant

Versus

The Commissioner of Taxes
Taxes Zone-3
35, Pioneer Road (Ayesha Manjil)
Kakrail, Dhaka-1000
… Respondent

Mr. Sarder Jinnat Ali
Mr. Md. Umbar Ali,
Mr. Md. Delwar Hosein,
Mr. Md. Ali Akbor Khan
… For the applicants

Mr. S. Rashed Jahangir, DAG with
Ms. Mahfuza Begum, AAG,
Mr. Titus Hillol Rema, AAG
… For the respondent

Mr. M. A. Noor
And
Mr. Kamal-ul Alam
… The Amici Curiae

Heard on the 10th, 11th, 12th & 13th May
And
Judgment on the 14th May, 2015

Present:
Ms. Justice Zinat Ara,
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice J. N. Deb Choudhury

It is a settled principle of law that when the provision of a fiscal law carries different meaning, in such case, the benefit of it will go in favour of the citizen i.e. the assessee-university/the assessee-college.
... (Para 42)

SRO No. 454 read with SRO No. 178:
In order to get exemption, issuance of some certificate or producing exemption letter before the assessing officer is not necessary. ...(Para 45)

Income Tax Ordinance, 1984
Section 44(4)(b):
The Government has jurisdiction to issue Notification exempting or reducing income tax of any university or educational institution under section 44(4)(b) of the Ordinance. ...(Para 46)

In the above facts and circumstances, we are of the opinion that the income of the assessee-university/the assessee-college ought to have been treated as tax exempted under SRO No. 178 for the assessment years 2002-2003, 2004-2005, 2005-2006, 2006-2007 and 2007-2008 by the Taxes Authority and the Tribunal. ...(Para 49)

Judgment

Zinat Ara, J.

1. The aforesaid five income tax reference applications have been sent by the Hon'ble Chief Justice for hearing and disposal by this Full Bench. Similar facts and questions of law are involved in these income tax reference applications and so, these have been taken up for hearing together and are being disposed of by this common judgment.

2. Income Tax Reference Applications No. 159 of 2011 and 160 of 2011 under section 160 of the Income Tax Ordinance, 1984 (hereinafter stated as "the Ordinance") have arisen out of a common order dated 27.07.2010, passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka in Income Tax Appeals No. 2961 of 2009-2010 (assessment year 2004-2005) and 2962 of 2009-2010 (assessment year 2005-2006).

3. Income Tax Reference Applications No. 161 of 2011 and 162 of 2011 under section 160 of the Ordinance have arisen out of a common order dated 31.03.2010, passed by the Taxes Appellate Tribunal, Division Bench-5, Dhaka in Income Tax Appeals No. 1383 of 2009-2010 (assessment year 2007-2008) and 1384 of 2009-2010 (assessment year 2007-2008).

4. Income Tax Reference Application No. 511 of 2004 under section 160 of the Ordinance has arisen out of the order dated 22.07.2004, passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka in Income Tax Appeals No. 5690 of 2003-2004 (assessment year 2002-2003).

Admitted Facts of Income Tax Reference Applications No. 159 of 2011, 160 of 2011, 161 of 2011 and 162 of 2011

5. The assessee-applicant-United International University (hereinafter referred to as the assessee-university) is a private university established for imparting higher education with the permission of the Government. The assessee-university is a trust under an unregistered deed of trust registered under the provision of the Society Act, 1980. The object of the assessee-university is to impart higher education to the students on non-commercial and non-profit basis. The Government of the People's Republic of Bangladesh, Ministry of Finance (the Government) through SRO No. 454-L/80 dated 31st December, 1980 (shortly stated as "SRO No. 454"), as amended by **এস,আর,ও, নং ১৭৮-আয়কর/২০০২** dated 3rd July, 2002 ("SRO No. 178", in short), exempted the assessee-university from tax liability along with other educational institutions.

6. The assessee-university filed its income tax returns for the assessment years 2004-2005, 2005-2006, 2006-2007 and 2007-2008 before the concerned Deputy Commissioner of Taxes (briefly stated as "the DCT") claiming that it was entitled to get exemption of taxes on its income under the provisions of SRO No. 454 read with SRO No. 178. But the DCT refused to accept the assessee-university's entitlement to get exemption from taxes under the aforesaid SROs and estimated various income of the assessee-university for the aforesaid assessment years and issued demand notices accordingly.

7. Being aggrieved, the assessee-university filed four separate income tax appeals before the Commissioner of Taxes (Appeals), Taxes Appeal Zone-3, Dhaka ("the CTA", in brief). But the CTA, upon hearing, by a

common order dated 27.08.2007, disallowed Income Tax Appeals Patra No. 1217, 1218/Coy-9/KaAu-3/2006-2007 relating to the assessment years 2004-2005 and 2005-2006 with the opinion that the assessee-university is not entitled to any exemption of taxes under the provisions of the said SRO No. 454 read with SRO No. 178. The CTA also disallowed Income Tax Appeals Patra No. 645/Coy-9/KaAu-3/2008-2009 and 697/Coy-9/KaAu-3/2008-2009 for the assessment years 2006-2007 and 2007-2008 respectively by separate orders dated 08.07.2009 and 20.07.2009 on the ground of non-compliance of the provision of section 153(3) of the Ordinance due to non-payment of taxes under section 74 of the Ordinance.

8. The assessee-university then preferred Income Tax Appeals No. 2961 of 2009-2010 and 2962 of 2009-2010 for the assessment years 2004-2005 and 2005-2006 respectively before the Taxes Appellate Tribunal, Division Bench-1, Dhaka ("the Tribunal", in brief). The Tribunal, by a common order dated 27.07.2010, allowed the appeals in part and modified the orders of the CTA but, in principle, agreed that the assessee-university was not entitled to exemption vide the said SROs. The assessee-university also preferred Income Tax Appeals No. 1383 of 2009-2010 and 1384 of 2009-2010 for the assessment years 2006-2007 and 2007-2008 respectively before the Taxes Appellate Tribunal, Division Bench-5, Dhaka (the Tribunal). The Tribunal disallowed the appeals by a consolidated order dated 31.03.2010 holding that the orders passed by the CTA in rejecting the appeals for non-payment of tax liability under the provision of section 153(3) of the Ordinance were lawful.

Admitted Facts of Income Tax Reference Application No. 511 of 2004

9. The assessee-applicant-Manarat Dhaka International College (shortly, "the assessee-college") was established pursuant to a deed of trust executed by his Excellency Janab Fuad Abdul Hamid Al- Khatib, the Ambassador of Royal Kingdom of Soudi Arabia in Bangladesh and it was registered by registered deed No. 118/1982 dated 05.03.1982/06.03.1982. The assessee-college is an educational institution established under the trust and so, it is not liable to pay income tax on its income under the provision of section 44(3) of the Ordinance read with SRO No. 454 and SRO No. 178. So, the assessee-college did not file its income tax return for the assessment year 2002-2003, but the taxes authority, treating it as default, estimated income of the assessee-college for the said assessment year under the provision of section 84 of the Ordinance and demanded payment of income tax accordingly. Being aggrieved, the assessee-college preferred Income Tax Appeal Patra No. 479/Contra:-5/KaAu-3/2003-2004 before the Appellate Joint Commissioner of Taxes, Appellate Range-3, Taxes Appeal Zone-3, Dhaka ("the AJCT", in brief). The AJCT, by order dated 14.10.2010, affirmed the order of the DCT. Whereupon, the assessee-college preferred Income Tax Appeal No. 2181 of 2003-2004 before the Taxes Appellate Tribunal, Division Bench-4, Dhaka (shortly, "the Tribunal"). The Tribunal, by its order dated 13.01.2004, vacated the order of the CTA, set-aside the order of the DCT and directed the DCT to examine the case de novo and ascertain whether the conditions laid down in Part-A of the Sixth Schedule to the Ordinance were complied with by the assessee and take appropriate action as per law after giving the assessee an opportunity of being heard.

10. Thereafter, in response to the notices by the DCT, the assessee-college submitted duplicate of the original return. The DCT completed assessment under sections 84/156/159/93/82(2) of the Ordinance computing income of the assessee-college at Tk. 1,41,00,000/- and charged tax thereon, but allowed tax exemption for the house property income under section 44 read with the provision of Part-A of the Sixth Schedule to the Ordinance. The assessee-college then preferred Income Tax Appeal Patra No. 479/Contra:-5/KaAu-3/2003-2004 before Appellate Joint Commissioner of Taxes, Appellate Zone-3, Taxes Appeal Zone-3, Dhaka ("the AJCT", in brief) the AJCT, whereupon the AJCT, by order dated 27.06.2004 rejected the appeal for non-payment of tax liability as required under section 153(3) of the Ordinance. Thereafter, the assessee-college filed Income Tax Appeal No. 5690 of 2003-2004 before the Tribunal. But the Tribunal rejected the appeal and affirmed the order of the AJCT.

The Assessee-University/The Assessee-College's Case

11. The assessee-university and the assessee-college are trusts registered under the Societies Act, 1980. The profits earned by the assessees are not distributed to the members of the Board of Trustees and under the trust deed, these are non-commercial and non-profitable institutions/organizations. Therefore, the assessees' income falls within the purview of SRO No. 454 and SRO No. 178, but the Taxes Authority, without considering the said legal proposition of law, imposed taxes upon the income of the assessees unlawfully. As the assessees' income was exempted from payment of taxes, the rejection of appeals on the ground of non-payment of taxes as required under section 153(3) of the Ordinance is unlawful.

Respondent's Case

12. The Commissioner of Taxes has contested the reference applications by submitting separate affidavits-in-opposition supporting the respective orders of the Tribunal stating that the assessee-university and the assessee-college are run on commercial basis and not for the charitable and religious purposes. Only those universities and educational institutions, 'not operating commercially', are entitled to get exemption from payment of taxes on their income under SRO No. 178. The assessee-university and the assessee-college are operated commercially and so, the income of the assessees are taxable and the assessees are not entitled to get the benefit under SRO No. 178.

Supplementary Affidavit

13. The assessee-university filed a supplementary affidavit annexing the Memorandum of Association of United International University Trust.

The Original Questions Raised

Income Tax Reference Applications No. 159 of 2011 and 160 of 2011

14. More or less following similar questions were framed in the above mentioned income tax reference applications:-

(1) Whether, on the facts and in the circumstances of the case, the Tribunal is justified legally, under section 159(2)//44 of the Income Tax Ordinance, 1984 in maintaining the order of the Commissioner (Appeals) that maintained the assessment order in which total income was computed for taxation when the applicant is exempted from taxation under paragraph 3 of the SRO No. 454-L/80 dated 31.12.1980 as amended by SRO No. 178-Income Tax/2002 dated 3rd July, 2002?

(2) Whether, on the facts and circumstances of the case, the Tribunal is justified, legally, under section 159(2)/29 of the Income Tax Ordinance, 1984, in maintaining/reducing order of the Commissioner (Appeals), that maintained/reduced the disallowances made by the DCT arbitrarily, without deleting the same in full?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal is justified, legally, under section 159(2)/44 of the Income Tax Ordinance, 1984 to ignore the fact, that the applicant is under the aegis of promissory estoppel by virtue of SRO No. 454-L/80 dated 31.12.1980 as substituted by SRO No. 178-Income Tax/2002 darted 3rd July, 2002, as enunciated by the High Court Division, as stated in paragraph 18 supra?

(4) Whether, on the facts and in the circumstances of the case, the Tribunal in passing its order can rely on SRO No. 158-Law/Income Tax/2007 dated 26.06.2007 effective from 01.07.2007 corresponding to the assessment year 2008-2009 in the light of the observation of the High Court Division to the effect that the law is applicable which is prevalent when the assessment proceedings started?

Income Tax Reference Applications No. 161 of 2011 and 162 of 2011

15. The questions raised in the above two income tax reference applications are more or less similar and basically as under:-

(1) Whether, on the facts and in the circumstances of the case, the Tribunal is justified, legally, under section 159(2)/74 of the Income Tax Ordinance, 1984 in rejecting the appeal and thereby maintaining the order of the Commissioner (Appeals) who rejected the appeal holding the erroneous view that the applicant failed to pay the admitted liability under sub-section (3) of section 153 of the Income Tax Ordinance, 1984, when the applicant was not required to pay any tax on the basis of the return filed by it under sub-section (1) of section 74 of the Income Tax Ordinance, 1984, and remanding the same to the Commissioner (Appeals) or hearing on merits?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal is justified, legally, under sections 159(2)/74 of the Income Tax Ordinance, 1984, in rejecting the appeal and thereby ignoring the fact that the applicant is under the aegis of promissory estoppel, admissible to it by virtue of SRO No. 454-L/80 dated 31.12.1980 as amended by the SRO No. 178-Income Tax/2002 dated 3rd July, 2002, as enunciated by the High Court Division, as stated in paragraph 16 supra, which cannot be violated arbitrarily?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal is justified, legally, in rejecting the appeal and thereby maintaining the appeal order passed by the Commissioner (Appeals) that maintained an

assessment order passed arbitrarily, involving promissory estoppels, is a malice in law, as held by the Appellate Division?

16. Income Tax Reference Applications No. 511 of 2004:-

"(I) Whether, in the facts and on the circumstances of the case, the Tribunal is judicious in holding the opinion that AJCT is right in law confirming the educational institution as commercial venture and denying exemption of tax enjoined to an educational institution by SRO No. 178-L/2002 dated 04.07.02 and having treated the applicant as defaulter under section 153(3) of the Ordinance?

(II) Whether, in the facts and on the circumstances of the case, the Tribunal is judicious in confirming higher tuition fees by Tk. 13,00,000/- and income from other source by Tk. 1,67,209/- and tax on the income, excepting the part of house property income under part-A of the Sixth Schedule of the Ordinance?"

Hearing and Decision by another Division Bench

17. The above mentioned income tax reference applications, namely, Income Tax Reference Applications No. 159 of 2011, 160 of 2011, 161 of 2011 and 162 of 2011, have been heard analogously by the Bench comprising Mr. Justice A.F.M. Abdur Rahman and Mr. Justice F.R.M. Nazmul Ahasan, and their lordships, upon considering the facts and circumstances of the cases and arguments placed before them by the contending parties, disagreed with the view taken in the judgment dated 14.01.2007 passed by a Division Bench comprising Mr. Justice Shah Abu Nayeem Mominur Rahman and Mr. Justice Abdul Awal to the effect that,- "i*n order to get such exemption it is necessary to satisfy the taxes authority as to the fulfillment of the conditions/criteria laid down in the SRO's by an University or educational institution and on being satisfied the tax authority is to issue a certificate or exemption letter to be produced/referred as and when required by the assessing officer. The SRO's do not authorize the assessing officer to decide the claim of such tax exemption by an assessee in as much as such claim for tax- exemption requires proper enquiry by competent authority."* Thereupon, their lordships, recording their point of difference, sent Income Tax Reference Applications No. 159 of 2011, 160 of 2011, 161 of 2011 and 162 of 2011 to the Hon'ble Chief Justice to take steps in accordance with the rule of the Supreme Court of Bangladesh (High Court Division) Rules, 1973. Similarly, by order dated 10.12.2012 passed in Income Tax Reference Applications No. 510 of 2004 and 511 of 2004, their lordships differed with the decision of the Division Bench as referred to above and sent these two income tax reference applications also to the Hon'ble Chief Justice to take steps in accordance with the provision of Chapter VII of the Supreme Court of Bangladesh (High Court Division) Rules, 1973.

18. At this stage, these income tax reference applications have been sent by the Hon'ble Chief Justice for hearing and disposal by this Full Bench.

The Point of Difference

19. The point of difference in Income Tax Reference Applications No. 159 of 2011 to 162 of 2011 are quoted hereinafter:-

"(1) *Whether the private university registered under the Private University Act 1992 being a trust registered under the Society Registration Act 1860 having in its object clause to impart higher education on the basis of non-profit, non-commercial basis can be treated as a commercial organization due to its charging higher tuition fee and paying higher rate of remuneration to the tutors.*

(2) Whether the provision of Section 44 along with the Provision of 6th Schedule Part-A of the Income Tax Ordinance 1984 and also the SRO No. 454-L/80 dated 31.12.1980 as amended by SRO No. 178-Income Tax/2002 dated 3.7.2002 require any prior certificate to be issued by the taxes authority i.e. the Board of Revenue in order to allow the exemption under the aforesaid SRO."

20. The point of difference in Income Tax Reference Application No. 511 of 2004 are quoted hereinafter:-

"1 Whether the private university registered under the Private University Act, 1992 being a trust registered under the Society Registration Act, 1860 having in its object clause to impart higher; education on the basis of non-profit, non-commercial basis can be treated as a commercial organization due to its charging higher tuition fee and paying higher rate of remuneration to the tutors.

(2) Whether the provision of section 44 along with the provision of 6th Schedule Part-A and also the SRO No. 454-L/80 dated 31.12.1980 as amended by SRO No. 178-Income Tax/2002 dated 3.7.2002 requires any

prior certificate to be issued by the taxes authority i.e. the Board of Revenue in order to allow the exemption under the aforesaid SRO."

21. It may be mentioned that Income Tax Reference Applications No. 510 of 2004 and 511 of 2004, both are relating to the assessment year 2002-2003. The initial assessment order was, eventually, set-aside by the Tribunal and subsequently, fresh assessments were made and it was challenged up to the Tribunal. Therefore, the initial assessment order as challenged in Income Tax Reference Application No. 510 of 2004 merged with the subsequent order of the Tribunal relating to Income Tax Reference Application No. 511 of 2004. So, at the time of hearing, Income Tax Reference Application No. 510 of 2004 has not been pressed and, thus, rejected for non-prosecution by order passed separately in Income Tax Reference Application No. 510 of 2004.

Arguments of the assessee-university/the assessee-college

22. Mr. Sarder Jinnat Ali, the learned Advocate for the assessee-university/the assessee-college, appearing with Mr. Md. Umber Ali, Mr. Md. Ali Akbor Khan and Mr. Md. Delwar Hossin, has taken us through the reference applications, connected materials on record, relevant SROs No. 454 and 178 and put forward the following arguments before us:-

(1) the Government (Ministry of Finance) in exercise of its power as conferred by sub-section (1) of section 60 of the Income Tax Act, 1922 (hereinafter referred to as the Act, 1922) and in supersession of the Ministry of Finance's previous Notification No. 1041(K)61 dated 31st October, 1961 published Gazette Notification being SRO No. 454. In the Notification SRO No. 454, some classes of income was made tax exempted including the income of a university or other educational institutions existing solely for educational purposes and not for purpose of profit;

(2) subsequently, the Government in exercise of its power as conferred by clause (b), sub-section (4) of section 44 of the Ordinance amended SRO No. 454 and substituted sub-clause (3) of clause (a) making the income of university/other educational institution "not operated commercially" as tax exempted. The assessee-applicants are trusts registered under the Societies Registration Act and the assessee-university/the assessee-college are non-profit organizations not being operated commercially. Therefore, the assessees are entitled to have the benefit of SRO No. 454 read with SRO No. 178;

(3) merely because the assessee-applicants charge higher tuition fees on the students and pay higher salaries to the teachers would not make the assessee-university and the assessee-college a commercially operated organization so as to disentitle the assessees from the exemption as provided by SRO No. 178;

(4) the object of the assessee-university and the assessee-college is non commercial object and no profit is distributed amongst the sponsors of the university and the college. The income of the assessee-university and the assessee-college is spent for promoting education by giving scholarships and other incentives to the students for development of education;

(5) in the aforesaid facts and circumstances of the cases, the points referred to by the Division Bench are liable to be decided in favour of the assessee-applicants.

However, Mr. Sarder Jinnat Ali submits that he has no submission relating to application of the provision of section 44 read with the provision of Part A of the Sixth Schedule to the Ordinance as those provisions are not related to these cases and, as such, points of reference may be reframed accordingly.

Arguments of the respondent-the Commissioner of Taxes

23. Mr. S. Rashed Jahangir, the learned Deputy Attorney General appearing with Ms. Mahfuza Begum and Mr. Titus Hillol Rema, the learned Assistant Attorney Generals, on behalf of the respondent, takes us through the affidavits-in-opposition and SROs No. 454 and 178 and subsequent Notifications published in the official gazette being SRO No. 156-Income Tax/2007 dated 28th June, 2007 showing that sub-clauses (1), (2) and (3) of clause (a) were deleted with effect from 1st July, 2007 and contends as under:-

(a) SRO No. 158-Law/Income Tax/2007 dated 28th June, 2007 shows that the Government imposed 15% taxes on the income of private universities and other universities except public university;

(b) Notification being SRO No. 268-Ain/Income Tax/2010 dated 1st July, 2010 shows that the previous Notification was rescinded and the private universities, private medical colleges, private dental colleges and private engineering colleges have to pay reduced taxes of 15% on their income except public universities and institutions engaged in information technologies;

(c) according to the development by subsequent SROs, it is evident that originally the income of the private universities/educational institutions were fully exempted from payment of taxes at the initial stage. Subsequently, after certain periods of time, when the private universities started profiteering by charging higher tuition fees, then the Government decided to impose taxes upon the said universities/educational institutions that run on profit;

(d) under further development, the Government included the income of the private universities, colleges, medical colleges, etc. operated on commercial basis within the ambit of taxation;

(e) from the SROs No. 454, 178 and subsequent SROs, it is evident that the intention of the Government was clear that the private universities/colleges are to pay taxes on their income, because they are operating commercially i.e. charging high tuition fees and making profit;

(f) whether the profit is distributed to the organizers is not a question to be decided. It is not the purpose for utilizing the profit but the operation on commercial basis would be the factor to decide the ambit of taxation in view of the provision of SRO No. 178;

(g) therefore, the orders passed by the Tribunal in deciding that the income of the assessee-university/the assessee-college are not tax exempted are lawful;

Mr. S. Rashed Jahangir placed before us Internal Revenue Bulletin 2011-48 dated November, 28, 2011 in support of his contentions about the nature of an activity, not the purpose or motivation for conducting the activity, is determinative factor to decide commercial activity.

Submissions of the Amici Curiae

24. In course of arguments, it was found that the words "not operated commercially" have not been defined in the Ordinance or the Rules made thereunder or in SRO Nos. 454 or 178. Therefore, Mr. M. A. Noor and Mr. Kamal-ul-Alam, the learned Counsels, were requested to assist the court as Amici Curiae.

25. Mr. M. A. Noor, the learned Amicus Curiae, submits that the intent of SRO No. 178 is not clear. If there is any doubt in the interpretation of the terms of the SRO i. e. the words "if not commercially operated," the benefit should go to the tax payer. He further submits that if there is large scale abuse of the exemption, the Government can withdraw the exemption or modify it to clarify the position. He also submits that the "commercial activity" has been the subject of judicial examination for a long time and in the case of Sakharam Narayan Kherdekar vs City of Nagpur Corporation reported in AIR Bom 200 (1963) 65, "any activity which can justly be called a commercial activity must imply some investment of capital and the activity must run the risk of profit or loss" and according to the Law Lexicon the term includes any type of business or activity which is carried on for a profit. He next submits that the words "which is not operated commercially" have not been defined in the Ordinance or in the Notification and, as such, there is vagueness in the Notification itself. In the circumstances, there being doubt in the terms of the SRO No. 178, the benefit should go to the tax payer.

26. Mr. Kamal-ul-Alam, the learned Amicus Curiae, has put forward the following submissions before us:-

(i) when SRO No. 454 was notified, as a matter of fact, there has not been any private university and a real term "tax exempted" never existed for the purpose of profit, as all were public universities being funded by the Government.

(ii) In 1990s, the concept of private university gained momentum and the Government enacted Private University Act, 1992. The said Act was subsequently repealed and re-enacted as Public University Act, 2010. Thereafter, varieties of private universities have been established in the country.

(iii) in SRO No. 178, the Government put emphasis on the commercial operation without defining the word "commercial" in any precise term. There are two aspects of the SRO. The first is that the university/educational institution in order to get exemption must "not operate commercially." The Government's view is that the universities are charging commercial rate for imparting education from the students resulting in the surplus/profit and, as such, the surplus or profit is taxable. On the other hand, the assessees' point is that the surplus/profit is not distributed to the sponsors and it may only be spent for further expansion for development of universities/educational institutions and so, there is no commercial object in the commercial charging and, as such, the surplus should be exempted from tax liability.

(iv) the presence or absence of a formal non-profit making status of an organization is not a helpful criteria for determining whether or not an organization 'operate commercially.' Many formally non-profit organizations 'operate commercially.' Moreover, many non-profit organizations consistently seek to generate profit in the sense of operating surplus, which permit re-investment and the constitution of reserves as protection against future bad times. They are, however, non-profit in the sense that they do not distribute their surplus/profit outside the organization i.e. its sponsors/share-holders.

(v) as 'commercial operation' has neither been defined in the Ordinance nor in SRO No. 178, there is clearly vagueness in the SRO itself and the mater being related to fiscal law, the benefit should go in favour of the citizen i.e. the assessees.

27. However, Mr. Alam, in principle, has agreed that when some private educational institutions are charging higher tuition fees and making profit years together and without reducing tuition fees for the purpose of education, increasing tuition fees on regular basis, in such case, the Government may impose taxes on such universities/educational institutions.

28. In support of his submissions, Mr. Alam has placed before us an unreported Indian Jurisdiction judgment dated March 16, 2015 passed by the Supreme Court of India in Civil Appeal No. 5167 of 2008 (M/S Queen's Educational Society vs Commissioner of Income Tax).

Examination of Materials on Record

29. We have gone through the income tax reference applications, the affidavits-in-opposition and the connected materials on record. We have also gone through the judgment dated 14.01.2007 passed by a different Bench of this Division in Income Tax Reference Application No. 274 of 2006, the order dated 16.10.2012 passed by a Division Bench comprising Mr. Justice A. F. M. Abdur Rahman and Mr. Justice F. R. M. Nazmul Ahasan in Income Tax Reference Applications No. 159 of 2011, 160 of 2011, 161 of 2011 and 162 of 2011and also the order dated 12.10.2010 passed by the said Bench in Income Tax Reference Applications No. 510 of 2004 and 511 of 2004. We have also carefully studied the relevant provisions of law and the judgments referred to us.

Questions Reframed

30. In view of the arguments as advanced before us by the contending parties, it transpires that the learned Advocate for the applicants admits that the income of the assessee-university/the assessee-college is not tax exempted under the provision of section 44 read with the provision of Part-A of the Sixth Schedule of the Ordinance except house property income. From the materials on record, it transpires that the assessee-college has some house property income and it has been given benefit under the provision of section 44 read with the provision of Part-A of the Sixth Schedule of the Ordinance for that part of income. Therefore, there is neither any grievance of the assessees on this portion of question nor any argument has been made on it. Moreover, we are of the view that the questions need reframing to avoid future confusion. Therefore, we would like to reformulate the questions in the following manner:-

(i) Whether, in the facts and circumstances of the cases, the Tribunal was justified in not allowing tax exemption benefit to the assessee-university/the assessee-college in view of the provision of clause (3) of **এস,আর,ও, নং ১৭৮-আয়কর/২০০২** dated 03.07.2002 in the assessment years 200102002, 2004-2005, 2005-2006, 2006-2007 and 2007-2008 by treating the assessees as "operated commercially" due to charging higher tuition fee and paying higher remunerations to the teachers?

(ii) Whether, in the facts and circumstances of the cases, any prior certificate issued by the Taxes Authority is required in order to allow the exemption to the assessee-university/assessee-college under SRO No. 454 dated 31.12.1980 read with SRO No. 178 dated 03.07.2002?

Deliberation of the Court

31. Question (i) is relating to the assessees' entitlement to get exemption of tax on the assessees' income under SRO No. 178.

32. Admittedly, the assessee-university and the assessee-college have been established for imparting education. It is further admitted that under SRO No. 454, the income of a university or other educational institutions existing solely for educational purposes and not for the purpose of profit were tax exempted. Subsequently, some amendment was made to the aforesaid Notification by SRO No. 178.

33. For better understanding, relevant portions of SRO No. 454 and SRO No. 178 are quoted below:-

"No. S.R.O. 454-L/80.—In exercise of the power conferred by sub-section (1) of section 60 of the Income Tax Act, 1922 (XI of 1922) and supersession of the Ministry of Finance Notification No. S.R.O. 1041(K)/61, dated the 3[1st] October, 1961 the Government is pleased to direct that:--

(a) the following classes of income shall be exempt from the tax payable under the said Act and they shall not be taken into account in determining the total income of an assessee for the purposes of the said act.—

……

……..

(3) the income of a university or other educational institution existing solely for educational purposes and not for purposes of profit;

……"

"এস,আর,ও নং ১৭৮-আয়কর/২০০২/-- Income-tax Ordinance, 1984 (XXXVI of 1984) এর section 44 এর sub-section (4) এর clause (b) তে প্রদত্ত ক্ষমতাবলে সরকার অত্র বিভাগের ৩১শে ডিসেম্বর, ১৯৮০ ইং তারিখের প্রজ্ঞাপন এস, আর, ও নং 454-L/80 এ নিম্নরুপ সংশোধন করিল, যথাঃ-

উপরি-উক্ত প্রজ্ঞাপনের clause (a) এর sub-clause (3)এর পরিবতে নিম্নরুপ sub-clause (3) প্রতিস্থাপিত হইবে, যথাঃ-

"(3) the income of any university, or any other educational institution, which is not operated commercially and also medical college, dental college, engineering college and institution imparting education on information technology;"

(Underlined by us)

34. The main arguments centered around whether the assessee-university or the assessee-college may be treated as "being operated commercially. There is no dispute that the words "operated commercially" or "not operated commercially" have not been defined in the Ordinance or the Rules made thereunder. From the Notification, SRO No. 178, it appears that no definition or explanation has been given for treating a university or educational institution as "not operated commercially."

35. In the Law Lexicon by P. M. Bakshi, Edition 2005 (reprint 2008), the word 'commercial' has been explained as under:-

"COMMERCIAL.—It relates to trade and commerce in general. Harendra H. Mehta v. Mukesh H. Mehta, AIR 1999 SC 2054 : 1999 (2) Raj 547 (SC).

The word 'commercial' is defined in the Concise Oxford Dictionary, New Edition for the 990, at page 227. **The word 'commercial' is defined as "having profit as a primary aim rather than artistic etc., value."** So also, in Stroud's Judicial Dictionary, Fifth Edition, Volume 1 (A to C), the word "commercial action" is stated to include, "any cause arising out of the ordinary transactions of merchants and traders", and further" any cause relating to the construction of mercantile document, etc." See Dena Bank, Ahmednagar v. Prakash Birbhan Katariya, AIR 1994 Bom 343 at 345; 1994 (1) Bom CR 537: 1994 Civil Court Cas 505."

(Bold, emphasis given)

36. In the Major Law Lexicon by P. Ramanatha Aiyar, Forth Edition, 2010, the expression "commercial purpose" has been used as under:-

"The expression 'commercial purpose' is not defined in the Act. **In the absence of a definition, its ordinary meaning has to be seen. 'Commercial' denotes "pertaining to commerce" (Chamber's Twentieth Century Dictionary); it means "connected with, or engaged in commerce; mercantile; having profit as the main aim" (Collins English Dictionary)** whereas the word 'commerce' means "financial transactions especially buying and selling of merchandise, on a large scale" (Concise Oxford Dictionary). Laxmi Engineering Works v. P.S.G. Industrial Institute, AIR 1995 SC 1428 (Consumer Protection Act, 1986, S. 2(1)(d)."

(Bold, emphasis given)

37. In the Internal Revenue Bulletin: 2011-48 dated November 28, 2011, the definition of "Commercial Activity" is as under:-

"Definition of Commercial Activity

Section 1.89204T of the 1988 temporary regulations provides rules for determining whether income is derived from the conduct of a commercial activity, and specially identifies certain activities that are not commercial, including certain investments, trading activities, cultural events, non-profit activities, and governmental functions. Several comments have expressed uncertainty about the applicable U.S. standard for determining when an activity will be considered a commercial activity, a non-profit activity, or governmental function for purposes of section 892 and s 1.892-4T.

Section 1.892-4T(d) of the proposed regulations restates the general rule adopted in the 1988 temporary regulations that, subject to certain enumerated exceptions, all activities ordinarily conducted for the current or future production of income or gain are commercial activities. Section 1.892-4(d) of the proposed regulations further provides that only the nature of an activity, not the purpose or motivation for conducting the activity, is determinative of whether the activity is a commercial activity. This standard also applies for purposes of determining whether an activity is characterized as a non-profit or governmental function under s 1.892-4T(c)(3) and (c)(4). In addition, s 1.892-4(d) of the proposed regulations clarifies the rule in the 1988 temporary regulations by providing that an activity may be considered a commercial activity even if the activity does not constitute a trade or business for purposes of section 162 or does not constitute (or would not constitute if

undertaken in the United States) the conduct of a trade or business in the United States for purposes of section 864(b).

(Underlined by us)

38. In the case reported in AIR 1964 Bom 200, 210, their lordships while deciding the meaning of "commercial activity" observed that **the very concept of any activity which can justly be called a commercial activity must imply some investment of capital and the activity must run the risk of profit or loss.** "Commercial activity" has been defined in Black's Law Dictionary, Ninth Edition, 38 as an activity such as operating a business conduct to make a profit.

39. From the above discussions, it appears that 'commercial activity' has been defined in various sorts of manner. Here, in this case, the assessee-university and the assessee-college claim that they are non-profit and non-commercial organizations. However, admittedly, the assessee-university and the assessee college charge high tuition fees and some income generated from the university/the college which, at the end of the fiscal year, remain as surplus income or profit.

40. According to the learned Deputy Attorney General, the assessees, by charging higher tuition fees gradually each year and without adjusting or reducing the surplus income or profit, are running business operation and the purpose of business operation is immaterial. But he failed to explain the criteria for treating an university or educational institution as operating commercially or that only because an universities or educational institutions are charging high tuition fees and there are some surplus income or profit, invested for the development of the university and the college, those may be treated as operated commercially. It is true that the assessee-university and the assessee-college are charging high tuition fees having surplus income/profit, and there is risk of profit or loss in running such university/college, though the main aim may not be profit earning.

41. In the above circumstances, two different views may be taken. The first view is that the assessee-university and the assessee-college are charging higher tuition fees so that at the end of a year there is surplus amount or profit and so, they are operating commercially. The second view is that the income of the assessee-university/the assessee-college is not for the purpose of profit or loss, but for imparting education to the students and, as such, it cannot be treated as "operated commercially."

42. Thus, considering the meaning of "commercial activity" as discussed hereinbefore, it is evident that the expression of the words "not operated commercially" is vague and it may carry meaning in favour or against the assessees i. e. both ways. When there is doubt, an interpretation which is favourable to the subject should be preferred.—National Board of Revenue vs. Bata Shoe Co., 42 DLR (AD) 105. When a particular provision is susceptible of two or more interpretations, that one most favourable to the citizen must accepted.—Commissioner of Customs vs. Customs, Excise & VAT Appellate Tribunal, 8 BLC 329. It is a settled principle of law that when the provision of a fiscal law carries different meaning, in such case, the benefit of it will go in favour of the citizen i.e. the assessee-university/the assessee-college.

43. Question (ii) is about the requirement of certificate or exemption letter issued by Tax Authority to get exemption from payment of income tax.

44. In the judgment dated 14.01.2007 passed in Income Tax Reference Application No. 274 of 2006, their lordships observed as under:-

"The SRO No. 454-L/80(a) dated 31.12.80 as amended by SRO No. 178-Income Tax/2002 dated 3.7.2002 contains, amongst other, that the income of any University or any other educational institution "not operated commercially" and or "institution imparting education on information technology" are exempted from payment of tax and the same is general provision as to entitlement to claim exemption. **In order to get such exemption it is necessary to satisfy the taxes authority as to the fulfillment of the conditions/criteria laid down in the SRO"s by an university or educational institution and on being satisfied the Tax authority is to issue a certificate or exemption letter to be produced/referred as and when required by the assessing officer."**

(Bold, emphasis supplied)

45. The learned Deputy Attorney General failed to show before us that there is any legal requirement to issue a certificate by the Tax Authority or exemption letter to be produced in order to get the benefit of SRO No. 454 read with SRO No. 178. Therefore, we agree with the view expressed by the Division Bench comprising

Mr. Justice A. F. M. Abdur Rahman and Mr. Justice F. R. M. Nazmul Ahasan that in order to get exemption, issuance of some certificate or producing exemption letter before the assessing officer is not necessary.

46. However, it appears that in this judgment dated 14.01.2007, their lordships has not addressed the issue of "not operated commercially." Be that as it may, we are of the opinion that the Government has jurisdiction to issue Notification exempting or reducing income tax of any university or educational institution under section 44(4)(b) of the Ordinance. In fact, by subsequent Notification, being SRO No. 268-Law-Income Tax/2010 dated 1st July, 2010 the Government has done so.

47. The above view of ours is supported by the unreported judgment dated 16th March, 2015 (M/S. Qeen'S Educational Society vs. Commissioner of Income Tax) wherein it has been decided as under;-

"8.13 From the aforesaid discussion, the following principles of law can be summed up:-

(1) It is obligatory on the part of the Chief Commissioner of Income Tax or the Director, which are the prescribed authorities, to comply with proviso thirteen (un-numbered). Accordingly, it has to be ascertained whether the educational institution has been applying its profit wholly and exclusively to the object for which the institution is established. Merely because an institution has earned profit would not be deciding factor to conclude that the educational institution exists for profit.

(2) The provisions of section 10(23C)(vi) of the Act are analogous to the erstwhile Section 10(22) of the Act, as has been laid down by Hon'ble the Supreme Court in the case American Hotel and Lodging Association (supra). To decide the entitlement of an institution for exemption under Section 10(23C)(vi) of the Act, the test of predominant object of the activity has to be applied by posing the question whether it exists solely for education and not to earn profit [See 5-Judges Constitution Bench judgment in the case of Surt Art Silk Cloth Manufacturers Association (supra)]. It has to be borne in mind that merely because profits have resulted from the activity of imparting education would not result in change of character of the institution that it exists solely for educational purpose. A workable solution has been provided by Hon'ble the Supreme Court in para 33 of its judgment in American Hotel and Lodging Association's case (supra). Thus, on an application made by an institution, the prescribed authority can grant approval subject to such terms and conditions as it may deems fit provided that they are not in conflict with the provisions of the Act. The parameters of earning profit beyond 15% and its investment wholly for educational purposes may be expressly stipulated as per the statutory requirement. Thereafter the Assessing Authority may ensure compliance of those conditions. The cases where exemption has been granted earlier and the assessments are completed with the finding that there is no contravention of the statutory provisions, need not be reopened. However, alter grant of approval if it comes to the notice of the prescribed authority that the conditions on which approval was given, have been violated or the circumstances mentioned in 13th proviso exists, then by following the procedure envisaged in 13th proviso, the prescribed authority can withdraw the approval.

(3) The capital expenditure wholly and exclusively to the objects of education is entitled to exemption and would not constitute part of the total income.

(4) The educational institutions, which are registered as a Society, would continue to retain their character as such and would be eligible to apply for exemption under section 10(23C)(vi) of the Act. [See para 8.7 of the judgment-Aditanar Educational Institution case (supra)]

(5) Where more than 15% of income of an educational institution is accumulated on or after 1st April, 2002, the period of accumulation of the amount exceeding 15% is not permissible beyond five years, provided the excess income has been applied or accumulated for application wholly and exclusively for the purpose of education.

(6) The judgment of Uttrakhand High Court rendered in the case of Queens Educational Society (supra) and the connected matters, is not applicable to eases fall within the provision of Section 10(23C)(vi) of the Act.

There are various reasons, which have been discussed in para 8.8 of the judgment, and the judgment of Allahabad High Court rendered in the case of City Montessori School (supra) lays down the correct law.

48. And finally held:

"8.15 As a sequel to the aforesaid discussion, these petitions are allowed and the impugned orders passed by the Chief Commissioner of Income Tax withdrawing the exemption granted under Section 10(23C)(vi) of the Act are hereby quashed. However, the revenue is at liberty to pass any fresh orders, if such a necessity is felt after taking into consideration the various propositions of law culled out by us in para 8.13 and various other paras.

8.16 The writ petitions stand disposed of in the above terms."

(Underlined by us)

49. In the above facts and circumstances, we are of the opinion that the income of the assessee-university/the assessee-college ought to have been treated as tax exempted under SRO No. 178 for the assessment years 2002-2003, 2004-2005, 2005-2006, 2006-2007 and 2007-2008 by the Taxes Authority and the Tribunal.

50. In the circumstances, rejection of appeals for non-payment of admitted tax as required under section 153(3) of the Ordinance and imposing taxes on the income of the assessee-university/the assessee-college were not justified.

51. In view of the discussions made in the foregoing paragraphs, vis-à-vis the law, we find merit and force in the submissions of Mr. Sarder Jinnat Ali, the learned Advocate for the assessee-applicants and the learned Advocates Mr. M. A. Noor and Mr. Kamal-ul-Alam, the Amici Curiae and we find no merit in the submissions of Mr. S. Rashed Jahangir, the learned Deputy Attorney General.

52. In the result, our answer to questions (i) and (ii) as re-formulated by us are decided in the negative in favour of the assessee-applicants and against the department-respondent.

53. The connected Rules being Rules No. 53(Ref.) of 2011, 54(Ref.) of 2011, 55(Ref.) of 2011 and 56(Ref.) of 2011 are, hereby, disposed of.

54. This judgment of ours do govern Income Tax Reference Applications No. 160 of 2011, 161 of 2011, 162 of 2011 and 511 of 2004.

55. No costs.

56. Before we part with the judgment, we convey our gratitude to the learned Amici Curiae for their assistance rendered to this court.

57. The Registrar, Supreme Court of Bangladesh is directed to take steps under section 161(2) of the Income Tax Ordinance, 1984.

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1 SCOB [2015] HCD 16

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 11442 of 2014

Latif Bawany Jute Mills Limited
... Petitioner

-Versus-

The Chairman, Labour Appellate Tribunal, Dhaka and others.
...Respondents

Mr. Md. Zahurul Islam Mukul, Advocate
... For the Petitioner

Mr. Sukumar Biswas, AAG
… For the Respondent

Date of Hearing : 05.05.2015
Date of Judgment : 05.05.2015

Present:
Mr. Justice Zubayer Rahman Chowdhury
And
Mr. Justice Mahmudul Hoque

Article 102 of the Constitution of the People's Republic of Bangladesh
&
Section 216 (1)(Chha) of the Bangladesh Labour Act, 2006:

We fail to understand how the learned Chairman of the Labour Appellate Tribunal, Dhaka could entertain the appeal of respondent no. 3 in the very first place when, admittedly, there was no judicial order under challenge. In our view, the appeal before the Labour Appellate Tribunal itself was absolutely misconceived and therefore not maintainable at all. ...(Para10)

Judgment

Zubayer Rahman Chowdhury, J :

1. By the instant Rule, the petitioner has challenged the legality and propriety of the Order dated 17.11.2014 passed by the learned Chairman, Labour Appellate Tribunal Dhaka (respondent no. 1) in Appeal No. 651 of 2014.

2. At the time of issuance of the Rule on 09.12.2014, the operation of the impugned order dated 17.11.2014 was stayed for a period of 6 (six) months.

3. Relevant facts, necessary for disposal of the Rule are that respondent no. 3 joined Latif Bawany Jute Mills Ltd (briefly, the Mill) on 27.11.1979 as Overhead Helper declaring his age as 25 years. After getting promoted, respondent no. 3 was serving in the Mill as Line Sarder.

4. On 18.09.2014, the Mill issued Memo No. 24.04.2612.904.73.000.14/2334 dated 18.09.2014 informing respondent no. 3 that he was to go on retirement with effect from 26.11.2014, upon attaining the age of 60 years. However, respondent no. 3 filed Labour Case no. 1254 of 2014 under section 213 of the Bangladesh Labour Act, 2006 praying for a declaration that the order dated 18.09.2014 issued by the petitioner was illegal along with further prayer for correcting his age as per the voter ID Card.

5. During the pendency of the aforesaid case, respondent no. 3 filed another application under section 216 (1)(Chha) of the Act praying for stay of the operation of the Memo dated 18.09.2014 issued by the Mill.

6. Respondent no. 2 issued a show cause notice by Order No. 2 dated 19.10.2014. However, being aggrieved thereby, respondent no. 3 filed Appeal No. 651 of 2014 before the Chairman, Labour Appellate Tribunal, Dhaka and obtained an order of status quo till disposal of the appeal.

7. Mr. M. Zahurul Islam Mukul, the learned Advocate appearing on behalf of the petitioner Mill submits that the learned Chairman of the Labour Court, Dhaka had only issued a show cause notice upon the parties. However, without replying to the same, respondent no. 3 moved before the Labour Appellate Tribunal, Dhaka

and managed to secure an order of status quo. He further submits that the Labour Appellate Tribunal, Dhaka had absolutely no jurisdiction to entertain the appeal as the order dated 19.10.2014 merely asked the parties to show cause.

8. We have perused the application and heard the learned Advocate.

9. The impugned order dated 17.11.2014, as evidenced by Annexure-E reads as under :

"Present : Justice Md. Shamsul Huda
Chairman

Appeal No. 651 of 2014

মোঃ মোস্তফা
..... Appellant
-vs-
চেয়ারম্যান, ২য় শ্রম আদালত, ঢাকা ও অন্যান্য
..... Respondents

Order No. 02 dated-17.11.2014

Admit. Call for the record and issue usual notices upon the respondent by registered post with A/D fixing 17.12.2014 for S/R.

Parties are directed to maintain statusquo till disposal of the Appeal.

Sd/=
Chairman
Labour Appellate Tribunal
Dhaka"

10. We fail to understand how the learned Chairman of the Labour Appellate Tribunal, Dhaka could entertain the appeal of respondent no. 3 in the very first place when, admittedly, there was no judicial order under challenge. In our view, the appeal before the Labour Appellate Tribunal itself was absolutely misconceived and therefore not maintainable at all. Consequently, the impugned order dated 25.12.2014 passed by the learned Chairman, Labour Appellate Tribunal, Dhaka is absolutely without lawful authority.

11. In that view of the matter, we are inclined to hold that the instant Rule merits positive consideration.

12. Accordingly, the Rule is made absolute.

13. The Order dated 17.11.2014 passed by the learned Chairman, Labour Appellate Tribunal Dhaka (respondent no. 1) in Appeal No. 651 of 2014 is set aside, being without lawful authority.

14. Furthermore, as we have found that the proceeding before the Chairman, Labour Appellate Tribunal, Dhaka is without any legal basis and, therefore, not maintainable, all further proceedings of Appeal No. 651 of 2014 is hereby stayed.

15. There will be no order as to cost.

16. The office is directed to communicate the order.

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1 SCOB [2015] HCD 18

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 11959 of 2013

Md. Mahbubur Rahman Basunia
..... Petitioner

-Versus-

The Government of Bangladesh represented by the Secretary, Ministry of Agriculture, Bangladesh Secretariat, Ramna, Dhaka and others
.....Respondents

Mr. A. M. Amin Uddin with
Mr. Yousuf Khan Rajib, Advocates
.....For the petitioner

Mr. Md. Motaher Hossain (Sazu), DAG with
Ms. Purabi Rani Sharma, AAG and
Mr. Md. Shafiquel Islam Siddique, AAG
….For the respondent nos. 1 & 3

Mr. Abul Kalam Chowdhury, Advocate
….For the respondent no. 2

Mr. Abdul Wadud Bhuiyan with
Mr. S. R. M. Lutfor Rahman Akhand, Advocates
….For the respondent no. 4.

Heard on 19.10.2014, 25.11.2014, 30.11.2014, 01.12.2014, 04.12.2014 and 08.12.2014.
Judgment on 10.12.2014.

Present:
Mr. Justice Moyeenul Islam Chowdhury
-And-
Mr. Justice Md. Ashraful Kamal

Article 102 of the Constitution
Writ of Certiorari:

The High Court Division exercising power while dealing with the Writ of Certiorari does not work as a Court of Appeal and as such it is not required to make determination of facts on its own. It can interfere with the findings of a Court of facts under its extra-ordinary jurisdiction under Article 102 only if it can be shown that the Court has acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/facts causing prejudice to the petitioner or it has acted *malafide* or in violation of the principle of natural justice. ...(Para 30)

উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫
Sub-Rule (3) of Rule 4:

Undeniably the post of the petitioner is beyond the jurisdiction of the Public Service Commission and that being so, for regularizing the service of the petitioner, the recommendation of the DPC or the Selection Committee, as the case may be, is a must. But admittedly no recommendation of the DPC or the Selection Committee, as the case may be, was obtained prior to regularization of the service of the petitioner in BARI. So we find that the petitioner was regularized in the service of BARI as Assistant Director (Finance and Accounts) on 24.05.2006 in flagrant violation of Sub-Rule (3) of Rule 4 of the Rules of 2005. ....(Para 34)

বাংলাদেশ কৃষি গবেষণা ইনস্টিটিউট (কর্মকর্তা ও কর্মচারী) চাকুরী প্রবিধানমালা, ২০১১
Regulation 46(1):
It is true that Chapter Seven of the Service Regulations of 2011 is captioned "সাধারণ আচরণ ও শৃংখলা". But none the less, it appears from the language employed in Regulation 46(1) that the appellate authority can hear any appeal preferred against any order by an aggrieved employee and the appeal need not be confined to matters arising out of disciplinary proceedings only.... the appellate authority can entertain any appeal against any order of the authority, whether it relates to disciplinary proceedings or not, under Regulation 46 of the Service Regulations of 2011. ....(Para 43)

The Government Servants (Discipline and Appeal) Rules, 1985
Sub-Rule (2) of Rule 22
From a combined reading of the provisions of Sub-Regulation (3) of Regulation 46 of the Service Regulations of 2011 and Sub-Rule (2) of Rule 22 of the Government Servants (Discipline and Appeal) Rules, 1985, the position that emerges is that the appellate authority will pass such orders as it deems just and equitable, regard being had to the facts and circumstances of the case. Given this scenario, it cannot be said that the appellate authority committed any illegality by way of forming a three-member inquiry committee and acting upon the report dated 29.05.2013 of that committee. ....(Para 45)

Judgment

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh, a Rule Nisi was issued calling upon the respondents to show cause as to why the impugned Memo No. 12.062.027.01.00.001.2010-326 dated 08.10.2013 issued under the signature of the respondent no. 3 (Annexure-'H' to the writ petition) cancelling the order of promotion of the petitioner made under Memo No. ১প-১/২০০৯/প্রশাসন/২৩৭৭ dated 09.09.2012 and directing the respondent no. 2 to take necessary steps to promote the respondent no. 4 with the observation that the regularization of the petitioner was violative of the existing rules should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. Subsequently the petitioner filed an application for issuance of a further Rule whereupon a further Rule Nisi was issued calling upon the respondents to show cause as to why the order dated 02.12.2013 issued by the respondent no. 2 under Memo No. ১ব্য/গ-৭৭৬/২০১২/প্রশাসন/একক নথি/৫৯৬৩ (Annexure-'N' to the application for issuance of a further Rule) cancelling the order of promotion of the petitioner dated 09.09.2012 to the post of Senior Assistant Director (Finance and Accounts) pursuant to the order dated 08.10.2013 issued under the signature of the respondent no. 3 should not be declared to be without lawful authority and 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 case of the petitioner, as set out in the Writ Petition, in short, is as follows:

The petitioner joined as an Assistant Director (Accounts) on 15.03.1997 in a project, namely, "উদ্যান উন্নয়ন প্রকল্প (বারী অংশ)" under Bangladesh Agricultural Research Institute (BARI), Joydebpur, Gazipur. The respondent no. 3, by an order dated 04.11.2003, transferred all the employees who joined the aforesaid Development Project to the Revenue Budget since 01.01.2000 and accordingly the petitioner along with others was transferred to the Revenue Budget. Thereafter the respondent no. 3, by another order dated 03.05.2006, posted the petitioner as Assistant Director (Finance and Accounts), Gardening Research Centre, BARI, Joydebpur, Gazipur on temporary basis. Subsequently the petitioner was regularized as Assistant Director (Finance and Accounts) by the order under Memo No. ২প-৫/২০০৪/প্রশাসন/১১৯৫২ dated 24.05.2006. While the petitioner was working as Assistant Director (Finance and Accounts), the respondent no. 2, by the order under Memo No. ১প-১/২০০৯/প্রশাসন/২৩৭৭ dated 09.09.2012, promoted the petitioner to the post of Senior Assistant Director (Finance and Accounts) and he joined the promoted post on the self-same date (09.09.2012). While the petitioner has been working as Senior Assistant Director (Finance and Accounts), BARI, the respondent no. 3 illegally issued the order under Memo No. 12.062.027.01.00.001.2010-326 dated 08.10.2013 cancelling the order of regularization of the petitioner under Memo No. ২প-৫/২০০৪/প্রশাসন/১১৯৫২ dated 24.05.2006 and the order of promotion of the petitioner under Memo No. ১প-১/২০০৯/প্রশাসন/২৩৭৭ dated 09.09.2012 and directing the respondent no. 2 to promote the respondent no. 4 to the post of Senior Assistant Director (Finance and Accounts) in place of the petitioner. Be that as it may, since the petitioner joined the Development Project on 15.03.1997, he is senior to the respondent no. 4 who joined the post of Assistant Director (Finance and Accounts) on 09.08.2006. Although the respondent no. 4 joined as Assistant Director (Finance and Accounts), BARI on 09.08.2006; yet the fact remains that the petitioner was temporarily posted as Assistant Director (Finance and Accounts), BARI by an office-order dated 03.05.2006 and he was regularized as Assistant Director (Finance and Accounts) by another office-order dated 24.05.2006. As the petitioner is senior to the respondent no. 4 in the service of BARI, the cancellation of the order of promotion of the petitioner and the order of his regularization in the service of BARI (Annexure-'H' to the writ petition) is without lawful authority and of no legal effect.

4. In the Supplementary Affidavit dated 05.06.2014 filed on behalf of the petitioner, it has been stated that the Senior Assistant Secretary, Ministry of Finance, by an order dated 04.09.2003, informed the respondent no. 2 of the transfer of 44(forty-four) posts of the Development Project to the Revenue Budget. Accordingly the

respondent no. 3, by an order dated 04.11.2003, transferred all the employees of the Development Project, namely, "উদ্যান উন্নয়ন প্রকল্প (বারী অংশ)" to the Revenue Budget since 01.01.2000 and as such the petitioner along with others was transferred to the Revenue set-up since that date (01.01.2000). Anyway, the Departmental Promotion Committee (DPC), by its resolution dated 09.09.2012, recommended the promotion of the petitioner to the post of Senior Assistant Director (Finance and Accounts) and the said recommendation was placed in 50th General Meeting of the Board of Management of BARI chaired by the Director-General on the same date (09.09.2012) and the Board of Management unanimously decided to promote the petitioner to the post of Senior Assistant Director (Finance and Accounts) and thereafter the petitioner was promoted thereto on 09.09.2012 and he joined the promoted post of Senior Assistant Director (Finance and Accounts) on that very date (09.09.2012). The BARI authority did not commit any illegality in promoting the petitioner to the post of Senior Assistant Director (Finance and Accounts). As the respondent no. 4 is junior to the petitioner, he is not entitled to be promoted to the post of Senior Assistant Director (Finance and Accounts) of BARI.

5. The case of the respondent no. 4, as set out in the Affidavit-in-Opposition, in short, is as follows:

The respondent no. 4 is senior to the petitioner inasmuch as the respondent no. 4 joined BARI on 15.08.2006 in the post of Assistant Director (Finance and Accounts) directly which is a permanent post in the Revenue Budget of BARI and the authority, by its order dated 08.03.2007, regularized the service of the respondent no. 4 with effect from 15.08.2006. On the other hand, the petitioner joined a Development Project under the name and style "Horticulture Development Project" in 1997 and subsequently the petitioner's post was temporarily transferred to the Revenue Budget and he was temporarily appointed in the post of Revenue set-up; albeit his post was not included in বাংলাদেশ কৃষি গবেষণা ইনস্টিটিউট (কর্মচারী) চাকুরী প্রবিধানমালা, ১৯৯০ (briefly the Service Regulations of 1990) and in the BARI organogram. However, the post of the petitioner was created and included in বাংলাদেশ কৃষি গবেষণা ইনস্টিটিউট (কর্মকর্তা ও কর্মচারী) চাকুরী প্রবিধানমালা, ২০১১ (hereinafter referred to as the Service Regulations of 2011) and his post was made permanent by the order of the Ministry of Agriculture under Memo No. গবেষণা-১/চাকুরী/রাজস্বখাত-২৮/২০০০ dated 23.01.2012 with effect from 01.06.2012. The petitioner was appointed as Assistant Director (Finance and Accounts) in the Development Project, namely, "উদ্যান উন্নয়ন প্রকল্প (বারী অংশ)" and the duration of the project expired on 31.12.1999. Thereafter the Ministry of Agriculture, by its Memo No. কৃম-৩/চাকুরী (রাজস্বখাতে স্থানান্তর)-২৮/২০০৩/৭২০ dated 04.11.2003, temporarily transferred 44(forty-four) posts including the post of the petitioner to the Revenue Budget and gave sanction on year-to-year retention basis with retrospective effect since 01.01.2000 under certain terms and conditions. Subsequently the BARI authority, without following the terms and conditions mentioned in the Memo dated 04.11.2003 issued by the Ministry of Agriculture and violating the relevant provisions, directly appointed the petitioner to the post of Assistant Director (Finance and Accounts) on temporary retention basis by its Memo No. ২প-৫/২০০৪/প্রশাসন/৯৮১২ dated 16.04.2005. At that point of time, there were 2(two) posts of Assistant Director (Finance and Accounts) in the BARI organogram and as such the BARI authority in his appointment letter imposed a condition to the effect that "রাজস্বখাতে স্থানান্তরিত সহকারী পরিচালক (অর্থ ও হিসাব) পদটি স্থায়ী হওয়ার পর সন্তোষজনকভাবে কার্য সম্পাদন সাপেক্ষে তাহাকে চাকুরীতে স্থায়ী করা হইবে।" Since the petitioner's post was created and included in the Service Regulations of 2011, there was no scope to regularize his service prior thereto. Besides, before regularization of the service of the petitioner, the BARI authority did not take any approval from the Selection Committee or the DPC, as the case may be, which was mandatory for regularization of his service as per "উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫" (in short, the Rules of 2005). So the order of regularization dated 24.05.2006 of the service of the petitioner is illegal. Anyway, the respondent no. 4 raised an objection to the alleged seniority of the petitioner and made an application to the Director-General of BARI for fixation of inter se seniority. On the basis of that application submitted by the respondent no. 4, the Director-General of BARI formed a high-powered three-member committee by his order under Memo No. বি-৬৪৬/২০১২/প্রশাসন/১২৯৪ dated 06.08.2012. That committee asked the petitioner and the respondent no. 4 to submit their respective papers and documents and accordingly they submitted the same. The committee perused the papers and documents and found that some irregularities had been committed at the time of regularization of service and fixation of seniority of the petitioner and accordingly the committee made a report dated 05.09.2012 and submitted the same to the Director-General of BARI under Memo No. ৪৫২ dated 06.09.2012 recommending fixation of the two contestants' inter se seniority by the Ministry of Public Administration. But none the less, the BARI authority promoted the petitioner to the post of Senior Assistant Director (Finance and Accounts) by the order dated 09.09.2012.

6. According to the general rules of seniority, the petitioner is junior to the respondent no. 4 by 6(six) years. After completion of 4(four) years of satisfactory service, the respondent no. 4 got selection grade scale by Memo No. বি-১৯০/২০০৯/প্রশাসন/৫৩৯২ dated 13.12.2010 and his present scale of pay is Tk. 15,000-26,200/-. But the petitioner did not get selection grade scale in the post of Assistant Director (Finance and Accounts) in that he did not complete 4(four) years of service in the substantive post of Assistant Director (Finance and Accounts). At the time of promotion of the petitioner to the post of Senior Assistant Director (Finance and Accounts), his

scale of pay was Tk. 11,000-20,370/-. The granting of selection grade scale to the respondent no. 4 by the BARI authority is clearly indicative of his seniority vis-à-vis the petitioner. As the petitioner was unlawfully promoted to the post of Senior Assistant Director (Finance and Accounts), the respondent no. 4 filed a petition of appeal before the Secretary, Ministry of Agriculture as appellate authority. In the matter of promotion to the post of Senior Assistant Director (Finance and Accounts), the respondent no. 4 was illegally and unjustly superseded. However during the pendency of the appeal, the appellate authority formed a three-member inquiry committee to enquire into the promotion of the petitioner to the post of Senior Assistant Director (Finance and Accounts) and the said inquiry committee perused the documents and papers submitted by the 2(two) contestants, namely, the petitioner and the respondent no. 4, heard them in person and made a report dated 29.05.2013 to the Secretary, Ministry of Agriculture. On the basis of the report dated 29.05.2013 (Annexure-'29' to the affidavit-in-opposition), the appellate authority, that is to say, the Secretary, Ministry of Agriculture rescinded the order of promotion of the petitioner to the post of Senior Assistant Director (Finance and Accounts) holding that the regularization of the petitioner in the service of BARI was unlawful and directed the Director-General of BARI to promote the respondent no. 4 thereto within 30(thirty) working days.

7. The petitioner cannot claim his seniority for promotion to the next higher post from the date of his joining the Development Project. According to the SRO No. ১৮২-আইন/২০০৫/সম/বিধি-১/এস-৯/২০০০ dated 20.06.2005 (Rules of 2005), he is entitled to claim his seniority from the date of regularization of his service in the Revenue Budget since 01.06.2012. Over and above, the petitioner did not complete a minimum of 5(five) years service for promotion to the post of Senior Assistant Director (Finance and Accounts) as per the Service Regulations of 2011. That being so, the petitioner was not eligible for promotion thereto and the appellate authority rightly cancelled the orders of promotion and regularization of the petitioner in the service of BARI and directed the Director-General of BARI to promote the petitioner by the impugned order. As the impugned order of the appellate authority, that is to say, the Secretary, Ministry of Agriculture is in perfect accord with the relevant provisions of law, no exception can be taken thereto.

8. The respondent no. 2 has also filed an Affidavit-in-Opposition opposing the Rule. As the case of the respondent no. 2 is similar to that of the respondent no. 4, his case is not reiterated here.

9. In the Supplementary Affidavit-in-Opposition dated 19.11.2014 filed by the respondent no. 4, it has been averred that as the petitioner's post was not in the BARI organogram, it was kept on year-to-year retention basis up to 31st May, 2012.

10. In the Supplementary Affidavit-in-Opposition dated 03.12.2014 filed by the respondent no. 4, it has been mentioned that BARI is a body corporate constituted by the Bangladesh Agricultural Research Institute Ordinance, 1976 and the Service Regulations of 2011 were framed pursuant to Section 18 of the said Ordinance. The Director-General is the head of BARI and he is subordinate to the Secretary of the Ministry of Agriculture. As the controlling authority of the Director-General of BARI, the Secretary, Ministry of Agriculture is the appellate authority and accordingly the respondent no. 4 preferred the appeal to the Secretary, Ministry of Agriculture under Regulation 46 of the Service Regulations of 2011.

11. In the Affidavit-in-Reply filed on behalf of the petitioner, it has been stated that as per the seniority list of the Finance and Accounts Section of BARI, the petitioner is senior to the respondent no. 4 and that is why, the petitioner was legally promoted to the post of Senior Assistant Director (Finance and Accounts).

12. At the outset, Mr. A. M. Amin Uddin, learned Advocate appearing on behalf of the petitioner, submits that prior to cancellation of the promotion of the petitioner by the Secretary, Ministry of Agriculture, the petitioner was not afforded any opportunity of being heard and in that view of the matter, the impugned order (Annexure-'H' to the writ petition) was passed by not following the principle of "Audi Alteram Partem" and in this perspective, the impugned Annexure-'H' is not sustainable in law and, therefore, it is liable to be struck down.

13. Mr. A. M. Amin Uddin further submits that it is on record that the petitioner joined as Assistant Director (Accounts) in a project under the name and style "Horticulture Development Project" in 1997 and the project came to an end on 31.12.1999 and afterwards 44 (forty-four) posts of the project including the post of the petitioner were transferred to the Revenue Budget from the Development Budget and the post of the petitioner was kept on year- to-year retention basis and the respondent no. 3, by an office-order dated 03.05.2006, posted the petitioner as Assistant Director (Finance and Accounts) in BARI on temporary basis and subsequently the respondent no. 2, by an order dated 24.05.2006, regularized the service of the petitioner as Assistant Director (Finance and Accounts) of BARI and as per Rule 5(1) of the Rules of 2005, the seniority of the petitioner shall have to be counted from the date of his regularization in the Service of BARI with effect from 24.05.2006 and it is the admitted position that the respondent no. 4 directly joined BARI as Assistant Director (Finance and Accounts) on 15.08.2006 and this being the position, it is evident that the petitioner is

senior to the respondent no. 4 and as such the petitioner was rightly promoted to the post of Senior Assistant Director (Finance and Accounts) on 09.09.2012.

14. Mr. A. M. Amin Uddin also submits that no forum of appeal as contemplated by Regulation 46 of the Service Regulations of 2011 is available to the respondent no. 4 and as the respondent no. 4 is aggrieved by the promotion order of the petitioner dated 09.09.2012, he ought to have filed a Review Petition before the authority under Regulation 47 of the Service Regulations of 2011 and the appeal before the Secretary, Ministry of Agriculture preferred by the respondent no. 4 being not maintainable, he illegally entertained the appeal, passed an order for formation of a three-member inquiry committee into the matter and ultimately on the basis of the report dated 29.05.2013 (Annexure-'29' to the affidavit-in-opposition of the respondent no. 4) of the three-member inquiry committee, he rescinded the orders of promotion and regularization of the petitioner in the service of BARI by Annexure-'H' to the writ petition and in such a posture of things, the Annexure-'H' is non est in law.

15. Mr. A. M. Amin Uddin further submits that Chapter Seven of the Service Regulations of 2011 relates to "সাধারণ আচরণ ও শৃংখলা" and the provision of appeal as contemplated by Regulation 46 of the Service Regulations of 2011 is intended for dealing with matters arising out of disciplinary proceedings only and the impugned order (Annexure-'H' to the writ petition) was passed by an authority who was not empowered to hear and decide the appeal of the respondent no. 4 and the entire exercise undertaken by the Secretary, Ministry of Agriculture in this regard was an illegal exercise.

16. Mr. A. M. Amin Uddin next submits that Clause (kha) and Clause (ga) of Sub-Regulation (2) of Regulation 46, in particular, pertain to disciplinary proceedings and in that view of the matter, Regulation 46 of the Service Regulations of 2011 does not provide for any forum of appeal against the promotion order of the petitioner dated 09.09.2012; but curiously enough, the Secretary, Ministry of Agriculture disregarded the same and made the impugned order which is not tenable in law.

17. Mr. A. M. Amin Uddin also submits that the Director-General of BARI did not apply his mind to the cancellation of the promotion of the petitioner and at the behest or dictation of the Secretary, Ministry of Agriculture, the Director-General rescinded the order of promotion of the petitioner by issuing Annexure-'N' to the application for issuance of a further Rule and since the Annexure-'N' was issued being dictated by the Secretary, Ministry of Agriculture, it cannot be sustainable in law. On this point, Mr. A. M. Amin Uddin has referred to the decisions in the cases of The Purtabpore Co., Ltd….Vs….Cane Commissioner of Bihar and others, 1 SCC 308; State of U. P. and others…Vs…Maharaja Dharmander Prasad Singh and others, 2 SCC 505 and Board of Intermediate and Secondary Education, Dhaka represented by its Chairman and others…Vs…Md. Faizur Rahman and others, 51 DLR (AD) 59.

18. Per contra, Mr. Abdul Wadud Bhuiyan, learned Advocate appearing on behalf of the respondent no. 4, submits that the three-member inquiry committee formed by the Ministry of Agriculture perused the papers and documents submitted by both the contestants, namely, the petitioner and the respondent no. 4 and the inquiry committee also heard them in person and as the Secretary, Ministry of Agriculture acted in accordance with the recommendation given by the three-member inquiry committee, it cannot be said by any stretch of imagination that the principle of "Audi Alteram Partem" was not adhered to prior to issuance of the impugned order by the Secretary, Ministry of Agriculture (Annexure-'H' to the writ petition) and in this perspective, the Annexure-'H' is perfectly a valid and lawful order.

19. Mr. Abdul Wadud Bhuiyan next submits that there were only 2(two) posts in the organogram of BARI at the relevant point of time and as such the post of the petitioner, on its transfer from the Development Budget to the Revenue Budget, was kept on year-to-year retention basis up to 31st May, 2012 and as there was no substantive post of the petitioner in the Service Regulations of 1990 (since repealed), he could not be made permanent until 01.06.2012 and admittedly the respondent no. 4 directly joined BARI as Assistant Director (Finance and Accounts) on 15.08.2006 against a substantive vacant post and such being the state of affairs, the respondent no. 4 is undoubtedly senior to the petitioner; but the BARI authority illegally deprived the respondent no. 4 of his due promotion and promoted the petitioner to the post of Senior Assistant Director (Finance and Accounts) by the order dated 09.09.2012.

20. Mr. Abdul Wadud Bhuiyan further submits that as per Sub-Rule (3) of Rule 4 of the Rules of 2005, the recommendation of the DPC or the Selection Committee, as the case may be, is a sine qua non for regularization of the service of the petitioner; but indisputably no recommendation was made either by the DPC or by the Selection Committee for regularization of the service of the petitioner in accordance therewith and this being the landscape, the order of promotion of the petitioner dated 09.09.2012 made by the Director-General of BARI is ex-facie illegal.

21. Mr. Abdul Wadud Bhuiyan also submits that although Chapter Seven of the Service Regulations of 2011 is captioned "সাধারণ আচরণ ও শৃংখলা", yet the fact remains that any order can be appealed against before the higher authority as per Regulation 46 of the Service Regulations of 2011 and the preferring of any appeal to the higher authority arising out of any promotion matter as in the present instance to the Secretary, Ministry of Agriculture by the respondent no. 4 has not been debarred by Regulation 46, regard being had to the language of Clause (ka) of Sub-Regulation (2) of Regulation 46 of the Service Regulations of 2011.

22. Mr. Abdul Wadud Bhuiyan further submits that Clause (ka) of Sub-Regulation (2) of Regulation 46 provides— "এই প্রবিধানমালার নির্ধারিত পদ্ধতি পালন করা হইয়াছে কি না, না হইয়া থাকিলে উহার কারণে ন্যায় বিচারের হানি হইয়াছে কি না" and this provision engrafted therein clearly indicates that the appellate authority shall consider whether the prescribed procedure has been followed under the Service Regulations of 2011 and in case of failure to follow the prescribed procedure thereunder, whether there has been a failure of justice by that reason and this Clause (ka) leaves no room for doubt that the appeal to the Secretary, Ministry of Agriculture preferred by the respondent no. 4 was very much competent.

23. Mr. Abdul Wadud Bhuiyan next submits that admittedly the respondent no. 4 did not prefer any review application to the Director-General of BARI as contemplated by Regulation 47 of the Service Regulations of 2011 and instead of preferring any review application before him, the respondent no. 4 chose to prefer an appeal against the order of promotion of the petitioner dated 09.09.2012 and the appeal was duly disposed of by the Secretary, Ministry of Agriculture on the basis of the report dated 29.05.2013 submitted by the three-member inquiry committee.

24. Mr. Abdul Wadud Bhuiyan also submits that it is on record that the BARI authority formed a three-member committee to determine the inter se seniority of the petitioner and the respondent no. 4 and that committee, after hearing the parties and perusing the relevant documents and papers submitted by them, made a report dated 05.09.2012 (Annexure-'23') to the Director-General of BARI recommending fixation of inter se seniority of the parties by the Ministry of Public Administration; but for some mysterious and cryptic reasons, the Director-General himself snubbed the report of the committee (Annexure-'23') and promoted the petitioner to the post of Senior Assistant Director (Finance and Accounts) on 09.09.2012 by superseding the respondent no. 4 and this action is indicative of the malafide intention or bad faith on the part of the Director-General.

25. Mr. Abdul Wadud Bhuiyan next submits that the decisions in the cases of The Purtabpore Co., Ltd.…Vs.…Cane Commissioner of Bihar and others, 1 SCC 308; State of U. P. and others…Vs…Maharaja Dharmander Prasad Singh and others, 2 SCC 505 and Board of Intermediate and Secondary Education, Dhaka represented by its Chairman and others…Vs…Md. Faizur Rahman and others, 51 DLR (AD) 59 relied upon by Mr. A. M. Amin Uddin being clearly distinguishable are not applicable to the facts and circumstances of the present case and the reference to those decisions by Mr. A. M. Amin Uddin is a shot in the dark.

26. Mr. Abdul Wadud Bhuiyan further submits that being senior to the petitioner, the respondent no. 4 got selection grade scale of Tk. 15,000-26,200/- on 13.12.2010 with effect from 15.08.2010; but the petitioner did not get the same as is apparent from Annexure-'19' to the affidavit-in-opposition of the respondent no. 4 and on 08.10.2013, the appellate authority, having considered the pros and cons of the matter and regard being had to the seniority of the respondent no. 4, rescinded the order of promotion of the petitioner dated 09.09.2012 and directed the respondent no. 2 to take necessary steps for promotion of the respondent no. 4 within 30(thirty) working days.

27. Mr. Abdul Wadud Bhuiyan lastly submits that this is a Writ of Certiorari and in a Writ of Certiorari, the scope of interference of the High Court Division under Article 102 of the Constitution is very limited and in support of this submission, he draws our attention to the decision in the case of the Government of Bangladesh and another…Vs…Md. Afsar Ali and others reported in 58 DLR (AD) 107 wherein it has been held by our Appellate Division that the High Court Division can interfere with the findings of fact arrived at by the inferior Tribunal only when it can be shown that the findings are based on no evidence or non-consideration of material evidence and as the impugned order (Annexure-'H' to the writ petition) does not come within the purview of the "ratio" enunciated in the aforesaid decision, the petitioner has no legs to stand upon.

28. Mr. Abul Kalam Chowdhury, learned Advocate appearing on behalf of the respondent no. 2, submits that Regulation 46 of the Service Regulations of 2011 provides for the forum of appeal and accordingly the respondent no. 4 preferred his appeal before the appellate forum against the order of promotion of the petitioner dated 09.09.2012 and the appellate authority disposed of the appeal in accordance with law and as the impugned order of the appellate authority dated 08.10.2013 (Annexure- 'H' to the writ petition) was passed as per law, the petitioner can not get any relief in this Writ Petition.

29. We have heard the submissions of the learned Advocate Mr. A. M. Amin Uddin and the counter-submissions of the learned Advocates Mr. Abdul Wadud Bhuiyan and Mr. Abul Kalam Chowdhury and perused the Writ Petition, Supplementary Affidavit, Affidavits-in-Opposition, Supplementary Affidavits-in-Opposition, Affidavit-in-Reply and relevant Annexures annexed thereto.

30. It goes without saying that this is a Writ of Certiorari under Article 102 of the Constitution. In this regard, we feel tempted to say that the High Court Division exercising power while dealing with the Writ of Certiorari does not work as a Court of Appeal and as such it is not required to make determination of facts on its own. It can interfere with the findings of a Court of facts under its extra-ordinary jurisdiction under Article 102 only if it can be shown that the Court has acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/facts causing prejudice to the petitioner or it has acted malafide or in violation of the principle of natural justice. This view is underpinned by the decision in the case of the Government of Bangladesh …Vs…Md. Jalil and others reported in 15 BLD (AD) 175.

31. In the decision in the case of the Government of Bangladesh and another…Vs…Md. Afsar Ali and others reported in 58 DLR (AD) 107 adverted to by Mr. Abdul Wadud Bhuiyan, it has been held by the Appellate Division that the High Court Division can interfere with the findings of fact arrived at by the inferior Tribunal only when it can be shown that the findings are based on no evidence or non-consideration of material evidence.

32. From the aforementioned two decisions of the Appellate Division, it is manifestly clear that in a Writ of Certiorari, the scope of interference of the High Court Division under Article 102 of the Constitution is very limited. So keeping this in view, we will adjudicate upon the Rules.

33. It is admitted that the petitioner first joined as Assistant Director (Accounts) in Horticulture Development Project under BARI, Gazipur on 15.03.1997 and the duration of the project eventually ended on 31.12.1999. It is further admitted that 44(forty-four) posts of the project including the post of the petitioner were transferred from the Development Budget to the Revenue Budget with effect from 01.01.2000. It is also undisputed that after the transfer of the post of the petitioner to the Revenue set-up, it was kept on year-to-year retention basis till 31st May, 2012.

34. Be that as it may, the respondent no. 3, by an office-order dated 03.05.2006, posted the petitioner as Assistant Director (Finance and Accounts) of BARI on temporary basis. Thereafter the respondent no. 2, by an order dated 24.05.2006, regularized the petitioner in the service of BARI as Assistant Director (Finance and Accounts). One of the core questions raised in this writ petition is this: was the petitioner regularized in the service of BARI on 24.05.2006 in violation of the provisions of Sub-Rule (3) of Rule 4 of the Rules of 2005? Sub-Rule (3) of Rule 4 of the Rules of 2005 contemplates that "কর্মকমিশনের আওতাভুক্ত কোন পদে কমিশনের সুপারিশক্রমে এবং কমিশনের আওতা বহির্ভূত কোন পদে বিভাগীয় পদোন্নতি বা বাছাই কমিটির সুপারিশক্রমে নিয়মিত করিতে হইবে।" Undeniably the post of the petitioner is beyond the jurisdiction of the Public Service Commission and that being so, for regularizing the service of the petitioner, the recommendation of the DPC or the Selection Committee, as the case may be, is a must. But admittedly no recommendation of the DPC or the Selection Committee, as the case may be, was obtained prior to regularization of the service of the petitioner in BARI. So we find that the petitioner was regularized in the service of BARI as Assistant Director (Finance and Accounts) on 24.05.2006 in flagrant violation of Sub-Rule (3) of Rule 4 of the Rules of 2005.

35. Of course, as per Sub-Rule (1) of Rule 5 of the Rules of 2005, the seniority of any regularized officer or employee shall be calculated from the date of his regularization in the service. As the petitioner was regularized in the service of BARI on 24.05.2006 illegally, the provisions of Sub-Rule (1) of Rule 5 of the Rules of 2005 cannot be called in aid in this respect.

36. It transpires that the DPC in its meeting dated 09.09.2012 unanimously recommended the petitioner for promotion to the post of Senior Assistant Director (Finance and Accounts) of BARI and the said recommendation was also ratified by the Management Board of BARI in its 50th General Meeting on that very date (09.09.2012). On the self-same date (09.09.2012), the Director-General of BARI promoted the petitioner to the post of Senior Assistant Director (Finance and Accounts) and on that very date, the petitioner also joined his promoted post. From the trend of these events, it seems that the BARI was in an unusual hurry to promote the petitioner to the next higher post without caring for the legality or otherwise of the regularization of the service of the petitioner.

37. On a careful perusal of the organogram of BARI, it becomes crystal clear that there were 2(two) sanctioned posts of Assistant Director (Finance and Accounts) in BARI at the relevant point of time. Indisputably the respondent no. 4 and one Md. Younus Ali were holding those two substantive posts of Assistant Director (Finance and Accounts) at that time. There was no substantive or permanent third post of

Assistant Director (Finance and Accounts) till its creation and inclusion in the Service Regulations of 2011. As mentioned earlier, the post of the petitioner as Assistant Director (Finance and Accounts) of BARI was kept on year-to-year retention basis till 31st May, 2012. Against this backdrop, the question of regularization of the service of the petitioner as Assistant Director (Finance and Accounts) of BARI on 24.05.2006 was out of the question. Accordingly after the framing of the Service Regulations of 2011, the post of the petitioner was made substantive/permanent on 01.06.2012.

38. In this connection, the relevant provisions of Regulation 6 of the Service Regulations of 2011 may be quoted below verbatim:

"৬। পদোন্নতির মাধ্যমে নিয়োগ।— (১) এই প্রবিধানমালার বিধান এবং তফসিলের বিধানাবলী সাপেক্ষে, কোন কর্মচারীকে পরবর্তী উচ্চতর পদে পদোন্নতির মাধ্যমে নিয়াগ করা যাইবে। ....

(৪) কোন কর্মচারী তাহার পদে স্থায়ী না হইলে তাহাকে পদোন্নতি দেওয়া যাইবে না। ....."

(Emphasis laid is ours.)

39. So it is palpably evident that unless any employee is made permanent in his post, he can not be promoted to the next higher post. There is no gainsaying the fact that the respondent no. 4 directly joined BARI as Assistant Director (Finance and Accounts) on 15.08.2006 against a substantive vacant post and he was made permanent therein with effect from that date (15.08.2006). On the contrary, it may be recalled that the post of the petitioner, on its transfer to the Revenue Budget from the Development Budget, was kept on year-to-year retention basis till 31st May, 2012. As per Annexure-'41' to the affidavit-in-opposition filed by the respondent no. 4, the Ministry of Public Administration by its Memo No. ০৫.১৫৭.০১৫.০১.০৫.০০৪.২০০১(অংশ-১)-১১৭ dated 17.05.2010 informed the Ministry of Agriculture that "নিয়োগবিধি চূড়ান্ত না হওয়া পর্যন্ত পদগুলি স্থায়ী করণের কোন অবকাশ নেই". Again according to the Service Regulations of 2011, an Assistant Director (Finance and Accounts) can not be promoted to the post of Senior Assistant Director (Finance and Accounts) unless he has completed a minimum of 5(five) years service as Assistant Director (Finance and Accounts). As the petitioner was made permanent in the post of Assistant Director (Finance and Accounts) on 01.06.2012, the question of completion of a minimum of 5(five) years service in that capacity by him did not arise at all on 09.09.2012, that is to say, on the date of his promotion to the post of Senior Assistant Director (Finance and Accounts) of BARI. It appears that the BARI authority completely disregarded this aspect of the matter while promoting the petitioner to the next higher post on 09.09.2012.

40. Mr. Abdul Wadud Bhuiyan, it seems, has rightly submitted that the respondent no. 4 got selection grade scale of Tk. 15,000-26,200/- on 13.12.2010 with effect from 15.08.2010; but the petitioner did not get the benefit of selection grade scale as he was junior to the respondent no. 4 and prior to the promotion of the petitioner to the post of Senior Assistant Director (Finance and Accounts), his scale of pay was Tk. 11,000-20,370/-. This dimension of the matter was also ignored by the BARI authority before promoting the petitioner to the post of Senior Assistant Director (Finance and Accounts).

41. It is mysteriously astounding that the report dated 05.09.2012 (Annexure-'23') of the three-member committee formed by the Director-General of BARI was given a go-by by the Director-General himself wherein the committee unanimously recommended fixation of inter se seniority of the petitioner and the respondent no. 4 by the Ministry of Public Administration. It does not stand to reason and logic as to why the Director-General gave a damn to the report dated 05.09.2012 and promoted the petitioner to the next higher post immediately thereafter, that is to say, on 09.09.2012. This conduct of the BARI authority smacks of some bad motive.

42. However, the next contentious issue between the petitioner and the respondent no. 4 is about the availability or otherwise of the forum of appeal as postulated by Regulation 46 of the Service Regulations of 2011. For proper appreciation of the submission and the counter-submission of the learned Advocates on this crucial point, Regulation 46 is reproduced below:

"৪৬। আদেশের বিরুদ্ধে আপীল।—(১) কোন কর্মচারী উপযুক্ত কর্তৃপক্ষ কর্তৃক সাধারণ বা বিশেষ আদেশ দ্বারা, নির্ধারিত কর্তৃপক্ষের নিকট, অথবা যে ক্ষেত্রে অনুরুপ কোন কর্তৃপক্ষ নির্ধারিত নাই, সেই ক্ষেত্রে যে আদেশদানকারী কর্তৃপক্ষের আদেশের বিরুদ্ধে আপীলের প্রস্তাব করা হইবে, তিনি যে কর্তৃপক্ষের অব্যবহিত অধঃস্তন তাহার নিকট অথবা যে ক্ষেত্রে নিয়োগকারী কর্তৃপক্ষের অধঃস্তন কোন কর্তৃপক্ষ আদেশ দান করিয়াছেন, সেই ক্ষেত্রে নিয়োগকারী কর্তৃপক্ষের নিকট আপীল করিতে পারিবেন।

(২) আপীল কর্তৃপক্ষ নিম্নোক্ত বিষয়সমূহ বিবেচনা করিবে, যথাঃ—

(ক) এই প্রবিধানমালার নির্ধারিত পদ্ধতি পালন করা হইয়াছে কি না, না হইয়া থাকিলে উহার কারণে ন্যায় বিচারের হানি হইয়াছে কি না;

(খ) অভিযোগসমূহের উপর প্রদত্ত সিদ্ধান্ত সঠিক ও ন্যায়সংগত কি না; এবং

(গ) আরোপিত দন্ড মাত্রাতিরিক্ত, পর্যাপ্ত বা অপর্যাপ্ত কি না।

(৩) আপীল কর্তৃপক্ষ যেরুপ উপযুক্ত বলিয়া বিবেচনা করিবে সেইরুপ আদেশ প্রদান করিবে।

....."

43. In this context, it may be pointed out that admittedly the respondent no. 4 did not file any review application to the authority as per Regulation 47 of the Service Regulations of 2011. Instead of filing any review application under Regulation 47, he chose to prefer an appeal before the appellate authority (Secretary, Ministry of Agriculture) under Regulation 46 of the Service Regulations of 2011. As per the submission of Mr. A. M. Amin Uddin, Chapter Seven of the Service Regulations of 2011 is captioned "সাধারণ আচরণ ও শৃংখলা" and in that view of the matter, the appeal as contemplated by Regulation 46 is intended to deal with matters arising out of disciplinary proceedings only. In contra-distinction to this submission, Mr. Abdul Wadud Bhuiyan draws our attention to Clause (ka) of Sub-Regulation (2) of Regulation 46 wherein it has been stated— "এই প্রবিধানমালার নির্ধারিত পদ্ধতি পালন করা হইয়াছে কি না, না হইয়া থাকিলে উহার কারণে ন্যায় বিচারের হানি হইয়াছে কি না" and contends that all kinds of appeals are entertainable by the appellate authority under Regulation 46. Again Mr. A. M. Amin Uddin adverts to Clause (kha) and Clause (ga) of Sub-Regulation (2) of Regulation 46 wherein it has been respectively stated—"অভিযোগসমূহের উপর প্রদত্ত সিদ্ধান্ত সঠিক ও ন্যায়সংগত কি না; এবং আরোপিত দন্ড মাত্রাতিরিক্ত, পর্যাপ্ত বা অপর্যাপ্ত কি না" and argues that the appeals are confined to disciplinary proceedings only. It is true that Chapter Seven of the Service Regulations of 2011 is captioned "সাধারণ আচরণ ও শৃংখলা". But none the less, it appears from the language employed in Regulation 46(1) that the appellate authority can hear any appeal preferred against any order by an aggrieved employee and the appeal need not be confined to matters arising out of disciplinary proceedings only. In the present case before us, admittedly the Director-General of BARI is subordinate to the Secretary of the Ministry of Agriculture. In other words, the Secretary of the Ministry of Agriculture is the controlling officer of the Director-General of BARI. So it is seen that the Secretary of the Ministry of Agriculture is the appellate authority of the Director-General of BARI. Clause (ka) of Sub-Regulation (2) of Regulation 46 provides that the appellate authority will consider whether the procedure prescribed under the Service Regulations of 2011was complied with or not and in case of non-compliance, whether there was any miscarriage of justice on that account. Reading the provisions of Regulation 46 as a whole, we reiterate that an aggrieved employee can prefer an appeal to the appellate authority against any order of the authority. Accordingly the respondent no. 4 rightly preferred the appeal to the appellate authority (respondent no. 1). Of course, Clause (kha) and Clause (ga) of Regulation 46(2) are obviously designed for the appellate authority to deal with matters arising out of disciplinary proceedings. Precisely speaking, the appellate authority can entertain any appeal against any order of the authority, whether it relates to disciplinary proceedings or not, under Regulation 46 of the Service Regulations of 2011. That being the legal position, our definite finding is that the appeal preferred by the respondent no. 4 before the Secretary, Ministry of Agriculture was very much maintainable.

44. Now a pertinent question arises: was the appellate authority, or for that matter, the Secretary of the Ministry of Agriculture legally justified in forming a three-member inquiry committee to inquire into the subject-matter of the appeal? In this connection, Sub-Regulation (1) of Regulation 55 contemplates:

"এই প্রবিধানমালায় উল্লেখ নাই, এইরুপ কোন বিষয়ে, সরকারী কর্মচারীদের ক্ষেত্রে প্রযোজ্য বিধি-বিধান, যতদূর সম্ভব, অনুসরণ করা হইবে।"

Again Sub-Regulation (3) of Regulation 46 provides:

"আপীল কর্তৃপক্ষ যেরুপ উপযুক্ত বলিয়া বিবেচনা করিবে সেইরুপ আদেশ প্রদান করিবে।"

45. The Government Servants (Discipline and Appeal) Rules, 1985 may be referred to in this respect. Sub-Rule (2) of Rule 22 of the Government Servants (Discipline and Appeal) Rules, 1985 provides that in the case of an appeal against any other order, the appellate authority shall consider all the facts and circumstances of the case and pass such orders as it deems just and equitable. What we are driving at boils down to this: from a combined reading of the provisions of Sub-Regulation (3) of Regulation 46 of the Service Regulations of 2011 and Sub-Rule (2) of Rule 22 of the Government Servants (Discipline and Appeal) Rules, 1985, the position that emerges is that the appellate authority will pass such orders as it deems just and equitable, regard being had to the facts and circumstances of the case. Given this scenario, it can not be said that the appellate authority committed any illegality by way of forming a three-member inquiry committee and acting upon the report dated 29.05.2013 of that committee (Annexure-'29'). The procedure prescribed under the Service Regulations of 2011 was not deviated or departed from by the appellate authority (respondent no. 1) in any manner.

46. In this Writ of Certiorari, generally speaking, the finding of the appellate authority cannot be substituted by our finding. In the writ jurisdiction of the High Court Division, we will only see as to whether the finding arrived at by the appellate authority is based on the materials on record or not. In a Writ of Certiorari, it is well-settled, the High Court Division is not an Appellate Court and as the High Court Division is not an Appellate Court, it will not review or re-assess the materials on record unless it is absolutely necessary in order to interfere with a perverse finding of the appellate authority. This being not the case, we are not inclined to interfere with the order under challenge contained in Annexure-'H' to the writ petition.

47. As to the contention of Mr. A. M. Amin Uddin that at the behest or dictation of the Secretary, Ministry of Agriculture, the Director-General of BARI issued the order contained in Annexure-'N' to the application for issuance of a further Rule and the Director-General of BARI did not apply his mind to the materials on record independently and as the Director-General was mechanically in tune with the Secretary of the Ministry of

Agriculture, the impugned Annexure-'N' is liable to be knocked down as being illegal, we would like to observe that the appellate authority, that is to say, the Secretary, Ministry of Agriculture is competent under Regulation 46 to review the entire matter and with that end in view, he formed a three-member inquiry committee of the Ministry of Agriculture and he acted on the basis of the report dated 29.05.2013 of that inquiry committee in rescinding the promotion and regularization orders of the petitioner. In this view of the matter, the original authority must act in accordance with the order passed by the appellate authority. In such a situation, it cannot be agitated that the Director-General of BARI illegally complied with the directive of the Secretary, Ministry of Agriculture by issuing Annexure-'N' which is in complete accord with Annexure-'H'.

48. The facts and circumstances of the cases of The Purtabpore Co., Ltd….Vs….Cane Commissioner of Bihar and others, 1 SCC 308; State of U. P. and others…Vs…Maharaja Dharmander Prasad Singh and others, 2 SCC 505 and Board of Intermediate and Secondary Education, Dhaka represented by its Chairman and others…Vs…Md. Faizur Rahman and others, 51 DLR (AD) 59 banked upon by Mr. A. M. Amin Uddin appear to be signally distinguishable from those of the present case. As such the reference to those cases by Mr. A. M. Amin Uddin is of no avail to him.

49. As regards the submission of Mr. A. M. Amin Uddin that the principle of "Audi Alteram Partem" was not adhered to prior to issuance of Annexure-'H' to the writ petition, suffice it to say that undeniably the three-member inquiry committee formed by the Secretary, Ministry of Agriculture heard both the petitioner and the respondent no. 4 in person and perused their papers and documents in support of their respective claims and thereafter the inquiry committee submitted its report dated 29.05.2013 to the appellate authority and ultimately the appellate authority acted on the said report dated 29.05.2013 and made the impugned order contained in Annexure-'H' to the writ petition. In this perspective, can we say that the petitioner was condemned unheard by the appellate authority? In our view, the principle of "Audi Alteram Partem" was substantially complied with when they were heard in person by the three-member inquiry committee formed by the appellate authority and as admittedly the appellate authority acted on the report dated 29.05.2013 of the inquiry committee, the question of violation of the principle of natural justice cannot be entertained in any view of the matter. So we are led to hold that the petitioner was not condemned unheard by the appellate authority. Consequently the orders respectively passed by the appellate authority contained in Annexure-'H' and the Director-General of BARI contained in Annexure-'N' cannot be found fault with on that count.

50. From the foregoing discussions and in view of the facts and circumstances of the case, we have no hesitation in holding that there is no merit in the Rules. The Rules, therefore, fail. Accordingly, the Rules are discharged without any order as to costs.

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1 SCOB [2015] HCD 28

HIGH COURT DIVISION
(Special Original Jurisdiction)

Contempt Petition No.264/2010.
(Arising out of Writ Petition No.7694/2010)

Dr.Mohiuddin Khan Alamgir … Petitioner

=Versus=

Sohul Hossain, Election Commissioner, Election Commission for Bangladesh
… Respondent-contemnor

Mr.Rokonuddin Mahmud, Advocate
...For the petitioner
Mr. Mahmudul Islam, Advocate
... For the contemnor
The 10th August, 2010

Present:
Mr.Justice A.H.M. Shamsuddin Choudhury
and
Mr.Justice Sheikh Md.Zakir Hossain.

An act constitutes contempt if it is calculated to or has the tendency of interfering with the due course of justice. The object of the discipline enforced by the court in the case of contempt of court is not to vindicate the dignity of the person of the Judge but to prevent undue interference with the administration of justice. The confidence in courts of justice which the public possess must in no way be tarnished, diminished or wiped out by contumacious behaviour of any person. ...(Para 15)

An unbroken chain of authorities, in prevalence from the days of the Raj, confirm that the power of a Court of record, is inherent. ...(Para 33)

Legislation that derogates or abridges Supreme Court's constitutional and inherent power, is void. ...(Para 35)

It is conceded that although the power cannot be taken away or materially interfered with, the legislature might regulate the exercise of the power by prescribing rules of practice and procedure. It is also stated that the existence of a remedy other than proceedings for contempt does not deprive a Court of its power to adjudicate a person in contempt which means that the fact that an act constituting a contempt is also criminal and punishable by indictment or other method of criminal prosecution, does not deprive the outraged court from punishing the contempt. ...(Para 43)

There is no room for any controversy that the High Courts have power to punish summarily for contempt of Court committed by the publications of libels on the Courts or on the Judges; and, as Superior Courts of record, it also has the inherent jurisdiction to summarily punish contempts. ...(Para 73)

The power to punish summarily for contempt is not a creature of statute but an inherent incident of every Court of record. This inherent jurisdiction cannot be wiped out. ...(Para 76)

The law looks at the conduct of the person proceeded against in order to find out if it was calculated to produce an atmosphere of prejudice in the midst of which, the judicial proceedings have to go on. The test of guilt in such cases depends on the findings whether the matter complained of tended to interfere with the cause of justice, and not on the question whether such was objective sought, much less whether it was achieved. Neither desire to obstruct or prevent administration of justice, nor its fulfillment is counted in proceedings for contempt. ...(Para 78)

Intention is of no relevance or consequence so long as the words used in the publication tend to interfere with the course of justice or prejudice the public or the Court in the trial of the case. ...(Para 79)

It is difficult to enumerate the acts which may amount to contempt of Court. The overriding question in all cases of contempt of Court must, however, be whether the action or remark of the alleged contemnor is or is not calculated to interfere with, interrupt or thwart the course of justice. ...(Para 80)

Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. Anything that tends to prejudice that fair trial by a Court, constitutes a contempt of Court. ...(Para 83)

Contempt is constituted when something is done, which is capable of interfering with the impartial flow of justice. To elaborate this, a plethora of high preponderant authorities command that nobody must make any comment about an issue which is awaiting adjudication in a Court of law because such comment may attempt to pervert the course of justice by influencing the mind of the Court or people at large and also by impliedly suggesting what should be the outcome of the proceeding at the end of the day. ...(Para 84)

It is not essential, in order to constitute a contempt, that the act should be done publicly or publicized in any way. ...(Para 93)

Knowledge of the pendency of the proceeding is not a necessary ingredient of the offence of contempt of Court. All that is necessary is to show that a proceeding was actually pending at the time or was imminent. ...(Para 100)

It is the contemner's duty to take proper care and to make sure before issuing a statement regarding a sub-judice matter that no proceedings were pending before the Court or were contemplated. If he made no such enquiries then he clearly acted negligently and cannot take advantage of his negligence. ...(Para 101)

Fair criticism of the conduct of a Judge, may not amount to contempt if it is made in good faith and in public interest. To ascertain the good faith and the public interest, the courts have to see all the surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sough to be achieved. ...(Para 119)

Now, if a reasonable bystander analyses the ratio of all the cases discussed under the caption, "Kind of Comment that Constitutes Contempt", he will no doubt hold that the comments in question are certainly contemptuous and hence punishable by this Court, because the contemnor has effectively passed a verdict on the matter which is awaiting adjudication by this Division. ...(Para 129)

The impugned comment constituted the offence, because; (1) by this comment the contemnor purported to usurp the function of this Division, (2) the comment has the potential of influencing the minds of the people at large as well of the judges, whether or not it actually generated that effect, (3) the comment amounted to prejudging the cause which was awaiting adjudication, (4) the comment was vibrant enough to lead the public as well as the judges concerned to reckon that by issuing the Rule and passing the interlocutory order, the Court resorted to illegality and that this Court was wrong as the contemnor claimed to have been right, (5) the comment amounted to an aspersion and insinuation on the merit of our order, and was capable of transmitting a suggestion that a wrongly passed order should be reversed, (6) in all, the comment amounted to a trial by a stranger, i.e., the contemner, which could seriously obstruct the right course of justice and cause its deviation. ...(Para 130)

Judgment

A. H. M. SHAMSUDDIN CHOUDHURY, J.

1. This Rule was issued on 28th September, 2010, whereby the contemnor Md. Sohul Hossain, one of the incumbent Election Commissioners, Election Commission of Bangladesh was asked to show cause as to why he shall not be committed for contempt of Court and shall not be punished for his alleged bizarre comment within 7 (seven) days from date.

2. Antecedent facts that led to the issuance of this Rule are figured below in succinct form:

The contempt petitioner, Dr. Mohiuddin Khan Alamgir, a Member of Parliament, received a notification dated 22nd September 2010, issued by an official of the Election Commission for Bangladesh (henceforth the E.C.), whereby the earlier was intimated that his Parliamentary seat has become vacant.

3. On receipt of that notification the petitioner filed a writ petition before this Division, which was registered as Writ Petition No. 7694 of 2010.

4. Upon hearing the petitioner's learned Senior Counsel, Mr. Rokanuddin Mahmud, we issued a Rule on 26th September 2010, requiring the E.C. to explain why the intimation texed in the notification should not be declared to have been issued without lawful authority and is of no effect in the vision of law. We also placed a stay on the operation of the said intimation for a period of 6 (six) months from the date of the Rule.

5. On 27th September, i.e. during the subsistence of the period of stay and while the Rule was awaiting disposal in the form of a judicial review, the contemnor while addressing the media, both electronic and print, stated that the E.C. was quite correct and legal in declaring the seat vacant.

6. His statement was widely televised through the electronic media on the very day he addressed the media and was published in the print media, the following day.

7. The petitioner proffered that "such adverse comment made by the contemnor-respondent is calculated as a deliberate and blatant attempt by him to interfere with the administration of justice, in a matter which is sub-judice" as the legality of the Order dated 22nd September 2010 was under exploration through the process of judicial review by this Court. The petitioner further stated, "By making such derogatory and contumacious statement, the contemnor-respondent has committed flagrant and gross contempt and disregard of the Hon'ble Court. Such contempt has been aggravated by the fact that it has been committed by a public functionary, holding high Constitutional Office who is otherwise under a bounden duty on oath to preserve, protect and defend the Constitution, including Article 112 thereof, which enjoins him to act in aid of the Supreme Court. If public functionaries are allowed, without any restraint and punishment, to make such adverse comment and remark on sub-judice matters with the intention of interfering with the administration of justice, and encroaching upon the jurisdiction and constitutional preserve of the Hon'ble Court, then this would bring the Hon'ble Court into disrepute and public confidence in the demonstrative dispensation of justice is likely to be shaken and eroded".

8. The contemnor filed an affidavit-in-opposition, stating:

> "That the statements made in paragraph no. 2 in respect to the contemnor's comments made to the media on 27/09/2010 published in various newspapers are matters of record; however the statements made in that paragraph of the effect that the contemnor has made comment indicating disapproval of the Hon'ble Court's order are quite incorrect, misconceived and misdirected and as such denied.
>
> That the submissions made in the paragraph no. 3 to the effect that the contemnor attempted to interfere with the administration of justice or made derogatory or contemptuous statement or violated his oath to abide by the constitution or encroached upon the constitutional jurisdiction of the Hon'ble Court or brought the Hon'ble Court to disrepute, are altogether incorrect, misconceived and nothing but mere surmises, and as such those are denied.
>
> That is respectfully submitted that the petitioner neither did make any derogatory remark against the order of the Hon'ble Court, nor scandalized the Hon'ble Judges or disobeyed any order of the Hon'ble Court by making the alleged comments upon which the rule has been issued, and therefore, those do not come under the scope of contempt of court; and even if the reports made in the newspapers are taken to be fully correct, the same do not constitute contempt of Court.
>
> That it is submitted that the contemnor has all the respect for the order of the Hon'ble Court and obliged as his solemn duty to uphold the honor, dignity and prestige of the Hon'ble Court".

9. So, the comment that prompted us to issue the Rule, is not denied by the contemnor. Instead he claims that those comments can not be brought in within the canopy of the contempt of law.

10. The petitioner's case is that by making this statement while the question as to propriety and lawfulness of the decision is pending disposal by this Court and since the matter is sub-judice, the contemnor resorted to something which has the tendency of perverting the course of justice and also undermining the authority of this Court. It is asserted by the contempt petitioner that such comment on a matter which is awaiting adjudication in a Court of law is destined to cause interference with the tide of justice because they are bound to prejudice the minds of the people at large.

11. At the contemnor tried to insist that his comments were neither derogatory nor scandalizing nor reflective of any disobedience to the authority of this Court, the whole fate of the case revolves round the question as to whether the irrefuted comments constituted the offence of contempt of Court.

Power on Contempt Generally

12. The last bulwark of a State is its courts of justice.

13. In the free world today, wherever responsible Governments exist (the U.S.A., U.K., commonwealth countries etc.) concept of special respect to seats of justice, attended with punishment in case of contumacious behaviour, prevails.

14. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice and as such no action can be permitted which may shake the very foundation of itself. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law. It is an unusual type of jurisdiction combining "the jury, the Judge and the hangman" and it is so because the Court is not adjudicating upon any claim between the litigating parties. This jurisdiction is not exercised to protect the dignity of an individual Judge but to protect the administration of justice from being maligned. Power to punish for contempt is for maintenance of effective legal system. Contempt jurisdiction cannot, however, be invoked to wreck personal vengeance against the alleged contemners.

15. An act constitutes contempt if it is calculated to or has the tendency of interfering with the due course of justice. The object of the discipline enforced by the court in the case of contempt of court is not to vindicate the dignity of the person of the Judge but to prevent undue interference with the administration of justice. The confidence in courts of justice which the public possess must in no way be tarnished, diminished or wiped out by contumacious behaviour of any person. (Ajay Kumar Pandey, Advocate, re, (1998) 7 SCC 248. Supreme Court Bar Assn. v. Union of India, (1998) 4 SCC 409. Kapildeo Prasad Sah v. State of Bihar, (1999) 7SCC 569: 1999 SCC (L&S) 1357. N.C. Das v. M.A. Mohsin, (1997) 7 SCC 438).

16. Bracton observed:

"There is no greater crime than Contempt and Disobedience, for all persons within the Realm ought to be obedient to the King and within his Peace."

17. Justice, an organisation of lawyers, in their 1959 report on Contempt of Court stated:

"...it is essential to the maintenance, and indeed for the very existence of the legal system of any State, that the Court should have ample powers to enforce its orders and to protect itself from abuse of itself, or its procedure. We desire at the outset, to make it clear that we recognise and accept this principle. In our view, any alteration or amendment of the law of Contempt of Court must be such as will, without any doubt, leave the Court with sufficient powers for these purposes."

18. The common Law view was that decisions given by the Courts were the decisions of the King in law. If the King's authority could not be questioned, then authority of the Courts could not be questioned, too. If the King could not be abused or scandalized, so also the Courts could not be abused or scandalized. Just as the proceedings before the King could not be prejudiced, or obstructed; similarly the proceedings before the Court could not be prejudiced or obstructed.

19. If anyone interfered in the administration of justice, he was liable to be punished. It is the genesis of the law of contempt of Courts. King's word was law. He could not be disobeyed. If a person was asked to stay, he had to stay. If he was asked to depart, he had to depart. Anyone, howsoever high he may be, could be punished for disobedience. The punishment had no limits. The condemned man could lose his property, liberty, limbs or even his life. Since the King had the right to punish, he also had the right to pardon. A sincere apology for any lapse could save the man from the wrath of the King.

20. The authority of the King traveled down to superior courts. Their word was also final, in the ladder of various stages of the litigation. No one could question the authority of the Courts. No one could humiliate the Courts or scandalize them. No one could prejudice or obstruct the course of justice, anyone who did all this, was punished.

21. It was Wilmot, J., who pronounced the law on the subject with precision in the case of R.V. Almon, where one John Almon, a book-seller, published a libel on Lord Mansfield, the Chief Justice. An attachment of

the person of John Almon was obtained, but in the warrant of attachment by mistake, instead of writing R.V. Almon, R.V Wilkes was written. Mr. Justice Wilmot (as he then was) urged Sergeant Glyn to accept the amendment, but he as a man of honour, did not agree. The mistake was fatal and the proceedings were dropped. Wilmot, J., thus could not deliver the judgment, which he had written out. The judgment was written in 1765, but it came to light when Wilmot's son published it in 1802, as "Notes of Judges' Opinions and Judgments" (1765 Wilmot 243).

22. In that the judgment recognised as the cornerstone of the law on the subject, Wilmot, J., stated;

"The power which the Courts in 'Westminster Hall have of vindicating their own authority, is coeval' with their foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it. And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage, as supports the whole Fabric of the Common Law; in as much the lex terrae, and within the exception of Magna Charta, as the issuing any other legal process whatsoever."

23. He went on to write; "These Courts were originally carved out of the one Supreme Court, and are all divisions of the aula regis, where it is said the King in person dispensed justice, and their power of committing for contempt was an emanation of the royal authority, for any contempt of the Court, would be a contempt of the Sovereign".

24. The dictum of Wilmot, J., was followed by successive Courts and constitutional authorities not only in England, but also in America, as are to be found in Sutherland, J.'s words, in Michaelson v. United States; and Brewer, J.'s words in Besset v W.B. Cankey Co.

25. Oswald, the best known universal authority on the law of contempt, stated that the contempt of Court, irreverently termed as "legal thumbscrow", is so manifold in it's aspects that it is difficult to lay down any exact definitions of the offence (Miller-v-Knox 1878 4 Bing NC 574).

26. Oswald nevertheless, put forward a broader definition stating, "To speak generally, contempt of Court may be said to be constituted by any conduct that tends to bring the authority and the administration of law into disrespect or disregard, or interfere with or prejudice the parties litigant or their witnesses during litigation". (Oswald 3rd Edition, page 6). According to the Oswald's classification contempt may take place in any of the following circumstances:

(1) By abusing, interfering with or obstructing the process of the Court in anyway or disobeying any order of the Court;

(2) Scandalising the Court or Judge in relation to his office into hatred ridicule or contempt;

(3) Doing anything which tends to prejudice the determination of a matter pending before the Court.

27. Oswald in his learned treatise "Contempt of Court", stated;

"Contempt in the legal acceptation of the time, primarily signifies disrespect to that which is entitled to legal regard; but as a wrong purely moral, or affecting an object not possessing a legal status, it has, in the eye of law, no existence".

28. In its origin, all legal contempt will be found to consist in an offence more or less direct against the Sovereign himself as the fountain of law and justice, or against his place, where justice was administered. This clearly appears from the old cases.

29. Blackstone assimilated a number of instances of contempt of Court in a passage occurring at page 285 of his Commentaries, Vol. IV:

"Some of these contempts may arise in the face of the Court as by rude and contumelious behaviour, by obstinacy, perverseness or prevarication, by breach of the peace or any willful disturbance whatever, others in the absence of the party, as by disobeying or treating with disrespect the King's writ or the rules or process of the Court; by perverting such writ or process to the purposes of private malice, extortion or injustice; by speaking or writing contemptuously of the Court or Judges acting in their judicial capacity, by printing false accounts or even true ones, without proper permission, of causes then depending in judgment; and by anything in short that demonstrates a gross want of that regard and respect which, when once Courts of justice are deprived of their authority so necessary for the good order of the Kingdom, is entirely lost among the people".

30. Harwick LC by referring to the definition of contempt, said, there are three different kinds of contempt. One kind is scandalizing the Court itself. There may be, likewise, contempt of this Court in abusing parties who are concerned with cases here. There may be also contempt of this Court in prejudicing mankind against persons before the cause is heard and there cannot be anything of greater consequence than to keep the streams of justice clear, pure, that parties may proceed with safely both to themselves and their characters, (St. James Evening Port Case 1742 2 A+K 469).

31. Our system has adopted British jurisprudence and hence entire law of contempt in our country is based on the lines indicated above. In the version of Markandey Katju J, "The present law of contempt of Court in India is a hangover of the original law on this subject in England."

32. We in Bangladesh derive our power to punish for contempt from our Constitution, the Supreme Law of the land. Article 108 of the Constitution designates "Supreme Court as Court of record and states, "Supreme Court shall be a court of record and shall have all the powers of such a Court including the power, subject to law, to make an order for the investigation of or punishment for any contempt of itself."

33. An unbroken chain of authorities, in prevalence from the days of the Raj, confirm that the power of a Court of record, is inherent.

34. The law that supplements the constitutional power is the Contempt of Court Act, 1926. As the Constitution fortifies the Court of record with power to punish for contempt and as the same is inherently possessed by the Supreme Court, our Court of record, the legislative framework performs a secondary role from the back seat only. In any event this Act does not define contempt. It's only significance lies in that it prescribes the extent of punishment, which have on occasions, been ignored by the Supreme Court.

Legislature can not Abridge or Abrogate this Power

35. As the following high profile decisions reveal, legislation that derogates or abridges Supreme Court's constitutional and inherent power, is void.

36. In the case of Surendra Nath Banerji -V- Chief Justice and Judges of the High Court of Fort William in Bengal, (ILR 1883, 10 Cal 109, the first case of its kind in the Sub-continent, Peacock, J., said:

"Thus a High Court derives the power to punish for contempt of Court from its own existence or creations. It is not a power conferred upon it by any law.

The powers to punish for contempt of Court are not conferred by legislature. They cannot be abrogated or abridged by the legislature".

37. He added;

"The arraignment of the justice of the judges is arraigning the King's justice. It is an impeachment of his wisdom and goodness in the choice of his Judges and excites in the minds of the people a general dissatisfaction with all judicial determinations and indisposes their minds to obey them and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice; and in my opinion calls out for a more rapid and immediate redress than any of the obstruction whatsoever, not for the sake of the Judges as private individuals, but because they are channels by which the King's justice is conveyed to the people."

38. This view was affirmed by the Privy Council.

39. The above principle is recognized universally. The American Jurisprudence accepted Wilmot J.'s dicta in toto.

40. There can be no doubt that the High Courts in India, before the commencement of the Government of India Act. 1935, had power, jurisdiction and authority to punish summarily for contempts of themselves and of their Judges. The Government of India Act 1935, preserved this power, authority and special summary jurisdiction for the High Courts that then existed.

41. Views expressed by Indian Supreme and High Courts and *opinio juris* are that so far as contempt of the High court itself is concerned, as distinguished from that of a court subordinate to it, the Constitution vests these rights in every High Court, and so no Act of a Legislature could take away that jurisdiction and confer it afresh by virtue of its own authority. These views expressed from time to time, are, figured below in conspectus;

Articles 129 and 215 of the Constitution of India declare the Supreme Court and every High Court to be Courts of records having all the powers of such a Court including the power to punish for contempt of itself. These articles do not confer any new jurisdiction or status on the Supreme Court and the High Courts. They merely recognise a pre-existing situation that the Supreme Court and the High Courts are Courts of record and by virtue of being so they have inherent jurisdiction to punish for contempt of themselves. Such inherent power to punish for contempt is summary. It is not governed or limited by any rules of procedure excepting the principles of natural justice. The Jurisdiction contemplated by Articles 129 and 215 is inalienable. It cannot be taken away or whittled down by any legislative enactment subordinate to the Constitution. The provisions of the Contempt of Courts Act, 1971, are in addition to and not in derogation of Articles 129 and 215 of the Constitution. The provisions of the Contempt of Courts Act, 1971, cannot be used for limiting or regulating the exercise of jurisdiction contemplated by the said two articles.

42. In Re: Vinay Chandra Mishara, (1995, 2 SCC 584) with reference to Article 129, the Supreme Court observed:

"The jurisdiction is independent of the statutory law of contempt enacted by Parliament under Entry 77 of List I of Seventh Schedule of the Constitution. The jurisdiction of this Court under Article 129 is sui generis. The jurisdiction to take cognizance of the contempt as well as to award punishment for it being constitutional, it cannot be controlled by any statute".

43. The supremacy of the constitutional power in this context is also recognised in the United States. In American Jurisprudence it is stated that if a Court derives its powers from a constitution, the court's power to punish for contempt cannot be taken away by the legislature. Further "a court has inherent power to punish contempt summarily and the power to determine the kind and character of conduct that constitutes contempt" and "a statute enumerating acts constitute contempt has been construed is not exclusive. But it is conceded that although the power cannot be taken away or materially interfered with, the legislature might regulate the exercise of the power by prescribing rules of practice and procedure. It is also stated that the existence of a remedy other than proceedings for contempt does not deprive a Court of its power to adjudicate a person in contempt which means that the fact that an act constituting a contempt is also criminal and punishable by indictment or other method of criminal prosecution, does not deprive the outraged court from punishing the contempt. The same view was pronounced in the following cases as well; (Sukhdev Singh Sodhi V. Chief Justice and Judges of the PEPSU High Court AIR 1954 SC 186, Delhi Judicial Service Association V. State of Gujarat 1991 (4) SCC 406, R. L. Kapur AIR 1972 SC 858.

44. The law of contempt was identified by the Indian Supreme Court of India as one of the major props, holding together the basic structure of the Indian Constitution.

45. In Surendranath Banerjee V Chief Justice and Judges of the High Court at Fort William in Bengal, supra, the High Court of Calcutta in 1883 convicted Surendranath Banerjee, who was Editor and Proprietor of a weekly newspaper for contempt of court and sentenced him to imprisonment for two months for publishing libel reflecting upon a Judge in his judicial capacity. On appeal the Privy Council upheld the order of the High Court and observed that the High Courts in Indian Presidencies were superior Courts of record, and the powers of the High Courts as superior Courts in India are the same as in England. The Privy Council further held that in common law every Court of record was the sole and exclusive judge of what amounts to contempt of Court.

46. In Sukhdev Singh Sodhi case, supra, the Indian Apex Court considered the origin, history and the development of the concept of inherent jurisdiction of a Court of record in India. That Court, after considering the Privy Council and High Courts' decisions, held that the High Court being a Court of record has inherent power to punish for contempt of subordinate courts. The Court further held that even after the codification of law of contempt in India, the High Court's jurisdiction as a Court of record to initiate proceedings and take seisin of the matter, remained unaffected by the Contempt of Courts Act, 1926".

47. Once it is realised that the Supreme Court and the High Courts in India are invested with constitutional power to punish under Articles 129 and 215, then the scope and extent of the punishment must also be left to the discretion of the superior courts since no ordinary legislature can restrict or fetter a constitutional power. The Indian Supreme Court also referred to Article 142 to buttress its constitutional power and to reject the suggestion that the power can be limited or restricted by ordinary legislative process. The width of the range of the power to make appropriate orders invoking Article 129 read with Article 142 cannot be encapsuled as illustrated in Delhi Development Authority V. Skipper Construction (1995, 3 SCC 507) where the sentence of imprisonment was deferred subject to several terms and conditions.

48. In the context of the Indian constitutional provisions, contained in Articles 129 and 215, read with Entry 77 of List I of the Seventh Schedule and Entry 14 of List III of the Seventh Schedule, some doubts arose as to the competence of the concerned legislatures to deal with the subject of contempt of Courts.

49. One view was based on the theory that a Court of record not only had the power to punish for contempt of itself but had also the sole and exclusive power to define and determine what amounts to contempt. The other view (as indicated by the Sanyal Committee which drafted the "Contempt of Court Bill", that eventually led to the passage of the "Contempt of Court of 1971" for India) is that Parliament or the concerned legislature has the power to legislate in relation to the substantive law of contempt of the Supreme Court and the High Courts.

50. In dealing with this question the Sanyal Committee observe-

"In view of the interpretation we have placed on the provisions of the Constitution relating to the competency of Parliament to legislate on contempt matters, it may not be quite necessary to consider the theory that a Court of record has not only the inherent power to punish for contempt of itself but has also the sole and exclusive power to define and determine what amounts to contempt, inasmuch as the theory has received some amount of judicial support.

51. As far as the Supreme Court and the High Courts are concerned the twin limitations on exercise of legislative power appear to be –

(i) Since the power of the Supreme Court and the High Courts to punish for contempt have been recognised in express terms by Articles 129 and 215 such power cannot be abrogated, nullified or transferred to some other body, save by an amendment of the Constitution. This view finds support from the following observations of the Supreme Court in Sukhdev Singh V Teja Singh, the Chief Justice, supra.

"In any case, so far as contempt of a High Court, as distinct from a subordinate Court, is concerned, the Constitution vests these rights in every High Court. So no Act of the legislature could take away that jurisdiction and confer it afresh by virtue of its own authority".

The principle laid down in Sukhdev Singh's case, supra, has been recently reiterated by the Supreme Court in Pritam Pal V High Court of Madhya Pradesh. (AIR 1992 SCC 904)

(ii) Articles 129 and 215 are "based on the assumption that there should be an effective power in the Supreme Court and each of the High Courts for dealing with cases of contempt. The power of Parliament to legislate in relation to the law of contempt of these courts, would, therefore, have to be exercised in such a way that the purpose of the constitutional provisions is not defeated. In short Parliament's power to legislate on contempt law, ought not to be exercised as to stultify the status and dignity of these courts.

52. The summary method of trying contempt is inherent in all courts of record. As stated by Peacock, C.J., supra, as early as in 1867, "there can be no doubt that every Court of record has the power of summarily punishing for contempt". The Judge concerned traced the origin of the power to punish for contempt in the Common Law of England. But as Bose, J. would put it, "it is evident from other decisions of the Judicial Committee that the jurisdiction is broader than that". It was noted that the Charter of 1774, which established the Supreme Court of Bengal, provided in Clause 4 of the Charter that the Judges should have the same jurisdiction as the Courts of King's Bench in England. Clause 21 expressly stated that the court is empowered to punish for contempt. When the Supreme Court of Bengal was abolished, the High Courts Act of 1961 conferred those powers on the Chartered High Courts by Sections 9 and 11 and Clause 2 of the Letters Patent of the year 1865, continuing them as courts of record. Despite this, in 1883 the Privy Council did not trace this particular jurisdiction of the Calcutta High Court of Clause 15 of its Charter but to the Common Law of England. It was expressed that Common Law is simply this, that the jurisdiction to punish for contempt is something inherent in every Court of record.

53. In re, Abdul Hussan Jauhar; (AIR 1926 All 623) Sulaiman, J. relying on a number of English authorities stated, " these leading cases unmistakably show that the power of the High Courts in England to deal with the contempt of inferior courts is based not so much on its historical foundation as on the High Courts' inherent jurisdiction".

54. In 1883 the Privy Council held that the Recorder's Court at Sierre Leon also has jurisdiction to punish for contempt not because that Court had inherited the jurisdiction of the English courts but because it was a Court of record. The Privy Council said:

"In this country every court of record is the sole and exclusive Judge of what amounts to a contempt of Court ..... and unless there exists a difference in the constitution of the Recorder's Court at Sierre Leon, the same power must be conceded to be inherent in that Court ... we are of opinion that it is a Court of record and that the

law must be considered the same there as in this country." (Rainy-V-The Justices of Sierra Leone, 8 Moo PC 47).

55. Bose, J., cited in Sukhdev Singh case, supra, the 1884 edition of Chambers Practice of the Civil Courts, where at p. 241 it is said, "every Superior Court of record, whether in the United Kingdom or in the Colonial Possessions or Dependencies of the Crown, has inherent power to punish contempts without its precincts as well as in facie curiale".

56. This is also borne out by Halsbury's statement that the superior Courts have an inherent power to punish criminal contempts.

57. Later, the Government of India Act, 1915, was enacted and under Section 106 of that Act all High Courts then in existence continued to have the same jurisdiction, powers and authority as they had at the commencement of the Act. Section 113 of the Act provided that new High Courts may be established by Letters Patent with the same jurisdiction, powers and authority as are vested in or may be conferred on any High Court existing at the commencement of that Act. In 1926 a Full Bench of the Allahbad High Court dealt with a contempt of a subordinate court under its inherent powers as a court of record. It was in this context that the Contempt of Courts Act of 1926 was passed to 'define, and limit the powers of certain courts in punishing contempts of courts'.

Comments on the Act of 1926

58. Bose, J. said: that an existing power in all Letters Patent High courts to punish for contempt being in recognition, it is evident that the power must have been inherent in themselves because they were Courts of record:.

59. These aspects of inherent summary power were affirmed in later cases by the Lahore High Court (1927) and the Patna High Court (1929). In 1936, Lahore High Court affirmed them again. In the same year the Privy Council's decision in Andre Paul Terence Ambard v. Attorney General of Trinidad and Tobago, (AIR 1936 PC-141) reiterated the inherent power theory and put on the slade the view that 'contempt is quasi-criminal in nature'. In 1942 the full Bench in K.L. Gauba –V-Chief Justice and the Judges of the Lahore High Court (1942 F C 1) reached the same old conclusion and quoted American decisions to affirm that "the power to fine and imprison for contempt from the earliest history of jurisprudence has been regarded as a necessary incident and attribute of a court without which it could no longer exist than without a Judge".

60. In Parashuram Detaram Shamdasani-v-. Emperor (AIR 1945 PC 134) the Privy Council reiterated that the summary power of punishing for contempt is a power which a court must necessarily possess.

61. The Constitution of India which came into force in 1950, does not envisage in its provisions any new Law of Contempt. It recognises the existing law and gives constitutional sanctity to the same. The fundamental right of speech guaranteed in Article 19(1)(a) of the Constitution is made subject to reasonable restrictions on the exercise of the right in the interest of contempt of court, among other thing such as security of State, etc. The existing law of contempt of court is protected in Article 19. The Supreme Court and the High Courts are recognised as Courts of record by virtue of Articles 129 and 215 respectively.

62. In Bijoyananda Patnaik v. Balakrishna Kar (AIR 1953 Ori 249), it was clearly posited that the power to punish for contempt is inherent in a Court of record and this has been recognised from the earliest times in England. The High Courts in India were created Courts of record by Letters Patents. By the Government of India Act, 1935, as well as by Article 129 and Article 215 of the Constitution, the Supreme Court of India and the High Courts are courts of record and it is essential for the administration of justice and protection of individuals that the Courts should be able to punish summarily acts of contempt because in the words of Blackstone, "this is an inseparable attendant upon every Superior Tribunal".

63. Narasimham J in State –v- E&P, E T K P (AIR 1952 Ori 318) expressed,

"The makers of the Constitution were fully aware that the law relating to contempt of Court in India was mainly case law based on the English Common law as interpreted by the English Courts and the Privy Council. The statutory law relating to contempt of Court touches only the fringe of the subject and is to be found in the Contempt of Courts Act, 1926, the Indian Penal Code and the Code of Civil Procedure. The Contempt of Court Act does not define contempt of Court. But sub-section 2(iii) of that Act implies the existence of the offence of contempt of Court, outside the provision of the Indian Penal Code. In Article 215 of the Constitution the fact that every High Court as a Court of record has power to punish contempt of itself is recognised. The contempt of

Court contemplated in this Article could not obviously be that class of contempt dealt with in the Criminal Procedure Code, the Indian Penal Code and the Code of Civil Procedure because those three Codes themselves provide the machinery for punishing contempt of that class. The expression 'Court of record' has got a well recognised meaning in English Law and Courts of record have always power to punish contempt. Prior to the Constitution, the High Courts of India have been exercising this power and in the Government of India Act, 1935, also the status of High Courts as Courts of record was recognised in Section 220. Therefore, when the makers of the Constitution enacted Article 215 in the Constitution, recognising the power of a High Court as a Court of record to punish contempts of itself and when the Contempt of Courts Act, 1926, does not define 'contempt', the obvious inference is that the law relating to contempt as contemplated by them, was not the statutory law described in the aforesaid codes but the common law right of every Court of record recognised in England and applied in India in the various decisions of the High Courts.

There can be therefore no doubt that the phrase 'existing law' in Article 19(2) includes not only statutory law but the entire law of contempt as was recognised in India prior to the advent of the Constitution, based on the English Common Law, and the case law as laid down by the High Courts and Privy Council."

(AIR 1952 Ori 318, 342, also J.R. Parashar v. Prashant Bhushan, (2001) 6 SCC 735.

64. In Sukhdev Singh v. S. Teja Singh, the Chief Justice, supra and Pritam Pal v. High Court of Madhya Pradesh, AIR 1992 SC 94, the Indian Apex Court expressed that Article 129 and 215 of the Indian Constitution recognise the power of the Supreme Court and the High Courts to punish for contempt and that no Act of Legislature can take away that jurisdiction and confer it afresh by virtue of its own authority.

65. In I Manilal Singh –v- Dr. H Barababu Singh, 1994 Supp (1)SCC 718, the Constitution Bench of the same Court, which procured the presence of Dr H. Borobabu Singh, the then Speaker of the Manipur State Legislative Assembly in a contempt proceeding, held that it was clear from the relevant constitutional provisions, particularly Article 129, 141, 142 144 and 145 that the power of the Supreme Court in contempt matter is not confined merely to the provisions of the Contempt of Courts Act, 1971 and the rules framed thereunder but is plenary to punish any person for contempt of court, and for that purpose to require his presence in person in the Supreme Court in the manner considered appropriate in the facts of the case. The court observed, "It is our Constitutional duty which requires us to make this order, to uphold the majesty of law and justify the confidence of the people, that no one in this country is above the law and governance is not of men but of the 'rule of law'. It is unfortunate that this action has to be taken against a person who happens to be the Speaker of a Legislative Assembly, but that does not permit us to apply the law differently to him when he has wilfully and contumaciously driven the court to this course. We must remind overselves that the 'rule of law' permits no one to claim to be above the law and it means- 'be you ever so high the law is above you'. It was said long back: 'to seek to be wiser than the laws, is forbidden by the law'."

66. The Court directed the Government of India to produce the contemner in the court. Subsequent to this direction, the contenmner filed an affidavit expressing his willingness to appear before the court. After the contemner's appearance before the court, contempt proceedings were dropped.

67. In that case, the petitioner/applicant I. Manilal Singh in his capacity as the Secretary of the Manipur Legislative Assembly took steps to implement the orders of the Supreme court. He was compulsorily retired by an order passed by the contemner. Manilal Singh was not allowed to function in spite of the orders of the Supreme Court. As a result, the Supreme Court directed the presence of the contemner before it to answer the contempt action initiated against him. The contemner claimed immunity from personal appearance which was rejected by the Court.

68. In Lakhan Singh –V- Ranbir Singh, AIR 1953 All 342, the following observation reflected the Court's view, "Article 215 vests the High Court with all the powers of a Court of record including the power to punish for contempt of itself. The phrase 'the power to punish for contempt of itself' does not limit such powers of the High Court which it possesses as a Court of record or other powers with which it may be invested by law."

69. In Ahmed Ali-v-Suptd. District Jail, Tejpur , AIR 1987 SC 1491, the Supreme Court of India held, that what amounts to contempt is for the High Court to determine as a Court of record. The definition in Section 2 of 1971 can at best operate as a guide for such determination. But it being not an all inclusive definition and as it is the province of a Court of record to determine the contempt, there is nothing in law that can oust such jurisdiction of the High Court.

Position in Our Own Jurisdiction

70. Our Supreme Court found no reason to deviate from pre or post partition Indian and the Privy Council decisions on the point of inherent power and, maintained the view that this inherent and Constitutional power can not be curtailed, shallowed, narrowed or abridged.

71. So, in Moazzem Hussain Khan –v- State, the Appellate Division observed;

"The power to punish for contempt, as a means of safeguarding judges in deciding on behalf of the community as impartially as is given to the lot of men to decide, is not a privilege accorded to Judges. The power to punish for contempt of court is a safeguard not for Judges as persons but for the function which they exercise" (Moazzem Hossain Khan Vs. State 35 DLR (AD) 290.)

72. FKMA Munim CJ expressed that to commit someone for contempt of Court and to punish him for it if is the inherent power of a Court of record. The Supreme Court of Bangladesh is such a Court. The power is no doubt extraordinary. The judge who commits any one for contempt of court is both prosecutor and arbiter of the alleged offence. It is, therefore, not unusual to issue a notice for contempt of court when occasion arises. **(Moazzem Hossain Khan Vs. State, supra).**

73. There is no room for any controversy that the High Courts have power to punish summarily for contempt of Court committed by the publications of libels on the Courts or on the Judges; and, as Superior Courts of record, it also has the inherent jurisdiction to summarily punish contempt's. Sir Barnes Peacock, CJ's formulation and ratio has been followed squarely in our jurisdiction too.

74. In M. Shamsul Haque –V- Bangladesh, this Division knocked down a contempt statute on the of the ground of the said legislation's purported endeavour to prune the Supreme Court's ambit and power in assuming jurisdiction and punishing for contempt of Court. (17 BLT (HC) 523).

75. Opinion of a good number leading Advocates, who acted as amicus curiae, were taken before the said conclusion was arrived at.

76. The above data has been furnished to bring home the point that the power to punish summarily for contempt is not a creature of statute but an inherent incident of every Court of record. This inherent jurisdiction cannot be wiped out. The same has been recognised from time to time in the relevant Letters Patent and the Constitutional Acts in India. The Government of India Act, 1935 stated in Section 220 that every High Court shall be a Court of record and declared in Section 223 that the then existing jurisdiction of High Courts shall be the same as they were immediately before the commencement of Part III of that Act. Section 203 of the Act constituted the Federal Court as a Court of record which was given appellate jurisdiction by Section 205.

Kind of Comments that Constitute Contempt

77. Now, we should concentrate on the question as to whether or not the comment in question can amount to contempt of Court. Again we should take in aid ratio of high preponderant decisions on this count.

78. The law looks at the conduct of the person proceeded against in order to find out if it was calculated to produce an atmosphere of prejudice in the midst of which, the judicial proceedings have to go on. The test of guilt in such cases depends on the findings whether the matter complained of tended to interfere with the cause of justice, and not on the question whether such was objective sought, much less whether it was achieved. Neither desire to obstruct or prevent administration of justice, nor its fulfillment is counted in proceedings for contempt.

79. Intention is of no relevance or consequence so long as the words used in the publication tend to interfere with the course of justice or prejudice the public or the Court in the trial of the case.

80. It is difficult to enumerate the acts which may amount to contempt of Court. The overriding question in all cases of contempt of Court must, however, be whether the action or remark of the alleged contemnor is or is not calculated to interfere with, interrupt or thwart the course of justice.

81. The question in such cases is what the publication can lead to, rather than what result it has actually generated. [1945 Lah 206, 1937 Bom 305, 1945 PC 134, PLD 1953 SC 170, 15 DLR 96, PLD 1962 SC 457, 15 DLR 81].

82. Prejudice: All publications which are calculated to or have the tendency to either excite prejudice against parties or their litigation or to interfere with due course of justice will constitute contempt [PLD 1963 SC 610: 15DLR 355]

83. Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. Anything that tends to prejudice that fair trial by a Court, constitutes a contempt of Court.

84. Now what is clear from the analyses just figured is that contempt is constituted when something is done, which is capable of interfering with the impartial flow of justice. To elaborate this, a plethora of high preponderant authorities command that nobody must make any comment about an issue which is awaiting adjudication in a Court of law because such comment may attempt to pervert the course of justice by influencing the mind of the Court or people at large and also by impliedly suggesting what should be the outcome of the proceeding at the end of the day. Such a scenario is not confined to this sub-continent, but is practiced globally. We would like to cite some or such authorities from the Courts in the subcontinent as well as from the United Kingdom.

85. In the case of Sire Edward Snelson-V-Judges of the High Court of West Pakistan, reported in 1961 PLD S.C 237, the Pakistan Supreme Court observed that "such conduct amounts to contempt of Court which tends to bring the administration of law into disrespect or to disregard or to interfere with or prejudice parties or their witnesses."

86. Pakistan Supreme Court in the same case, echoing Wilmot J's view, further observed, "The power of the Courts to vindicate their own authority is coeval with their first foundation and institution. It authorizes the Courts to deal, effectively with all that has tendency to hinder the normal course of justice. The reason for the existence of this jurisdiction is that unless armed with such a jurisdiction, the courts cannot properly function. It arises in three kinds of ways:

(1) a disobedience to an order of the Court; (2) a publication relating to the merits of a dispute pending before a Court; (3) an act which scandalizes a Court.

87. Pakistan Supreme Court in that case also had this to say, "All publications which offend against the dignity of the court or are calculated to prejudice the course of justice, will constitute contempt."

88. The case reported in PLD 1961 Lah. 78, recorded the following observation:

"Contempt of Court may be committed by:

(1) Scandalizing the Court itself;
(2) Abusing the parties who are concerned in the causes inside the Court;
(3) Prejudicing the public before the cause is heard."

89. Pakistan Supreme Court also observed, "All publications, which are calculated to or have the tendency to either excite prejudice against the parties or their litigations while it is pending, or to interfere with the due course of justice, will constitute contempt.

90. Pakistan Supreme Court further stated, "Publications, the effect of which is to prejudice a material issue in the case before the judgment is pronounced or which has the tendency to create in the public mind a preconception about such issue, are contempt."

91. In the decision which found a place in PLD 1964 Lahore 51, the Court observed:

"There may be contempt of this Court in prejudicing the mankind against persons before whom the cause is heard."

92. In another case, reported in PLD 1964 Lah. 661, Lahore High Court stated; "Any act done or writing published calculated to obstruct or interfere with the due course of justice or lawful process is contempt of Court."

93. It is not essential, in order to constitute a contempt, that the act should be done publicly or publicized in any way.

94. Lahore High Court in the case reported in PLD 1961 Lah. 78, observed:

"The respondent no doubt as a Secretary, Ministry of law, has the right to express his own views about judgments of the High Courts but these views can be expressed by him on confidential office files, the contents of which are not broadcast to the world at large or to the public servants other than those having official concern in the matter... He can not claim the protection which would attach to his secret communication in the discharge of his official duties."

95. In Syed Ahmad Nawaz Shah-V-Waliullah Uhad, reported in PLD 1953 BJ 79, the High Court stated, "For the purpose of the offence of contempt of court it is immaterial whether the mind of the judge concerned was actually prejudiced or not. It is enough that the writing had a tendency to produce an unwholesome impression."

96. Lahore High Court in the case reported in PLD 1950 Lah. 22 observed, "But if the report amounts to a comment or expression of opinion on matters sub-judice or has the tendency to influence the readers' opinion on those matters, it will amount to interference and hence to the offence of contempt of Court."

97. In that case reported in PLD 1963 SC 610: 15DLR 355 Pakistan Supreme Court in the case reported in PLD 1975 SC 383, said "comments in respect of pending proceedings are treated as contempt in order to keep the streams of justice pure and unsullied. Only those comments are punishable which really have the tendency to substantially prejudice the hearing of a case or interfere with the course of justice. The question always is whether the court before which the matter is pending would be so influenced by the Article or speech that its impartiality may be consciously or unconsciously affected. In other words, is there a real possibility of the speech of the Article being calculated to prejudice either party in the pending case."

98. Pakistan Supreme Court in the case reported in PLD 1976 SC 608 observed, "The Article not only prejudged the issue awaiting determination but also created an atmosphere disposing people not to readily accept contrary verdict of the Court. Situation tended to undermine people's confidence in administration of justice."

99. The question in these cases is not whether the publication has in fact, interfered or not or as to what was the intention of the commenter or the publisher, but whether it has the tendency to produce such prejudicial effect. The principle upon which this type of contempt is punished is to keep the streams of justice unsullied so that parties against whom litigations are pending in Courts of law should get a fair trial from the Courts and not to be subjected in advance to a "trial by newspapers". (Sadat Khialy Vs. The State, PLD 1962 Supreme Court 457 - 15 DLR (SC) 81 -1963 (2) PSCR 402. (per Hamoodur Rahman J).

100. Knowledge of the pendency of the proceeding is not a necessary ingredient of the offence of contempt of Court. All that is necessary is to show that a proceeding was actually pending at the time or was imminent.

101. It is the contemner's duty to take proper care and to make sure before issuing a statement regarding a sub-judice matter that no proceedings were pending before the Court or were contemplated. If he made no such enquiries then he clearly acted negligently and cannot take advantage of his negligence. . (Advocate General Vs. Shabir Ahmad, 15 DLR (SC) 355.)

102. Pakistan Supreme Court in the case reported in PLD 1958 SC 528, reiterated that intention is irrelevant in a contempt proceeding as it is a strict liability offence.

103. The same Court in a case reported in PLD 1962 SC 457 stated, "If the Article read reasonably and as a whole was calculated or had the tendency to prejudice mankind against one or other of the parties involved in the legal proceedings, it was enough to amount to interference with the course of justice, for, the question in these cases is not as to whether the publication, has, in fact, interfered or not or as to what was the intention of the author or the publisher but whether it has the tendency to produce such prejudicial effect. The principle upon which this type of contempt is punished is to keep the stream of justice unsullied so that parties against whom litigations are pending, should get a fair trial, and not be subjected in advance to a trial by the commentator."

104. Pakistan Supreme Court in the case cited in PLD 1963 SC 610 observed, "Any publication which has, or is likely to have, the tendency to pervert the course of justice by attempting to excite through the media of newspapers prejudice against the parties or their litigations while they are pending, constitutes contempt. Intention of the maker is wholly irrelevant, for what the Courts are concerned with is to ascertain as to what

effect the publication, read fairly and as a whole, is likely to produce in the minds of reasonable readers." The same view has also been expressed by the Supreme Court in the cases reported in PLD 1962 SC 457 and 15 DLR (SC) 81. The Supreme Court in the case reported in PLD 1963 SC 610 and also in 15 DLR (SC) 355, observed, "There is no difference in principle between a comment on a question of fact and expression of an opinion on a question of law, for a Court, even when dealing with a question of fact is expected not to be influenced by facts which may have come to his knowledge otherwise than in the from of the evidence adduced in the case. Therefore, any expression of opinion on a question of law in similar circumstances should be incapable of producing a like result and a alike pernicious tendency and hence such comments must be dealt with strong hands."

105. In the case of Helmore-v-Smith, reported in 1886 35 Ch D. 449 it was observed: "The main question always being whether or not there has been an interference, or a tendency to interfere with the administration of justice."

106. The Supreme Court of Pakistan in the case of Advocate General-v-Sabbir Ahmed, reported in PLD 1963 SC 610 observed that any attempt to pollute the stream of justice before it has begun to flow or to interfere with its proper and unfettered administration will amount of contempt. A Court dealing with a question of law would not normally allow itself to be influenced by expression of opinion on that question of law in a pending case because of their tendency, not because of the actual effect they produce. Actually there is no difference in principle between a question of law and fact.

107. Oswald (3rd Edition 93) said, "Comments by parties is more serious than those by strangers- It is a graver offence for the parties themselves or their advisors to comment on a pending cause than for a stranger who has no interest in the matter."

108. In the case of Attorney General of Pakistan-v- Abdul Hamid Sheikh, reported in PLD 1963 SC 170, Pakistan's Apex Court observed: "Publication leading to one sided impression in the mind of the public constitutes contempt. Neither intention of the another nor truth or falsity of the allegation is of any consequence. Publication of pleadings in advance amounts to serious interference with the decision of the case."

109. In the cases of Hunt-v-Clarke, 1889 58 LJ QB 490 and James-V-Flower, 1894 11 TLR 122, the Court observed; "Tendency to interfere is the only question. It is not whether there was interference, but whether it tends to interfere with due course of justice."

110. In the case of Sukhde Baiswar-v-Brij Bhushan Misra, reported in AIR 1951 All. 667, it was reiterated that intention has no relevance and so the liability is strict. The same view has also been expressed in Re: Sham Lal, reported in AIR 1978 SC 489.

111. In the case cited in PLD 1963 SC 610 that publication tending to prejudice the fair trial of a case by influencing the mind of the public and also of the court, is contemptuous.

112. In the case of D James Shield-v-N Ramesam, reported in AIR 1955 AP 156, the High Court of Andhra Pradesh said that an Article stating that persons arrested were innocent, amounted to a contempt of court because it amounted to prejudging the issue, which has been pending in a court of law. The same view has been expressed in the cases of State of Uttar Pradesh-v-Padma Kant Malmaviya, reported in AIR 1954 All 523 and Ramakrishna Mabtab-v-Balkrishna Kar, reported in AIR 1954 Ori. 57.

113. In Attorney General-v-Independent T.V. News Ltd. (1995 2 All ER 370) it has been said that if the mind of the jurors might be influenced in the trial, contempt is committed. The same view was also expressed by the House of Lords in the Lonrho PLC case, 1990 2 AC 154 (Per Lord Bridge who voiced similar observation).

114. Patna High Court in Awadh Narain Sing-v-Jwala Prasad Singh, reported in AIR 1956 Pat. 321 observed: "It has been said that publication includes any conduct which leads the public or a section thereof to believe something prejudicial to the other party."

115. In Larakha Hasan Hamirkha-v-Keshablal Dhaneshwar Dwivedi, reported in AIR 1956 SC 102 the observation was; "The test is whether the impugned publication is likely to cause obstruction or interference with the due course of justice……."

116. In the case of Padama Vati Devi Bhargava-v-R.K. Karanjiya (AIR 1963 MP 61), "The High Court of Madhya Prodesh said that even though a newspaper article may not actually prejudice the Court, it may still amount to a preliminary mini trial and hence contemptuous."

117. In the case of P.C. Sen, reported in AIR 1970 SC 1821, the Indian Supreme Court observed: "Where a Chief Minister of the Government broadcasts the sort of point of view which is sub-judice in a writ petition, that broadcast and that opinion amount to a contempt of Court." The same view has been taken by the Court of Appeal in the case of Attorney General-v- MBN Ltd. (1997 1 All ER 456).

118. In the case of R.-v- Mohashae Khural Chand, AIR 1945 Lah. 206, the Privy Council said, "An assertion that a fact exists and is correct when the existence of that fact is in dispute in a pending case, is likely to prejudice a fair trial." The same view has been taken in the cases of Lakhan Singh-v-Balbir Singh (AIR 1953 All. 342 and Gottepulla Bapaiya-v-Peter Bappopayya, AIR 1938 Mad. 975).

Fair Criticism on the Conduct of Judges May not Amount to Contempt

119. Fair criticism of the conduct of a Judge, may not amount to contempt if it is made in good faith and in public interest. To ascertain the good faith and the public interest, the courts have to see all the surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sough to be achieved.

120. In P.N. Duda v. P. Shiv Shanker (1988, 3 SCC 167), the Indian Supreme Court had held that Judges have their accountability to the society and their accountability must be judged by the conscience and oath to their office, i.e., to defend and uphold the constitution and the laws without fear and favour.

121. In R. Vs. Commr. Of Police (1968)2 QB 150 Lord Denning observed, "Let me say at once that we will never use this jurisdiction to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. All that we ask is that those who criticize us should remember that, from the nature of our duties, we cannot reply to their criticism. We cannot enter into public controversy. We must rely on our conduct itself to be its own vindication.

Krishna Iyer J. on Fair Criticism

122. V.R. Krishna Iyer J. wrote extra judicially on contempt; "The Constitution gives you power. And all public power is held as a trust. If you breach this trust you pay for it: by facing responsible criticism. When there is justice, which is your professional-fundamental duty, criticism loses its sting. And the Preamble to the Constitution spells it out. Social, economic and political justice is your basic obligation, which you have to fulfil without fear or favour. If you fail here, you disrobe yourself and deserve correctional criticism.

123. This judicature is a noble and never a nocent institution. If you goofily debunk and unjustly bring the judiciary into disrepute, you judges commit contempt and get punished. The court is a magnanimous institution, majestic and glorious, and it sustains the confidence of the nation. But if the judiciary behaves as an elite upper sector and denies the rights of the common masses, criticism is what you earn. Remove those judges who conduct themselves with a sense of contempt for social justice and human rights: that is the fascist, authoritarian way.

124. This has become a critical issue. Judges as an instrumentality under the Constitution have vast powers under Article 141 to 144. When the Executive misuses its powers, the court can strike down its actions. When the Legislature commits excesses beyond the Constitution or otherwise defaults, the court can declare it void. When judges themselves are guilty of laws, shortcomings or violations, public criticism is the only way judges can be corrected by, against allegation of corruption, against the sitting judges of the apex Court.

Willing to go to jail, Won't Say Sorry: Shanti Bhushan

125. Recently, India's former Law Minister, Shanti Bhushan told the Supreme Court that he and his lawyer son, Prashant Bhushan, would prefer to go to jail instead of tendering an apology for pointing to corruption in the judiciary. Bhushan told this to the court after he and his son were asked if they were willing to offer an apology.

126. The senior Bhushan said this when he was asked by the court . He became a party to the contempt case by filing an affidavit saying that of 16 chief justices of India, eight were 'definitely corrupt', six were 'definitely honest' and for two of them 'a definite opinion cannot be expressed.'

127. This matter engendered waves of fierce debate in India, raising a basic question as to whether the former Law Minister concerned should be punished for contempt or whether allegations levelled by him should be investigated and, if proved true, steps should be on the way for removing those Judges, against whom such allegation are proved.

128. We do wholeheartedly endorse the views that the law of contempt is not there to vindicate the personal glory of individual Judges or to clean the dirty lincen of those who may indulge on corrupt or unholy or other disgraceful practices, rendering a Judge disqualified to continue with this post. We are also at one with the introspection that the Majesty and the Grandour of the superior Courts depends on the irreproachable credibility and integrity of the Judges that men it and that to protect and hold high the Majesty and the Grandour of the superior Courts, it is absolutely essential that the Judges, (Chief Justice inclusive) against whom allegation of corruption or other impropriety or breach of Code of Conduct are proved, should be removed. Obviously, no High Court or Supreme Court with any corrupt or otherwise depraved Judge, whether he be the Chief Justice or another Judge, can claim any degree of Majesty.

These questions are, however, not relevant in the instant case.

Does the Comment by the instant Contemnor Constitute Contempt ?

129. Now, if a reasonable bystander analyses the ratio of all the cases discussed under the caption, "Kind of Comment that Constitutes Contempt", he will no doubt hold that the comments in question are certainly contemptuous and hence punishable by this Court, because the contemnor has effectively passed a verdict on the matter which is awaiting adjudication by this Division.

130. The impugned comment constituted the offence, because; (1) by this comment the contemnor purported to usurp the function of this Division, (2) the comment has the potential of influencing the minds of the people at large as well of the judges, whether or not it actually generated that effect, (3) the comment amounted to prejudging the cause which was awaiting adjudication, (4) the comment was vibrant enough to lead the public as well as the judges concerned to reckon that by issuing the Rule and passing the interlocutory order, the Court resorted to illegality and that this Court was wrong as the contemnor claimed to have been right, (5) the comment amounted to an aspersion and insinuation on the merit of our order, and was capable of transmitting a suggestion that a wrongly passed order should be reversed, (6) in all, the comment amounted to a trial by a stranger, i.e., the contemner, which could seriously obstruct the right course of justice and cause its deviation.

131. No word or action capable of influencing the destiny of a pending cause can be acceptable in any civilized country and such action, utterances must be dealt with strong handedly, without compassion.

132. It is unfortunate, least said, that a person, who has held several Judicial offices and is also presently holding a quasi judicial office as an Election Commissioner, made prejudicial comment on a sub-judice matter. Even the Chief Election Commissioner, who is not fortified with legal back ground, had the wisdom to realise that no comment should be made on a sub-judice matter, as he refused to be drawn to any comment, reckoning that a comment on a sub-judice matter is devastating to the cause of justice.

133. Worse happened when the contemner demonstrated outrageous disregards and scorn to the authority of law by refusing to appear before this Court when he was ordered to, as if he was above law. This haughty and high handed attitude on the part of a person, reposed with high Constitutional duties, is not only disgracefully and pitiable, but also raises the question as to whether a man with this sort of supercilious propensity, reflective of a tendency to undermine the authority and the rule of law and Constitutional mandate, which requires all authorities in the Republic to work in aid of the Supreme Court, should be allowed to continue with such an important public office with quasi judicial function, whose allegiance to the dictates and the authority of law and the Courts must be impeccable and beyond qualm . The job of an Election Commissioner involves profound responsibility and integrity. Election Commissioners together conduct the national and local elections of the Republic and, to discharge those responsibilities they must have unsullied, indivisible, unfettered and unquestioned regard to the command of law. No person, devoid of such qualities, as the contemnor certainly is, can have competence to hold such an office. It is not only expected, but it is imperative, that the Election Commissioner must show total and un-inoculatable submission to the authority of law. Yet his conduct was such

that he treated the High Court as of no significance. By doing so, he has committed further and aggravated contempt of Court and transmitted a message to the whole world that High Court's order can be flouted with impunity. His conduct was certainly unbecoming of the post he holds.

134. Nobody is above law. As Lord Denning repeated a vintage remark, "be you ever so high the law is above you". Even the Prime Minister of India had to be in Court. The Speaker of a Provincial Assembly of India had to appear before the Supreme Court of India when he was accused of contempt, his plea of privilege was turned down and the Court asked the Government to ensure his appearance, (1. Moniram Singh-V-H. Barababu Singh) supra. In the U.K., the Home Minister of the day eventually submitted to the authority of the Court after his plea of Crown privilege was rejected (M-v- Home Office 1994, 1 AC 377). One Mr Habibullah, a Minister of that time, appeared before the High Court when a contempt Rule was issued against him. An incumbent Election Commissioner, when prosecuted under a Penal law, had to appear before the Court without any hesitation. Even the Prime Minister of the day responded to a contempt Rule Nisi and followed the legal procedure without any hesitation.

135. There is no dearth of such examples: the examples cited above are but only the tip of the iceberg. An order passed by a Court has to be obeyed, come what may, so long as the same pervades.

136. In this context, echoing Indian Supreme Court's observation, we would say, "we must remind ourselves that the rule of law permits none to claim to be above law. (Manilal Singh-v- Dr. H Barababu Singh, the Speaker of Manipur Parliament,) supra.

137. The scornfulness of the instant contemnor is deplorable. However, as Mr.Rokanuddin Mahmud, the learned Senior Advocate appearing for the petitioner prayed that his presence may be dispensed with; we readily agreed to do so. But we cannot be oblivious of the castigatable and abhorable attitude that the contemner hawkishly displayed.

138. Mr. Rokonuddin Mahmud, with all his greatness and nobility, submitted that although contempt of Court has undoubtedly been committed by the contemnor, we should, nevertheless, refrain from proceeding to punish him.

139. When the petitioner himself so prays, we are left with little choice as the Rule was not issued suo-motu, but at his client's behest. We have to swallow this plea with the greatest reluctance though, as we relish an immutable view that the contemnor should face merciless rigor of law for his persistent flagrant and deliberate disregard to this Court, and for treating himself to be above law.

140. Be it as it may, we, because of the petitioner's learned Senior Advocate's graceful and magnanimous plea, feel inclined to exonerate him. We do, therefore, dispose of the Rule with the above observations. We would, nevertheless, expect him to be respectful to the authority of law on all future occasions without any ifs and buts.

141. The Rule is hence disposed without any order as to cost.

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1 SCOB [2015] HCD 45

HIGH COURT DIVISION

Death Reference No.36 of 2010

The State

-Versus-

Mir Ahmad Hossain (absconding) and another
…Condemned-Convicts

Mr. A.K.M. Zahirul Huq, D.A.G with
Mr. Md. Aminur Rahman Chowdhury and

Mr. Shah Abdul Hatem, A.A.Gs
… For the State
Mrs. Hasna Begum, Advocate
… For the State Defence

Heard On: 27.06.15 and 28.06.15.
And
Judgment on: 29.06.2015

Present:
Mr. Justice Soumendra Sarker
And
Mr. Justice A.N.M. Bashir Ullah

The court can depend upon a single witness:

The court can very much rely on the evidence of a witness who is related to the victim or to other witnesses if the witness is considered by the Court reliable and that evidence of the witness is corroborated by other reliable witnesses. Besides this; in the case laws reported in 38 DLR(AD) 311 and 29 DLR(SC)211, it is a decided matter that the case of prosecution does not depend on the number of witnesses produced but it can depend upon a single witness whose evidence (testimony) is trustworthy, credible and unimpeachable. Therefore, obviously we can easily draw such inference in this matter that the case of the prosecution can stand very much on a single evidence if it is tangible and credible.

...(Para 32)

Judgment

Soumendra Sarker, J:

1. This reference under section 374 of the Code of Criminal Procedure has been made by the learned Additional Sessions Judge, Kishoreganj for confirmation of the sentence of death passed on the condemned-convicts namely Mir Ahmed (absconding) and Mir Moinul Hussain (absconding) in Sessions Case No.222 of 2003 under section 302 of the Penal Code.

2. The prosecution case, in a nutshell can be stated thus that one Md. Abdur Rouf, son of late Abdul Hakim of village-Madhya Austagram Kalapara, Upazila-Austagram, District-Kishoregonj lodged an ejahar with the Officer-in-Charge of Austagram Police Station under Kishoreganj District stating that, 7/8 days before the date of occurrence there was a hassle on some money transaction between his younger brother Abdus Samed and one of the accused of the case Mir Ahmed. On this issue the other accused persons namely Mir Mosharaf, Mir Ahmed, Mir Moinul Hossain, Mir Ashraf, Mir Babu Hossain, Mir Amjad Hossain, Sajjad Hossain, Kamrul Miah and Mir Nabi Hussain were trying to get an opportunity for taking revenge. Subsequently, on 10.12.2001 at about 7.30 p.m. when the brother of the informant Abdus Samed was coming from local Bardhaman Para Moulavi Bari after taking his ifter, the above mentioned accused with some deadly weapons suddenly attacked him infront of the residence of one Bacchu Khan of Bardhaman Para village. The accused gheraoed the deceased Abdus Samed. The accused Mir Mosharraf gave an order to kill the victim Abdus Samed and accordingly the accused Mir Ashraf and Sajjad Hossain caught hold of the victim's waist and hand. There after the condemned-convict of this Death Reference Mir Ahmed with a knife in his hand dealt with a serious blow on the left side of Abdus Samed's stomach causing bleeding injury. The victim Abdus Samed fell down and after that the other condemned-convict of this reference Mir Moinul Hossain with an intention to kill the victim inflicted with a '*kiris'* blow below to the left armpit of the victim Abdus Samed, causing severe blood injury. Then the other accused persons namely Mir Amjad Hossain and Kamrul Hossain started to kick the victim and immersed him into a ditch water which was beside that road. Thereafter, the accused Nabi Hossain told the other accused to examine the deceased. Then, the accused Babu Hossain entering into that ditch drown the victim Abdus Samed into the ditch water. Subsequent to that, the villagers Abul Kashem and Arzoo coming to the

place of occurrence started shouting. The accused persons then retreated. Hearing the hue and cry of Kashem and Arzoo the people of the locality rushed to the place of occurrence and they brought the victim Abdus Samed from the ditch water and then the injured Abdus Samed in presence of local witnesses disclosed the names of the accused persons and about the manner of occurrence. Thereafter, the witnesses managed to bring the victim Abdus Samed to Austagram Hospital; wherein the doctor declared him dead. The informant further stated in his FIR that the witnesses identified the accused persons with the help of torch light and charger light and after receiving the information of the occurrence he went to the hospital and found the dead body of his brother.

3. The Police took up the investigation of the case and visited the place of occurrence, held inquest report on the dead body of the deceased and sent the dead body to the morgue for postmortem examination and prepared sketch map and index of the place of occurrence. The investigating officer Sub-Inspector Abdul Majid during his investigation after examination of the witnesses under section 161 of the Code of Criminal Procedure recorded their statements and on completion of the investigation finding prima-facie case against the accused persons submitted charge sheet on 18.03.2002 under sections 147/148/149/302/114/34 of the Penal Code.

4. Then the case was transmitted to the Court of learned Sessions Judge, Kishoregonj for trial and the learned Sessions Judge sent the same to the court of learned Additional Sessions Judge, Kishoregonj who framed charge against the accused persons under sections 302 and 114/34 of the Penal Code on 18.11.2003. The charge was read over and explained to the presentee accused persons in Bengali at which they pleaded not guilty and claimed to be tried.

5. During trial of the case as many as eight prosecution witnesses were examined and the defence examined none but cross-examined the witnesses produced from the side of the prosecution.

6. After closer of the examination of the witnesses the presentee accused persons were examined under section 342 of the Code of Criminal Procedure and their answers were recorded and they again pleaded not guilty and claimed to be tried. The accused declined to produce any witness in support of their case but from the trend of cross-examination of the prosecution witnesses the defence case as appeared is total denial. The further case of the defence is such that out of previous enmity they have been falsely implicated by the informant and his men in this case and they are not in any way responsible or connected with the murder of the deceased Abdus Samed but have been falsely implicated in this case out of sheer enmity and grudge.

7. After trial of the case, considering the evidence and materials on records as well as the facts and circumstances of the case, the learned Additional Sessions Judge, Kishoregonj, however, found the condemned-convicts guilty and convicted them under section 302 of the Penal Code and sentenced them to death there under.

8. Mrs. Hasna Begum, the learned Advocate appearing as State Defence lawyer submits that the condemned-convicts namely Mir Ahmed (absconding) and Mir Moinul Hussain (absconding) are innocent and there is no legal evidence against them. The learned State defence lawyer further submits that out of 16 witnesses of the charge sheet only 08(eight) witnesses were examined during trial which is not sufficient to prove the case of the prosecution and there is no dependable eye witness of this occurrence and between the parties there exist previous enmity admittedly and out of that previous enmity and grudge the accused persons have been falsely implicated in this case and that there is no corroborative evidence which can directly connect the condemned-victims with the killing of the victim Abdus Samed. The learned State defence lawyer also submits that the knife which was allegedly used in the occurrence was not sent to the finger print expert for his opinion and during examination of the witnesses the witnesses are contradictory with one-another in ‘warding’ and that there is no date of hassle between the parties and no means of recognition in all though the occurrence which was allegedly took place at night. The learned State defence lawyer lastly submits that the local witnesses of this case are all relations with one-another and as such they cannot be relied on and there is no written dying declaration and accordingly the condemned persons are entitled to an order of acquittal.

9. Mr. A.K.M. Zahirul Huq, the learned Deputy Attorney General with Mr. Md. Aminur Rahman Chowdhury and Mr. Shah Abdul Hatem the learned Assistant Attorney Generals appeared on behalf of the State.

10. Mr. Md. Aminur Rahman Chowdhury the learned Assistant Attorney General controverting the argument of the learned State Defence lawyer submits that the prosecution in this case have successfully discharged their onus in proving the case and in this case there are number of eye-witnesses in presence of whom the occurrence took place & by the flash of torch light and charger light the witnesses could recognize the

accused persons and accordingly they disclosed about the occurrence and participation of the accused therein before the trial court. The learned Assistant Attorney General further submits that the eye-witness of the occurrence, P.W.2 Abul Kashem who was all along present at the time of occurrence specifically proved the case of the prosecution and defence has hopelessly failed to bring any discrepancy or material contradiction after examining the witness by which this witness can be disbelieved. The learned Assistant Attorney General also submits that the evidence of the prosecution witness No.2 Abul Kashem is unimpeachable. Besides this; from the very beginning of the occurrence the condemned-persons are absconding and are fugitive which is a strong circumstantial evidence against them that they are directly involved in the occurrence of killing the victim Abdus Samed. The learned Assistant Attorney General argued that the witness No.3 of this case Md. Nur Miah in his testimony stated about the dying declaration of the deceased Abdus Samed and the other competent responsible witnesses of this case the local Union Parishad Chairman (witness No.5) Md. Mosahed corroborated the witness No.3 on the aforesaid dying declaration of the deceased who immediately after the occurrence disclosed before the witnesses about the fatal blow of the condemned persons in his person at which he succumbed to death. The learned Assistant Attorney General during his argument states, "a man can tell a lie but a man who is about to dye cannot tell a lie". In support of the contention the learned Assistant Attorney General referring some decisions of our Apex Court and this Court reported in 9 BLC (AD)122, 54 DLR 359, 8 BLC 132, 55 DLR(AD)131, 3 BLC (AD)72 and 62 DLR(AD)225 submits that on mere relationship of the witnesses with the informant they cannot be disbelieved and the dying declaration which is coming from the victim of this case is a material piece of evidence in proving the guilt of the condemned-convicts. The learned Assistant Attorney General lastly submits that the condemned-convicts namely Mir Ahmed (absconding) and Mir Moinul Hussain (absconding) inasmuch as are fugitive from the very beginning, this circumstantial evidence cannot be ignored and considering all these facts and circumstances and sufficient legal evidence of the case the learned Additional Sessions Judge was quite justified in awarding death sentence to the condemned-convicts as the ingredients of section 302 of the Penal Code has been proved against them beyond all shadow of doubt and as a result of that the judgment and order of conviction & sentence passed by the learned Additional Sessions Judge, Kishoregonj should be upheld.

11. In view of the submissions made from the sides of the learned Advocates of both the sides to arrive at a conclusive decision as to the guilt of the condemned-persons, let us now scan the evidence adduced from the side of the prosecution and cross-examination of the prosecution witnesses including other material evidence.

12. The witness No.1 of this case Md. Abdur Rouf is the informant of this case, the witness No.2 is Md. Abul Kashem who is an eye-witness of the occurrence, the witness No.3 Md. Nur Miah despite was not present at the time of occurrence but he has heard the occurrence from others and also heard the dying declaration of the deceased, the witness No.4 Neel Miah claimed himself an eye-witness of the occurrence, the witness No.5 Md. Mozaheed is a Union Parshad Chairman of the locality who is the witness of dying declaration of the deceased. The witness No.6 Md. Sabbir Ahmed is a hear-say witness, the Witness No.7 Dr. Md. Abdul Majid is the P.M. done doctor and the last witness of this case P.W.8 Sub-Inspector Abdul Majid is the investigation officer who did the investigation and submitted charge sheet.

13. The informant of this case Abdur Rouf as witness No.1 during his deposition stated that the occurrence took place on 10.12.2001 at 7.30 p.m. on a road in front of one Bacchu Khan's residence. The informant further testified that the deceased Abdus Samed was his younger brother and at the time of occurrence Samed was coming from local "Bardhaman para Moulvi Bari Bazar" after having his ifter and when he reached to the place of occurrence the accused persons namely Mir Mosharaf, Mir Moinul Hossain, Mir Ahmed Hossain, Mir Nabi Hossain, Mir Ashraf Hossain, Mir Babu Hossain, Mir Amjad Hossain, Md. Kamrul and Sajjad in a pre-planed way having full preparation with deadly weapons gheraoed his younger brother Abdus Samed. After getting order from accused Mir Mosharraf Hossain to kill the victim Abdus Samed the accused Sajjad and Ashraf caught hold of the deceased Samed and the accused Mir Ahmed Hossain with a knife in hand inflected a death blow on the left side of the deceased's stomach causing serious blood injury. The injured Abdus Samed fell down and thereafter, the accused Moinul Hossain with a '*kiris'* in his hand dealt with a severe blow below the left armpit of Samed causing sever cut bleeding injury and thereafter the accused Amjad & Kamrul kicking the victim Abdus Samed thrown him into a nearby ditch which is situated beside the place of occurrence road. Thereafter, the accused Babu Hossain coming to the ditch water immersed the victim into ditch water. At that moment the witness Kashem and Arzoo started shouting and hearing that sound the people of the locality coming to the place of occurrence picked up the injured body of the victim and the victim Samed who was taking his last breath, told the facts of occurrence before them. Subsequent to that, Samed was taken to local Austagram hospital, wherein the doctor declared him dead. The informant during his deposition identified his

ejahar and signature therein which has been marked as Exhibits-1 and 1/1 respectively. He also identified the presentee accused on dock. He states in his deposition that the condemned-convicts namely Moinul and Ahmed are not present and he identified the lungi and shirt of his deceased brother. He also identified the seized torch light, charger light which were the means of recognition and the knife which was used in the occurrence.

14. The witness No.2 Abul Kashem during his deposition testified that the occurrence took place on 10.12.2001 in the evening at about 7.30 p.m. The deceased Abdus Samed is his elder brother and he accompanied the victim Samed at the time of occurrence. They went to local 'Bardhaman Para Moulvi bari Bazar' prior to the occurrence. His brother & he having ifter from one Bahar's shop while started for residence, at about 7.30 p.m. reaching in a road nearer to the residence of one Bacchu Khan of Bardhamanpara village, the accused persons namely Mir Mosharraf Hossain, Mir Ashraf, Mir Ahmed Hossain, Mir Moinul Hossain, Mir Amjad Hossain, Mir Nabi Hossain, Mir Babu Hossain along with other 3/4 persons being armed with knife, stick, kiris etc. gheraoed the victim Samed and committed the offence of killing the deceased. This eye-witness of the occurrence in his deposition testified about the occurrence in the following way:

"এজাহার ভূক্ত আসামী মীর মোশারফ হোসেন বাবু, মীর আশরাফ, মীর আহম্মদ হোসেন, মীর মইনুল হোসেন, মীর আমজাদ হোসেন, মীর নবী হোসেন, মীর বাবু হোসেনসহ আরও ৩/৪ জন আমাদেরকে ছোরা, লাঠি, কিরিচ নিয়া আমাদেরকে ঘেরাও করিয়া ফেলে এবং আসামী মীর মোশারফ হোসেন বাবুর হুকুমে মীর আশরাফ আমার ভাইয়ের কোমড়ে ২ হাত ঝাপটাইয়া ধরে। মীর আহাম্মদ হোসেন তাহার হাতে থাকা ছুরি দিয়া আমার ভাই আঃ ছামাদের পেটের বাম পার্শে ঘাই মারিয়া রক্তাক্ত জখম করিলে আমার ভাই মাটিতে পড়িয়া গেলে আসামী মীর মইনুল হোসেন তাহার হাতে থাকা কিরিচ দিয়া বাম বগলের নিচে ঘাই মারিয়া গুরুতর জখম করে। মীর আমজাদ হোসেন আমার ভাইকে লাথি মারিয়া রাস্তার পাশে গর্তের পানিতে ফেলিয়া দেয়। মীর নবী হোসেন বলে "দেখ মরছে কি-না?" মীর বাবু হোসেন গর্তের পানিতে আমার ভাই আঃ ছামাদকে চুবাইতে থাকে।

আমি সহ সাক্ষী আরজু মিয়া মোশাহিদ ডাক চিৎকার করিতে থাকিলে অন্যান্য সাক্ষীগণ সহ আরও বহূ লোক ঘটনাস্থলে জমায়েত হয়। তখন আমার ভাই আঃ ছামাদকে গর্তের পানি হইতে ধরাধরি করিয়া পানি টানিয়া গর্তের পারে উঠাই। তখন আমার ভাই আঃ ছামাদ উপস্থিত সাক্ষীসহ বহূ লোকজনের উপস্থিতিতে আসামীদের মারপিটের কথা প্রকাশ করে তখন আমার ভাইকে অষ্টগ্রাম থানা সদর হাসপাতালে নিয়া গেলে হাসপাতালের ডাক্তার আমার ভাইকে মৃত বলিয়া ঘোষনা করে।"

15. This witness in his deposition specifically states that he recognized the accused persons by the flash of a torch light which was in his hand and a charge light which was in the hand of witness Arzoo Mia. He further stated that the inquest report of the deceased Samed was prepared in his presence and he put his signature therein. He identified the inquest report and his signature therein which has been marked as Exhibit-2 and 2/1 respectively. This witness No.2 also testified that the torch light was produced by him before the local police station after the occurrence and the lights were seized by the police officer. The seizure list was prepared and he put his signature therein. This witness identified the seizure list and his signature therein which are marked as Exhibits-3 and 3/1. He further testified that on the following day i.e. on 11.12.2001 at about 8.30 hours the knife which is about 11/12 inches long was recovered from the ditch of the place of occurrence by the police officer who prepared the seizure list and in that seizure list also he (P.W.2) put his signature. He identified that seizure list and his signature therein which are marked as Exhibits-4 and 4/1.

16. In reply to cross-examination the witness No.2 Abul Kashem categorically testified that in front of his two eyes the occurrence took place and at that time he accompanied his brother Abdus Samed from local "Bardhoman Para Moulovi bari Bazar" after having their 'ifter' therefrom. During cross-examination in reply to a question from the side of the defence this witness deposed at a stage of his deposition that the deceased had two fatal injuries in his person and the condemned-convict Mir Ahmed Hossain during the occurrence dealt with a knife blow on the left side of the victim's abdomen, at which the deceased Abdus Samed fell down and then the other condemned-convict namely Mir Moinul Hossain inflicted '*kiris'* blow below the left armpit causing serious blood injury, and this witness himself observed the aforesaid occurrence and those two accused are not present on dock.

17. The witness No.3 of the prosecution Md. Nur Miah is a hear-say witness of this case. He was not present at the time of occurrence but hearing the hue and cry he went to the place of occurrence after commission of the offence and he along with other witnesses while picked up the body of the deceased from the ditch water the victim Abuds Samed told before him the condemned persons namely Ahmed Hossain dealt with a knife blow in his left abdomen and Moinul Hossain inflicted 'kiris' blow below the left armpit of him (deceased).

18. The witness No.4 of the case Neel Miah during his deposition identified the presentee accused-persons on dock. He testified that on 10.12.2001 at about 7/7.30 p.m. when he was returning from Bardhamanpara, he found that; in front of one Bacchu Khan's home-stead the accused Mosharraf, Moinul, Ahmed Hossain, Nabi Hossain, Babu Hossain, Amjad Hossain, Shahin and Kamrul jointly has gheraoed the deceased Samed. The accused Mosharraf ordered to kill the victim and after getting that order accused Shahin caught hold of the victim and Ahmed dealt with a blow of knife on the left side of Samed's stomach at which Samed fell down on the ground and then Moinul inflicted the blow of a '*kiris'* beneath the left armpit of Samed causing serious blood injury. This witness further testified that the accused Amjad and Kamrul kicking the victim Samed has thrown him into the water of a nearby ditch which stands beside the P.O. road and the accused Nabi immersed him into the water. Thereafter the witness Kashem, Morshed and Arzoo started shouting at which the accused persons fled away. In reply to cross-examination this witness stated at a stage that at about 7.00 p.m. he started for his residence from their Bazar and prior to him the victim Samed 10/12 minutes before completion of his (P.W.4) *ifter* started for his residence from that Bazar.

19. The witness No.5 Md. Moshaheed during his deposition before the court admitted that the informant happens to be his "***behai***" and the torch light which he possessed during the time of occurrence was "Eveready" by name. This witness denied the suggestion of the defence that at the instance of the informant he deposed falsely and implicated the accused persons in his examination in chief. This witness who is a U.P. Chairman corroborated the prosecution case including the contention on dying declation of the victim Abdus Samed.

20. The witness No.6 Sabbir Ahmed stated in his deposition that on 10.12.2001 at 7.30 p.m. this witness was in his residence and hearing hue and cry from the northern side of his residence he rushed to the place of occurrence and on his way towards the place of occurrence he found that the accused Mosharaf @ Babul, Nabi Hossain, Babu Hossain, Amjad, Moinul Hossain and Ahmed Hossain are retreating. By the flash of his torch light this witness found a blood strained '*kiris'* in the hand of accused Moinul Hossain. Thereafter, reaching to the place of occurrence he found that Kashem, Moshahed, Neel Mia and Nur Mia are taking the victim Samed to Austagram Hospital. With them this witness also went to the hospital and at that time Kashem disclosed before him about the occurrence.

21. During cross-examination from the side of the defence, this witness categorically testified that with the victim he went to the hospital and he found the victim Abdus Samed in injured condition and there was profound bleeding from the person of Abdus Samed. This witness in reply to a question from the side of the defence denied the suggestion that out of enmity with regard to boundary dispute with the accused persons he deposed falsely against them.

22. The witness No.7 of the prosecution is Dr. Md. Abdul Majid who did the post mortem of the deceased. During his examination-in-chief, he testified that on 11.12.2001 he along with his colleague Dr. Md. Saleh Uddin (Resident Medical Officer) after holding postmortem of the deceased Abdus Samed a man of 37 years of age found the following injuries in the person of the deceased: "one penetrating injury over the left mid axillary line of chest horizontally placed ½″ below the level of left nipple 1″X ⅓″ X deep to the chest cavity (2) one penetrating injury over the left side of upper abdomen below the costal margin, horizontally placed 1″ X ⅓″ X deep to abdominal cavity.

23. On dissection- Echymosis and clotted blood present in and around the injuries. left lung injured, left side of chest cavity contain blood and blood clott. Anterior wall of stomach injured, abdominal cavity contain blood and blood clott."

24. As to the cause of death of the injured Abdus Samed the P.M. done doctor, witness No.7 Dr. Md. Abdul Majid testified in the following way, "In our opinion death was due to shock and haemorrhage as a result of above mentioned injury which was ante mortem and homicidal in nature". This witness identified the postmortem report and his signature therein along with the signature given by his colleague doctor Md. Saleh Uddin which has been marked as Exhibit-5, 5/1 and 5/2 respectively.

25. In a reply to cross-examination the P.M. done doctor in his testimony emphatically states that he found only two injuries in the person of the victim and those were fatal injuries in nature causing profound bleeding.

26. The last witness of this case, the witness No.8 is the investigation officer Sub-inspector Abdul Majid. The investigation officer in his testimony stated that on 11.12.2001 he was serving in Austagram police station and the FIR was recorded by the charge officer and thereafter he was entrusted investigation of the case and after taking investigation he prepared the inquest report of the dead body and sent the dead body for postmortem to hospital morgue. He visited the place of occurrence, prepared sketch map and index which are marked as Exhibits-6 and 7 respectively. He identified his signatures therein which has been marked as Exhibits-6(1) and 7(1) respectively. The investigation officer further testified that during his investigation he seized the incriminating weapon of this case which is a knife and thereafter he prepared a seizure list which is marked as Exhibit-3/2. On 14.12.2001 he seized a red colored charger torch light and an ordinary torch light which is used by batteries and a charger light. He also prepared seizure list of these articles. This witness identified his signature in this seizure list dated 14.12.2001 which is Exhibit-4/2. P.W.8 further testified that during his investigation of the case he examined the witnesses under section 161 of the Code of Criminal Procedure and recorded their statements thereunder and tried to apprehend the absconding accused but failed and after his investigation charge under sections 147/148/149/302/114/34 of the Penal Code as was proved he submitted the charge sheet No.13 dated 18.03.2002 thereunder.

27. From the side of the defence the investigation officer was cross-examined and during cross-examination he denied the suggestion put before him that his investigation is perfunctory. In a reply to a question during cross-examination this witness testified that he recorded statements of 13 witnesses and prior to that the inquest report of the dead body was prepared by him and in that inquest report there are as many as nine witnesses. This witness also denied the suggestion of the defence that the witnesses who were examined by him during investigation did not state anything supporting the case of the prosecution.

28. Scrutinizing the case records we find that the learned trial court after examining the witnesses examined the presentee accused persons under section 342 of the Code of Criminal Procedure and during their examination the learned trial judge viz. Additional Sessions Judge, Kishoreganj brought attention of the accused on the relevant incriminating evidence against them which were produced from the side of the prosecution to substantiate their case. The learned Judge rightly on due appreciation of law has drawn attention of the evidence led against the accused persons during their examination under section 342 of the Code of Criminal Procedure and thereafter recorded the reply of the accused.

29. Analyzing the evidence of the witnesses it appears that, here in this case; the prosecution to establish their case examined as many as eight witnesses and out of them there are three eye-witnesses of the occurrence. The witness No.2 Abul Kashem, the witness No.4 Neel Mia and the witness No.5 Md. Mosaheed are the eye-witnesses of the occurrence in presence of whom the occurrence was held on the date, at the place and in the manner as stated from the side of the prosecution.

30. On perusal of the connected papers it further transpires that among these three eye witnesses the witness No.2 Abul Kashem is a very dependable, competent & trustworthy, who from the very beginning of the occurrence accompanied the deceased Abdus Samed and his evidence in respect of the occurrence is very substantive which has corroborated the ejahar in toto lodged by the informant. It is to be mentioned here that the witnesses produced were thoroughly cross-examined from the side of the defence but except some minor discrepancies there is no such fatal contradiction, omission or discrepancy by which it can be held that the witnesses are tutored or otherwise managed. The credible witness of this case (Witness No.2) Abul Kashem who has direct knowledge about the occurrence proved the direct participation of the condemned-convicts Mir Ahmed Hossain and Mir Moinul Hossain in the killing of victim Abdus Samed beyond all shadow of doubt.

31. In this context; it has been argued from the side of the state defence counsel that inasmuch as the eye-witness of the occurrence is relation he cannot be relied on.

32. With respect to the said submission we have every reason to differ with the opinion passed by the learned State defence counsel as on mere relationship the credibility or evidentiary value of a witness cannot be discarded if it is proved that he is trustworthy and the evidence is unimpeachable. The learned Assistant Attorney General on this ground referred a decision of our Apex Court reported in 9 BLC(AD)122 wherein their lordships held that the law is now settled that mere relationship of the witness or relationship with the victim do not make him unreliable or, in other words such evidence cannot be treated as not worthy of consideration. The

court can very much rely on the evidence of a witness who is related to the victim or to other witnesses if the witness is considered by the Court reliable and that evidence of the witness is corroborated by other reliable witnesses. Besides this; in the case laws reported in 38 DLR(AD) 311 and 29 DLR(SC)211, it is a decided matter that the case of prosecution does not depend on the number of witnesses produced but it can depend upon a single witness whose evidence (testimony) is trustworthy, credible and unimpeachable. Therefore, obviously we can easily draw such inference in this matter that the case of the prosecution can stand very much on a single evidence if it is tangible and credible. Here in this case; evidence of the prosecution both oral, documentary and circumstantial as well as dying declaration of the deceased and absconsion of the condemned-convicts from the very beginning of the case can easily be treated unimpeachable and conclusive in nature. Evaluating the evidence adduced from the side of the prosecution we find that these are sufficient as to proving the place of occurrence, time of occurrence and manner of occurrence and are conclusive and corroborative in nature which has been rightly and legally appreciated by the learned trial judge.

33. Be that as it may; we have the reason to inclined such a view that the prosecution in this case has been able to bring home the charge under section 302 of the Penal Code against the condemned-persons namely Mir Ahmed (absconding) and Mir Moinul Hussain (absconding). It is true that all the witnesses cited in the charge sheet were not examined by the prosecution even then we find that section 134 of the Evidence Act does not impose a duty upon the prosecution to examine all the witnesses cited in the charge sheet. Court can convict an accused on the evidence of a single witness if his testimony is believed. Furthermore, besides the oral evidence we have come across that a oral dying declaration is coming from the mouth of the victim at the time of his taking last breath when he was about to die. At that moment the deceased told about his fatal injuries which were done by these condemned two convicted persons under this death reference and with regard to this the witnesses No. 2, 3 and 5 gave direct evidence in their deposition stating that the deceased Abdus Samed before his death disclosed the names of the condemned-convicts who inflicted fatal blows to his person mentioning the names of condemned-convict Ahmed Hossain who dealt with a knife blow to the left portion of Samed's abdomen and after receiving that wound while Abdus Samed fell down the other condemned convict Moinul Hossain inflicted '*kiris'* blow beneath the left armpit and the above mentioned two injuries are the cause of death of the victim which were fatal in nature as per P.M. report (Exhibit-5). In this regard; the concerned medical officer who did the autopsy of the deceased testified before the court that the said injuries are the cause of death which is in their opinion anti mortem and homicidal in nature.

34. Having regard to the findings and discussions made above and in the facts, circumstances of the case we are of the view that the prosecution has been able to prove the case beyond all reasonable doubt and as such the impugned judgment and order should be sustained. No doubt; the heinous offence as stated above was committed and fierceness with which it was perpetrated by the condemned-convicts with a pre-planed manner and way is shocking to the conscious of everybody and as such we find nothing in this facts and circumstance of the case specially on the above mentioned legal evidence of the case to interfere with the conviction and sentence of death penalty as imposed upon the condemned-convicts under this Reference by the learned Additional Sessions Judge, Kishoreganj. We have found nothing in the circumstances of the case and in the conduct of the condemned convicted persons to take lenient view in the matter of the sentence despite our best concern to temper justice with mercy.

35. Considering all aspects of the matter we are obliged under the law to sustain the order of conviction and sentence.

36. In the result, the Death Reference No.36 of 2010 is accepted.

37. Let the Death Sentence of the condemned-convicts namely (1) Mir Ahmed Hossain (absconding), son of Mir Nabi Hossain and (2) Mir Moinul Hossain (absconding), son of late Mir Mamud Hossain be executed after their arrest/surrender in accordance with law and the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Kishoreganj.

38. Send down the lower Court's records at once along with the copy of this judgment to the court concerned immediately for information and necessary action.

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1 SCOB [2015] HCD 52

HIGH COURT DIVISION
(Criminal Revisional Jurisdiction)

Criminal Revision No. 906 of 2010 with
Criminal Revision No. 907 of 2010 with
Criminal Revision No. 908 of 2010 and
Criminal Revision No. 909 of 2010

Md. Zakir Hussain
.... Convict-petitioner.
-Versus-
Md. Jalal Khan and another
....Opposite-parties.

Mr. A.K.M. Shamsuddin with
Mr. Md. Abu Kawser, Advocates
…….For the convict-petitioner.

Mr. Saleh Ahmed Patwary, Advocate
……For the Opposite-Party No.1
Mr. Abdullah Al Mamun, D.A.G.
…….For the State (Opposite-Party No. 2).

Heard on 22.04.2015, 24.04.2015 and 13.05.2015
Judgment on 21.05.2015.

Present
Mr. Justice Abu Bakar Siddiquee.

Corroboration of evidence:
Where bitter enmity in between the parties is admitted some sort of corroboration of the evidence of interested witnesses is required as a rule of prudence. ...(Para 33)

Presumption against prosecution:
The prosecution withheld those witnesses who are the other neighbours and the security guard etc. Non-examination of those material witnesses who were able to corroborate the D.W-1, raises a presumption against prosecution that had they been examined in the case, they would not have supported the defence case and benefit of such defect will go the prosecution. ...(Para 34)

Negotiable Instruments Act, 1881
Subsection (1) of the Section 138:

A plain reading of subsection (1) of the Section 138 of the Act, 1881 shows that an offence under this section shall be deemed to have been committed, the moment a cheque drawn by a person on an account maintained by him with a bank for payment of any amount of money to another person from out of that account is bounced by the bank unpaid on any of the grounds mentioned therein. Sub-section (1) of section 138 has not made any qualification of the cheque so returned unpaid either post dated given as a security for repayment of the money as alleged by the accused or any other cheque issued by the drawer from encashment currently. The legislature has not made any difference between a post dated cheque issued as security and a cheque issued for encashment currently. I do not see any scope of making any such difference. ...(Para 42)

Judgment

Abu Bakar Siddiquee, J.

1. These four rules have been issued at the instance of the same convict-petitioner in four separate criminal revisions for issuing four separate cheques by him. These four Criminal Revisions are taken up together for analogous hearing for the purposes convenience and brevity. The term of four rules are almost similar and same which is as follows:-

2. These four separate Rules were issued calling upon the opposite-party to show cause as to why the impugned judgment and order of conviction dated 22.06.2010 passed by the learned Sessions Judge, Comilla in Criminal Appeal No. 86/2010 affirming the judgment and order dated 13.10.2010 passed by the learned Joint Sessions Judge, 1st Court, Comilla in Sessions Case No. 299 of 2006 arising out of C.R. Case No. 138/2006 convicting the accused petitioner under section 138 of the Negotiable Instrument Act, 1881 and sentencing him thereunder to suffer simple imprisonment for 1(One) year and also to pay a fine of taka 2,00,000/- should not be set aside and/or such other order or further order or orders passed as to this Court may deem fit and proper.

3. The prosecution cases of those four criminal cases are also similar and directed against four separate judgments which may briefly be stated as follows:-

One Md. Jalal Khan lodged the petition of complaint against the convict-petitioner before the Magistrate, 1st Class, Court No.1, comilla as complainant alleging *inter-alia* that convict -petitioner Md. Zakir Hussain and D.W-2 Abdus Salam Kachi are known to him who rendering their manpower business conjointly and took a tune of taka 4(four) lac from him with a promise to sent him to Taiwan. It has been further alleged that on a subsequent date said Abdus Salam Kachi executed an agreement in favour of complainant on 25.11.2005 at about 9-00 A.M with a stipulation that he will repay the entire amount if they failed to send him in abroad and subsequently as per terms of such agreement the convict-petitioner executed and issued four separate cheques with a view to secure such amount. It has been also alleged that subsequently the convict-petitioner and D.W-2 failed to send the complainant in abroad in due time and as per terms of said agreement. The complainant(O.P-1) presented the cheque before the relevant bank on 03.04.2006 for encashment but the said cheques were bounced due to insufficient of fund on the same day. It has been also alleged that the complainant served a legal notice upon the convict-petitioner with a request to repay the same but the convict-petitioner did not pay the same. Thus, the complainant (O.P-1) filed the case for commission of offence punishable under section 138 of the Negotiable Instruments Act, 1881.

4. On receipt of the petition of complaint, the learned Magistrate examined the complainant (O.P-1) and issued process against the accused-petitioner who appeared before the Court and obtained bail.

5. Thereafter the case record has been transmitted to the Sessions Judge, Comilla for trial who after taking cognizance of the offence transferred the case record to the Joint Sessions Judge, 1st Court, Comilla. The learned trial Court on receipt of the record has framed a formal charge against the accused-petitioner after observing all the necessary formalities and read over the same to him whereupon he pleaded not guilty of the offence and claimed to be tried.

6. Thereafter the prosecution adduced as many as 2(two) witnesses in order to prove the charge. On the other hand, the defence examined 5(five) witnesses as D.Ws.

7. On closer of the evidence, the accused-petitioner has been examined under section 342 of the Code of Criminal Procedure whereupon they abjured his guilt.

8. On conclusion of the trial, the learned trial Court found the convict-petitioner guilty of the offence and attributed the order of conviction and sentence as stated above.

9. Against the said order of conviction and sentence, the convict-petitioner preferred these four appeal before the learned Sessions Judge, Comilla who after admitting such appeal allowed the convict-petitioner to go on bail. Subsequently the appeal has been heard and dismissed by the learned Sessions Judge, Comilla.

10. Being aggrieved by and dissatisfied with the aforesaid judgment and order of conviction, the convict-petitioner preferred these revisional applications before this Court and obtained the present Rule.

11. Mr. A.K.M. Shamsuddin, the learned Advocate appearing on behalf of the convict-petitioner strenuously argued that both the Courts below failed to appreciate the evidence on record and also failed to consider the fact that the convict-petitioner was taken away forcively by the RAB personnel from his house and was constraint to put his signature on those cheques under proper examination the RAB personnel and as such the complainant was not at all a holder thereof in due course. He further adds that the prosecution was failed to prove its case by the reasonable doubt on adducing proper evidence.

12. On the other hand, Mr. Saleh Ahmed Patwary, the learned Advocate appearing on behalf of the Respondent No. 1 submits that all the formalities regarding an offence punishable under section 138 of the Negotiable Instrument Act, 1881 have been complied with duly and as such both the Courts below have rightly attributed the order of conviction and sentence which is liable to be affirmed.

13. Mr. Abdullah Al Mamun, learned Deputy Attorney General appearing on behalf of the Respondent No.2, supported the argument advanced by the learned Advocate for the Respondent No.1.

14. I have heard the learned Advocates for both the parties and perused the materials on record.

15. Let me proceed to examine the evidence on record with a view to testy the veracity of their testimonies.

16. P.W-1 Jalal Khan is the complainant of this case. He deposed that on 25.11.2005 the occurrence had been taken place in his house and D.W-2 Abdus Salam Kachi came to his house on that day and proposed to send him or his younger brother in abroad in lieu of a tune of taka 4,00,000/-. He further deposed that with a view to secure such money the convict-petitioner issued four cheques. He also deposed that subsequently the convict-petitioner failed to send his younger brother in abroad and as a result of which he presented the cheques before the relevant bank for encashment but the same has been bounced on the same day due to insufficient of fund. Thereafter he deposed that he was compelled to issue a legal notice which has been received by him but he did not pay, any heed to it. He produced the cheques in question and legal notices along with postal receipt. He also produced the bounced slips. Thereafter he prays for taking necessity action against the convict-petitioner.

17. In course of cross-examination, it is admitted by him that he filed as many as 4 cases against four cheques. It is admitted by him that he petition of complaint has been written as per his instruction and he failed to avert there as to whether the convict-petitioner took money from him on which date. He further admitted that he has no knowledge about the agreement and he does not know as to who executed the agreement. He also deposed that the convict-petitioner lodged separate F.I.R for recovery of those cheques. He denied the suggestion put to him during the course of cross examination.

18. P.W-2 Billal Khan deposed that both the parties are known to him and on 25.11.2005 at about 9-00 A.M he was present at the drawing room of the complainant (O.P-1) Jalal Khan along with Billal, Sadek, Liaqot, Mamun etc. Thereafter he deposed that the convict-petitioner Md. Zakir Hussain rushed there and issued cheques in their presence with a view to secure the debt.

19. In course of cross-examination, it is admitted by him that he was not well acquainted with accused-petitioner Md. Zakir Hussain. It is also admitted by him that he cannot say as to whether aforesaid convict-petitioner Md. Zakir Hussain filed any case against the P.W-1 Jalal Khan. Thereafter it is admitted by him that he is a driver and attached to RAB as driver. He also admitted that there are many elite person in their locality. He denied the fact that the fact of execution of those cheques by the convict-petitioner Md. Zakir Hussain in the drawing room in the Jalal Khan is a myth and concocted history. He denied the suggestion put to him during the course of cross examination.

20. After examination of the P.Ws, the convict-petitioner has been examined under section 342 of Code of Criminal Procedure wherein he proposed to adduce D.W in this case and accordingly as many as 5 D.Ws has been examined.

21. D.W-1 Kaikobad Sarker deposed that the accused Md. Zakir Hussain is personally known to him and his is his close neighbor. Thereafter he deposed that on 23.11.2005 at about 11-00/11-30 A.M, he came out from his house on hearing hue and cry and saw that some RAB personnel were applying force upon the accused Md. Zakir Hussain for entering into their jeep. Thereafter he deposed that those RAB personnel took the convict-petitioner Md. Zakir Hussain away. Thereafter he deposed that he came to know that the RAB personnel took him to their Feni camp and compelled him to execute some cheques along with an agreement.

22. In course of cross examination, it is admitted by him that convict-petitioner Md. Zakir Hussain has begot two sons and a wife and his residence is by the side of a market wherein as many as 20/30 shops are situated. It is further admitted by him that at the time of taking his away, he alone was present there and none else was present. Thereafter he deposed that he has heard the fact of lodging a G.D against Jalal Khan and Abdus Salam Kachi but he cannot remember the date and number of aforesaid GDE. It is also admitted by him that he cannot say as to whether is there any avertment in the F.I.R of another case under section 98 of the Code of Criminal procedure as to the fact of taking him away by the RAB personnel. It is also admitted by him that he

cannot say as to whether there is any avertment of such taking away by the RAB personnel in the reply of legal notice. He denied the suggestion put to him during the courser of cross examination.

23. D.W-2 Abdus Salam Kachi deposed that the accused petitioner Md. Zakir Hussain is known to him. He further deposed that he along with Zakir Hussain never took any money from the complainant for the purpose of sending any man in abroad. He also deposed that he never execute any agreement against realization of money from the complainant for sending his younger brother in abroad. Thereafter he deposed that the RAB personnel took away the convict-petitioner Md. Zakir Hussain to their camp at Chowmohoni and the RAB personnel compelled him to execute some cheques. He also deposed that that the RAB personnel threatened him to put him in cross-fire and on putting such pressure, they were able to took signature on those cheques along with an agreement.

24. In course of cross examination, it is admitted by him that he is a resident of Dhaka city. He also deposed that the RAB personnel never arrested him and he never went to the RAB Camp. He also deposed that he cannot say what is the rank and status of commander Quddus. It is also admitted by him that he never filed any case or against the RAB personnel in connection of fact of alleged exerting pressure and able to execute the cheques by the convict-petitioner Md. Zakir Hussain and he never informed the matter to the higher authority of RAB personnel. Thereafter it is admitted by him that he has not taken any legal action against the RAB personnel for exerting the pressure upon the convict-petitioner Md. Zakir Hussain. He denied the suggestion put to him during the course of cross examination.

25. D.W-3, Akter Hossain deposed that the convict-petitioner is known to him who is his brother-in-law. Thereafter he deposed that he knew the complainant Md. Jalal Khan whenever convict-petitioner Md. Zakir Hussain was taken to RAB camp at Choumohoni. Thereafter he deposed that convict-petitioner Md. Zakir Hussain is being supplied food to his business institution and an allegation was arose in between them about the fact of supplying such food. Thereafter he deposed that on 23.11.2005 at about midnight the RAB personnel took the convict-petitioner Md. Zakir Hussain to their camp. Thereafter he deposed that he had heard such news over telephone and rushed to the house of convict-petitioner Md. Zakir Hussain wherein he saw RAB personnel. He also deposed that wife of Zakir Hussain informed him about such news. Thereafter he deposed that next morning they communicated with the RAB personnel at Choumohoni Camp and he himself went to that camp along with his brother-in-laws wherein he found that the complainant and one Ismail were present there and he also found a person who wrote out on agreement and thereafter the RAB personnel insisted them to execute those written stamps paper and they were compelled to execute the stamp paper for the fear of cross fire. He also deposed that the aforesaid stamp papers are now available in court's file and there is his signature on those stamp papers and his brother-in-law also was compelled to execute the same in the same compulsion. He further deposed that they were able to rescue the convict-petitioner on execution of those papers. He further deposed that that the RAB personnel threatened them and resisted them to lodge information in elsewhere including the police station and they also insisted them to deposit aforesaid money in the account of the complainant. He finally deposed that all those occurrence are taken place in Feni and Chowmohoni.

26. In course of cross examination, it is admitted by him that accused-petitioner is his brother-in-law and he was taken to custody in a case instituted by the complainant. Thereafter it is admitted by him that they lodged no GDE stating the fact of apprehension of the accused by the RAB personnel. Thereafter he deposed that he knew about the fact of GDE lodged by the accused persons against the complainant for the first time when he came forward before the Court with a view to depose in this case, but he cannot say about he recital of such GDE and that he cannot say as to whether there was any averment regarding apprehension of the accused by the RAB personnel in the repay to the legal notice. It is also admitted by him that he or his brother in law made no allegation regarding apprehension by the RAB personnel. He denied the suggestion put to him during the course of cross examination.

27. D.W-4 Meheraj Hossain deposed that both the parties are known to him and he saw the complainant Md. Jalal Khan in the RAB office at Choumohoni for the first time. Thereafter he deposed that convict-petitioner Md. Zakir Hussain is his brother-in-law and on 23.11.2005 at about 11-30 P.M. his sister informed him that some RAB personnel came to their house and took away his brother-in-law (convict-petitioner) to their Camp. Thereafter he deposed that at one point of time RAB personnel called them to appear before them at

Choumohoni Camp. Thereafter he deposed that on 24.11.2005 they went to RAB Camp at Choumohoni and saw the complainant and one Ismail to sit there. He also deposed that RAB personnel namely Abdul Quddus and Abdus Salam called them and asked to execute two separate stamp papers wherein he and Akter put their signature at the behest of RAB personnel and they obtained those signatures under threat and coercion. Thereafter he deposed that the RAB personnel disclosed the fact that they will be released the convict-petitioner whenever the convict-petitioner will bring his cheque book and soon after execution of the cheque. Thereafter he deposed that they brought the cheque book and convict-petitioner Md. Zakir Hussain put his signature on four cheques under pressure and threat of the RAB personnel who also took their photos.

28. In course of cross examination, it is admitted by him that convict-petitioner Md. Zakir Hussain is his brother-in-law who was taken by the RAB personnel and also released after execution of stamp paper and cheques but they made no allegation about such threat and pressure in anywhere. He also deposed that they made no allegation against the RAB personnel to their higher authority. He cannot say as to whether there was any avertment in the reply of legal notice as to the fact of exertion of pressure upon the convict-petitioner and execution of cheque under such pressure. He denied the suggestion put to him during the course of cross examination.

29. D.W-5 Md. Salim Khan deposed that the accused-petitioner is known to him and he is the close neighbor of the convict-petitioner. He further deposed that on 23.11.2005 at about mid-night he found some RAB personnel to stoke their jeep by the side of the convict-petitioner's house and also found some RAB personnel to enter in the house of the convict-petitioner who apprehended the convict-petitioner and took away him to their camp. Thereafter he deposed that he inquired about the matter and came to know that the convict-petitioner Md. Zakir Hussain had a dispute as against his business partner and as such RAB personnel took him away in the instance of the complainant. He further deposed that he came to know that RAB personnel took signature upon cheque and agreement on exerting pressure.

30. In course of cross examination, it is admitted by him that convict-petitioner Md. Zakir Hussain is not a voter in his ward and he has been residing in his house. Thereafter he deposed that he entered into the house of convict-petitioner Md. Zakir Hussain and asked the wife of Md. Zakir Hussain about he cause of apprehension. Thereafter he deposed that he has not informed the matter in local police camp or the police station. He further deposed that he cannot say as to whether convict-petitioner Md. Zakir Hussain lodged the case of GDE against the complainant and Ismail. He further deposed that he cannot say as to whether the complainant and his partyman exerted the pressure upon Abdus Salam and Ismail. He cannot say as to whether there was any avertment regarding such apprehension by RAB in the reply to the legal notice. He denied the suggestion put to him during the course of cross examination.

31. On perusal of the evidence of the P.W. 1 and 2, it appears that the convict-petitioner issued such security cheques after entering into an agreement of sending the complainant in abroad in lieu of such cheques money on condition to the effect that in case of any failure, the complainant would be at liberty to encash the money from the relevant Bank. It further appears that the cheques in question were issued on sitting in the drawing room of the complainant in presence of the P.W-2 and others. On the other hand, the defence denied such fact and counter claimed that the complainant being the muscle man took away the convict-petitioner to the RAB Office with the help of RAB personnel and compelled him to execute the cheques and the agreement by exerting pressure upon him. On perusal of the claim and counter claim, it appears that the execution of those cheques is an admitted fact. Now it is the defence who is to prove the under what fact and circumstance he put signature on those cheques. The defence in order to prove such fact has set out a long avertment regarding execution of cheques as defence case.

32. Let me proceed to examine the evidence on record and see therefrom as to howfar the defence has been able to prove the defence case of exerting pressure by the RAB personnel and thereby compelled the convict-petitioner to put his signature on those cheques.

33. The convict-petitioner has adduced five witnesses with a view to prove his aforementioned defence case that he was taken to the RAB Camp wherein he was forced to execute the disputed cheques and agreement. The D.W-1 Kaikobad Sarker and D.W-5 Selim Khan are the close neighbor of the convict-petitioner. D.W-2 Abdus

Salam Kachi and D.W-3 Akter Hossain are the brother-in-law of the convict-petitioner and P.W-2 is business partner of the convict-petitioner and signatory of the agreement. Thus all those witnesses are interested and interrelated. It is a settled proposition that where bitter enmity in between the parties is admitted some sort of corroboration of the evidence of interested witnesses is required as a rule of prudence. Let me now proceed to see asto how far those witnesses are able corroborated each other on material particulars.

34. Only the D.W-1 Kaikobad Sarker came before the Court to depose that he saw the occurrence of taking away of the convict-petitioner by the RAB personnel. He also deposed that he was the only eyewitness of that fact and none else was present there. None else has come forward to corroborate him on this material point. It is admitted by the D.W-1 that there are a plenty of people who are living and working in the house and shops around the spot house of the convict. It was possible on their part to rush in the spot soon after hearing hue and cry as has been heard by the D.W-1. Thus his statement regarding absence of others at that time is unworthy of trust since it was possible to present some person on hearing hue and cry. He deposed that he heard the hue and cry and came out from his house and saw the occurrence but as per his version none else have heard the hue and cry all though there are hundreds of peoples around the house of the convict-petitioner as has been alleged. The prosecution withheld those witnesses who are the other neighbours and the security guard etc. Non-examination of those material witnesses who were able to corroborate the D.W-1, raises a presumption against prosecution that had they been examined in the case, they would not have supported the defence case and benefit of such defect will go the prosecution.

35. The alleged fact of taking away the convict-petitioner by RAB personnel was taken place on 13.11.2005 at about 11-00 P.M. The convict-petitioner filed a case under section 98 of the Cr.P.C for recovery of those cheques from the custody of the complainant on 25.04.2006. The recital of the aforementioned petition of complaint shows that there is no avertment asto the fact of taking away of the convict-petitioner by the RAB personnel. The convict-petitioner sent a reply on 10.08.2006 to the legal notice duly issued by the complainant. The convict-petitioner also lodged a G.D.E on 04.02.2006 but the fact of taking away by RAB personnel is totally absent in those documents as has been executed by the convict-petitioner from time to time. On perusal of the those document, it appears that all those documents have been executed by the convict-petitioner after the alleged fact of his taking away by RAB personnel but he instead of averting the fact of his taking away by the RAB personnel, he has asserted otherwise. Having considered those fact circumstances and materials on record, I am of the opinion that the convict-petitioner failed to prove their defence plea which appears to be as subsequent embellishment and unworthy of trust.

36. However, I have gone through both the Judgment of the Courts below and seen that both of them have arrived at concurrent finding and same decision regarding such fact. The fact of taking away of the convict-petitioner by RAB personnel is a matter of fact and both the Courts being the Courts of fact have arrived at a concurrent decision regarding such aspect of fact. On perusal of the aforementioned position of evidence, I find that there is no scope to interfere with the concurrent finding of the Courts below.

37. Now the learned Advocate appearing on behalf of the convict-petitioner strenuously argued that the cheques in question are seriously hit by the section 9, 43, 58 of the Negotiable Instrument Act. He adds that by taking a defective cheque, a transferee does not become a holder for value. He further argued that to constitute a person a holder in due course, it is necessary that he must be a holder for consideration and that the instrument must have been transferred to him before it became payable and also that he must be a transferee in good faith.

38. Now the question that falls for determination is whether the cheques in question were obtained by exerting pressure and tainted by fraud or not. But I have already seen that the defence side already failed to prove their case of exerting pressure and unholy influence in course of execution of those cheques. I have also seen that after execution of those cheques the convict-petitioner filed a series of cases and furnished the reply to the legal notice. But no where in those document, he made any statement stipulating the name and designation of the RAB. On the contrary it is evident of those cheques in question were being executed by the convict on sitting in the drawing room of the complainant-respondent no.1.

39. Not only that it has been admitted by the D.W-3 & 4 that they took no recourse of any law enforce or the higher authority of RAB with a view to redress their grievances although they have admitted that they put

their signatures on the agreement. I have already opined that those belated discloser in this case for the first time are nothing but subsequent embellishment which are unworthy of trust. Not only that the convict-petitioner neither averted this plea of barring the case under section 9, 43, 58 in Courts below nor he took such ground in the present memo of appeal.

40. The Prosecution has come with an allegation that the Zakir Khan and A. Salam (Kochi) are two business partner who have got manpower business and the cheques in questions are the security cheques. The agreement in between complainant and Abdus Salam Kochi was signed with a definite stipulation that if Abdus Salam Kochi failed to take the complainant in abroad in that case the complainant will be entitled to enchase the cheques as executed and issued by Zakir Hussain, one of the business partner of Abdus Salam Kochi. The complainant while deposing as P.W-1 stated that in case of failure to take him in abroad, the complainant is entitled to have the cheque money enchased. The P.W-2 Billal Khan corroborated to the effect that Zakir Khan executed the cheques in question on sitting in the drawing room of the complainant with a view to secure the money which has been taken against the agreement. Thus, the prosecution has able to prove the fact of issuing cheques by adducing corroborative evidence. Both the courts of fact have arrived at a concurrent view that the convict-petitioner has failed to prove the fact of taking the convict away to the RAB office and also the fact of execution of the cheques there and taking signature of agreement. Since the Courts of facts endorse the same view and since the shifting of evidence create no adverse situations, I have no other alternative but to agree with them.

41. Now the learned Advocate appearing on behalf of the convict-petitioner strenuously argued that the security cheques do not fall within the mischief of the section 138 of the Negotiable Instrument Act.

42. A plain reading of subsection (1) of the Section 138 of the Act, 1881 shows that an offence under this section shall be deemed to have been committed, the moment a cheque drawn by a person on an account maintained by him with a bank for payment of any amount of money to another person from out of that account is bounced by the bank unpaid on any of the grounds mentioned therein. Sub-section (1) of section 138 has not made any qualification of the cheque so returned unpaid either post dated given as a security for repayment of the money as alleged by the accused or any other cheque issued by the drawer from encashment currently. The legislature has not made any difference between a post dated cheque issued as security and a cheque issued for encashment currently. I do not see any scope of making any such difference.

43. The offence under this section can be completed with the concentration of a number of facts i.e (i) drawing the cheque (ii) presentation of the cheque (iii) dishonouring of the cheque unpaid by the drawee bank (iv) giving legal notice in writing to the drawer of the cheque demanding payment of the cheque amount and (v) failure to the drawer to make payment within 15 days of receipt of the notice.

44. By no logic, it can be said that the drawer of the cheque does not know the consequence if a cheque is return unpaid for the reasons as provided in subsection (i) of the section 138 of the Negotiable Instrument Act, 1881.

45. In the instant case, the subject matter is the dishonor of the cheques issued by the convict-petitioner in favour of the complainant which clearly comes within the mischief of this section 138 of the Negotiable Instrument Act, since all the aforementioned paints fall for determinations have been duly completed and complied with as it appears from the record. The Courts below took the right view on the point of fact of the case. I further endorse their views and as such there is no scope to interfere with the order of conviction and sentence. Accordingly, all those rules are liable to be discharged.

46. In the result, these four Rules are hereby discharged.

47. The impugned Judgment and order of conviction and sentence is hereby affirmed.

48. The convict-petitioner is directed to surrender before the trial Court within 30(thirty) days from the date of receipt of this judgment, failing which, the Court below is directed to take necessary action for realizing the amount in accordance with law.

49. Let a copy of this judgment along with L.C.R. be sent to the concerned Court at once.

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1 SCOB [2015] HCD 59

HIGH COURT DIVISION
(Criminal Appellate Jurisdiction)

Criminal Appeal No. 4103 of 2012

Md. Muslim Uddin and another
... Convict-Appellants
-Vs-
The State
... Respondent

Mr. Prabir Halder
... For the Appellants
Md. Moniruzzaman (Rubel), D.A.G with
Mr. Md. Abdul Bari, A.A.G with
Md. Abul Kalam Azad Khan, A.A.G
... For the State

Heard on 16.03.2015, 10.05.2015, 12.05.2015, 13.05.2015, 19.05.2015, 20.05.2015 and Judgment on 26.05.2015.

Bench:
Justice Md. Abdul Hye
And
Justice Krishna Debnath

Penal Code, 1860:
Section 304 Part II
Prosecution failed to prove any motive, pre-meditation, pre-plan or any conspiracy on the part of accused-appellant Muslim to kill victim Rajibul. In the absence of any motive, conspiracy, pre-plan or pre-meditation on the part of accused-appellant Muslim while inflicting injuries resulting the death of the victim 7 days after the occurrence, we find that the accused-appellant Muslim had no intention to commit murder but he committed the offence of culpable homicide not amounting to murder. ...(23)

Judgment

Krishna Debnath, J:

1. This Criminal Appeal is directed against the judgment and order of conviction and sentence dated 03.06.2012 passed by the learned Sessions Judge, Panchagarh, in Sessions Case No. 58 of 2010 arising out of Panchagarh Police Station Case No. 13 dated 19.09.2009 corresponding to G.R Case No. 196 of 2009, convicting the appellants under Sections 302/114/34 of the Penal Code and sentencing them to suffer rigorous imprisonment for life and to pay a fine of Taka 10,000/- (ten thousand) each in default to suffer rigorous imprisonment for 4 (four) months more.

2. The case of the Prosecution in brief, is that on 12.09.2009 at about 8.30 p.m. Rajibul Islam heard shouting from his neighbouring house of Farid and found that the accused persons were beating Fulbanu, wife of Farid. Rajibul Islam tried to quiet them by saying to settle the matter after Tarabi prayer. But accused-appellant Taslim Uddin became furious and ordered to kill Rajibul Islam. At that time accused-appellant Muslim Uddin inflicted Ramdao blow on the head of Rajibul Islam, causing injury to the left side of the head. Injured Rajibul Islam was taken to Panchagarh Hospital and the Doctor of Panchagarh Hospital referred him to Rangpur Medical College Hospital where victim Rajibul Islam succumbed to his injuries on 18.09.2009.

3. Md. Sahirul Islam, nephew of the deceased, lodged First Information Report with Panchagarh Police Station. After investigation of the Case, Investigating Officer submitted charge sheet against the convict-appellants and others under Section 143/448/323/302/114/34 of the Penal Code. After observing legal formalities the case record was transferred to the Sessions Judge, Panchagarh. Sessions Judge, Panchagarh, took cognizance of offence and framed charge against the accused-appellants and others under Section 302/114/34 of the Penal Code. The charge was read over and explained to the convict-appellants and others to which they pleaded not guilty and claimed to be tried.

4. Prosecution examined 12 witnesses in support of the case but the Defence examined none. Learned Trial Court on consideration of the evidence on record, convicted and sentenced the accused-appellants as aforesaid.

5. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence dated 03.06.2012 the accused-appellants preferred this appeal.

6. In this appeal only point for determination is whether the learned Judge was justified in passing the impugned judgment.

7. P.W- 1 Shahirul Islam stated that, on 12.09.2009 at about 8.30 p.m. he heard shouting in the house of Farid. He went there and found that the accused-persons were beating Fulbanu, wife of Farid. He further stated that Rajibul Islam tried to quiet them and told them to settle the matter after Tarabi prayer. But accused-appellant Taslim Uddin became furious and told " শালাকে ধর". At that time accused Muslim Uddin inflicted Ramdao blow on the head of Rajibul Islam. Rajibul Islam being injured, fell down on the ground. Rajibul Islam was taken to Panchagarh Hospital and then to Rangpur Medical College Hospital where he succumbed to his injuries on 18.09.2009. He lodged First Information Report which is marked Exhibit-1 and his signature is marked Exhibit-1/1. He also proved the inquest report Exhibit-2 and seizure list Exhibit-3.

8. P.W- 2 Md. Farid stated that, on 12.09.2009 at about 8.00 p.m. Rajibul came to his house to see his wife Fulbanu. At that time Taslim Uddin ordered "রাজিবুল এখানে দেওয়ানী করতে এসেছে, ওরে ধর।" Then accused Muslim inflicted Ramdao blow on the head of victim Rajibul Islam who fell down. Rajibul was carried to Panchagarh Hospital and thereafter to Rangpur Medical College Hospital where he succumbed to his injuries.

9. P.W- 3 Abdur Rahman stated that, on 12.09.2009 at about 8.00 p.m he came to the place of occurrence and found that Taslim, Muslim and other accuseds were in quarrel with his son-in-law P.W-2 Farid. At that time victim Rajibul came to that place and tried to quiet them. Taslim said that, "শালা রজিবুল তুমি দেওয়ানী হয়ে গেছ". Then accused Muslim inflicted Ramdao blow on the head of victim Rajibul. Rajibul fell down on the ground. He was carried to Panchagarh Hospital and then to Rangpur Medical College Hospital where he succumbed to his injuries.

10. P.W-4 Md. Bashir Alam stated that, a quarrel held in Farid's house between the parties on 12.09.2009 at about 8.00 p.m. Rajibul was going for Tarabi prayer and he tried to stop the quarrel by saying that the matter would be solved after Tarabi prayer. Then accused Taslim said "দেওয়ানী করছে শালা ওকে ধর". Thereafter Muslim inflicted Ramdao blow on the head of victim Rajibul. Rajibul has fallen down on the ground and he succumbed to his injuries at Hospital.

11. P.W- 5 Fulbanu stated that, a quarrel held between Sakil and her daughter Laboni. In the night again quarrel started. Taslim ordered and Muslim inflicted Dao blow on the head of Rajibul. Later on Rajibul died.

12. P.W- 6 Tahmina Akhter stated that, her husband victim Rajibul was going to Mosque for Tarabi prayer. On hearing hue and cry he went to the house of Farid. At that time Muslim inflicted Dao blow on the head of her husband victim Rajibul. Her husband Rajibul fell down on the ground. Subsequently her husband died in the hospital.

13. P.W- 7 Md. Jahirul Islam stated that, he and Rajibul were going to Mosque for Tarabi prayer. On hearing the quarrel they went to the house of Farid. Taslim said "তুমি কি দেওয়ানী মারাতে আসছো" "শালাকে ধর". At that time Muslim inflicted Dao blow on the head of Rajibul. Rajibul lost his sense.

14. P.W- 8 Tauhidul Islam stated that, there was a quarrel amongst Farid, Taslim and Muslim. Rajibul told them to settle the matter after Tarabi prayer. Taslim told "শালা দেওয়ানীগিরি করে ওকে ধর।" At that time Muslim inflicted Ramdao blow on the head of Rajibul. Rajibul fell down on the spot.

15. P.W- 9 Most. Regina stated that, on 12.09.2009 at about 8.00 p.m. victim Rajibul tried to stop the quarrel. Taslim told "ব্যাটাক ধর". Muslim inflicted *Ramdao* blow on the head of victim Rajibul.

16. P.W- 10 Md. Mahinul Islam, Sub-inspector of Police, is a formal witness. He is the Investigating Officer of the case. He stated that, during investigation he visited the place of occurrence, prepared sketch map, seizure list of the *alamat* and recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure and having found prima-facie case against the convict-appellants and others, submitted charge sheet under Section 448/323/302/114/34 of the Penal Code. He proved the sketch map as Exhibit-4, his signature thereon as Exhibit-4/1, Index as Exhibit-5, his signature thereon as Ehibit-5/1, seizure list as Exhibit-6 and his signature thereon as Exhibit-6/1 and *alamat* as Material Exhibit-I.

17. P.W- 11 Sub-Inspector of Police Md. Mizanur Rahman stated that, he received the case docket for further investigation of the case by the order of the Court. He visited the place of occurrence and gone through

the investigation report of previous Investigating Officer and submitted supplementary charge sheet under Section 143/138/323/302/114/34 of the Penal Code.

18. P.W- 12 Dr. Abdul Jalil, Associate Professor of Forensic Department, Dinajpur Medical College, stated that, on 18.09.2009 when he was attached to Rangpur Medical College Hospital, he held the Post Mortem of the dead body of deceased Rajibul Islam, and the Report is as under:-

"Incised wound found on the left parito temporal region, which was stitched up……another abrasion and bruises present in the right elbow joint.

On dissection-Left parito temporal found...few fractured, extravasations of blood and blood clotted found..."

Opinion:- as the death was due to shock and haemorrhage folling head injury which was antimortem and homicidal in nature.

In his cross-examination he replied that the hit was by a sharp weapon.

19. Mr. Prabir Halder, learned Advocate appearing on behalf of the convict-appellants place the papers and documents on record and submits that the F.I.R was lodged after 6(six) days of the occurrence. He further submits that the Prosecution failed to prove any previous plan on the part of the accused to attack the victim. He submits that there is no direct or circumstantial evidence against convict Md. Taslim Uddin that he ordered to kill victim Rajibul. On the other hand, he submits that convict- appellant Md. Muslim Uddin blew so-called *Ramdao* in absence of any conspiracy, pre-plan or pre-meditation and as such the impugned judgment and order of conviction is liable to be set-aside. Learned Advocate for the convict-appellants referred the case of Dalilur Rahman and others Vs. The State reported in 44 DLR(AD) page 379, Nibir Chandra Chowdhury and others Vs. The State, 21 BLD(AD)2001 page 121, Government of Bangladesh Vs. Siddique Ahmed 31 DLR(AD)1979 page 29, Lal Miah alias Lalu Vs. The State BCR 1988(AD) page 147.

20. Mr. Md. Moniruzzaman (Rubel), learned Deputy Attorney General with Mr. Md. Abdul Bari, learned Assistant Attorney General with Abul Kalam Azad Khan, learned Assistant Attorney General appearing on behalf of the State submit that, the learned Trial Court rightly relied upon the statements of 12 witnesses with other circumstances and arrived at a correct decision in convicting the convict-appellants.

21. Now, in view of the submission and counter submissions of the learned Deputy Attorney General and Assistant Attorney General for the State and learned Advocate for the convict-appellants as above, let us review the relevant evidence and materials on record and scan the attending circumstance of the case to arrive at a correct decision as to whether the learned Judge was justified in passing the impugned judgment and order of sentence.

22. It appears from record that P.W-1 Shahirul Islam, P.W-2 Md. Farid, P.W-3 Abdur Rahman, P.W-4 Md. Bashir Alam, P.W- 5 Fulbanu, P.W-6 Tahmina Akhter, P.W-7 Md. Jahirul Islam, P.W-8 Tauhidul Islam and P.W-9 Most. Regina in one voice stated that, at the time of occurrence accused Taslim did not order to kill Rajibul. All the aforesaid witnesses in one voice stated that, Taslim said "শালাকে ধর", " রাজিবুল এখানে দেওয়ানী করতে এসেছে, ওরে ধর", "শালা রাজিবুল তুমি দেওয়ানী হয়ে গেছ", "দেওয়ানী করছে শালা, ওকে ধর", "তুমি কি দেওয়ানী মারাতে আসছো', শালাকে ধর", "শালা দেওয়ানীগিরি করে ওকে ধর"। None of them stated that Taslim ordered to kill Rajibul. It further appears from record that convict-appellant Taslim Uddin has been implicated in this case simply as a so-called order-giver as stated above and excepting this there is no other allegation against him. We find that accused-appellant Taslim Uddin did not give any order to kill Rajibul Islam. It is unfortunate that the learned Judge awarded imprisonment for life to accused-appellant Md. Taslim Uddin without any credible evidence against him and as such accused-appellant Md. Taslim Uddin is entitled to be acquitted.

23. It appears from the record that all the witnesses in a voice stated that, accused-appellant Muslim inflicted Ramdao blow on the head of Rajibul. Death of victim Rajibul on 18.09.2009 at Rangpur Medical College Hospital for his sustaining injuries on 12.09.2009 at the house of P.W-2 Farid, is not disputed. Death of victim Rajibul has been proved by the evidence of witnesses including P.W-12 Dr. Abdul Jalil who held the Post-Mortem examination on the dead body of the victim. But 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 Muslim to kill victim Rajibul. In the absence of any motive, conspiracy, pre-plan or pre-meditation on the part of accused-appellant Muslim while inflicting injuries resulting the death of the victim 7 days after the occurrence, we find that the accused-appellant Muslim had no intention to commit murder but he committed the offence of culpable homicide not amounting to murder.

24. From the facts and circumstances of the case, evidence on record and discussions made above we are of the view that accused-appellant Muslim is guilty of the offence under Section 304 Part II of the Penal Code.

25. In the result, the appeal is **allowed in part** and appellant Md. Taslim Uddin is acquitted and the sentence of accused- appellant Muslim Uddin is altered from Section 302/34/114 of the Penal Code to that of under Section 304 part II of the Penal Code and thereby he is sentenced to 10 (ten) years rigorous imprisonment. Accused-appellant Md. Taslim Uddin be released forthwith if not wanted in connection with any other case.

26. Send down the Lower Court's Record at once along with a copy of judgment.

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1 SCOB [2015] HCD 63

HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Criminal Appeal No. 6691 of 2011
with
Criminal Appeal No. 6692 of 2011

Md. Muksedur Rahman Badal
..... Convict appellant
-Versus-

The State and another
..... Respondents

Mrs. Hosneara Begum
..... For the appellant
Mr. Md. Monwar Hossain, Advocate
….. For the respondent no.2

Heard on 20.10.2014, 21.10.2014 and 27.10.2014
Judgment on 19.11.2014 and 20.11.2014

Bench:
Justice A.N.M. Bashir Ullah

Negotiable Instruments Act, 1881
Section 118:
Unless the contrary is proved there is a presumption that every negotiable instrument was drawn for consideration, that is, the complainant of a case presumed to have got the cheque for consideration.
...(Para 50)

As the very section 118 of the N.I. Act starts with the words 'until the contrary is proved' that means the defence has the authority to prove the contrary fact of the presumption that every negotiable instrument was made or drawn for consideration in favour of the holder in due course.
...(Para 52)

In a case under section 138 of the N.I Act, the legal presumption exists in favour of the "holder in due course of the cheque" that he got the cheque for consideration and that has been ensured by the provisions of sections 9 and 118 of the N.I Act but at the same time this presumption is a rebuttable presumption. Whenever any accused leads the evidence to rebut such presumption the burden again shifts to the complainant who is the holder in due course of the chque to proof by the legal evidence that the cheque was drawn in his favour for consideration. **...(Para 68)**

Judgment

A.N.M. Bashir Ullah, J:

1. These two criminal appeals under section 410 of the Code of Criminal Procedure (in short, the Code) have been taken up jointly for disposal as the facts of the two appeals are almost similar and common with a few differences in respect of the prosecution case but the defence cases are almost similar and all the points regarding the fact and law raised by the convict-appellant in both the appeals are almost common, as such, the same are being disposed of by this single judgment.

2. Criminal Appeal no. 6691 of 2011 has been preferred by the convict appellant Md. Muksedur Rahman Badal (in short, Mr. Badal) against the judgment and order dated 04.10.2011 passed by the Metropolitan Additional Sessions Judge, 5th Court, Dhaka in Metro Session Case no. 2154 of 2007 arising out of C.R Case no. 2121 of 2007 convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 (in short, the N.I. Act) sentencing him to suffer simple imprisonment for 6(six) months with a fine of Taka 21,27,000/- (twenty one lacs twenty seven thousand).

3. The Criminal Appeal no. 6692 of 2011 has been filed by the same appellant against the judgment and order of conviction and sentence dated 04.10.2011 passed by the Metropolitan Additional Sessions Judge, 5th Court, Dhaka in Metro Session Case no. 133 of 2008 arising out of C.R Case no. 2592 of 2007 convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 sentencing him to suffer to suffer simple imprisonment for 6(six) months with a fine of Taka 8,58,000/- (eight lacs fifty eight thousand).

4. The facts relevant for the disposal of the appeal no. 6691 of 2011, in short, is that Feroz Mahmood Rasel (in short, Mr. Rasel) as complainant filed a petition of complaint in the Court of Metropolitan Magistrate, Dhaka under section 138 of the Negotiable Instruments Act, 1881 against the present appellant Mr. Badal alleging, inter-alia, that the complainant Mr. Rasel is the proprietor of Prantik Enterprise, a business firm and also a bonafide businessman. The accused in order to run his business took a loan of Taka 21,27,000/- (twenty one lacs twenty seven thousand) from the complainant on 20.04.2006. The accused in order to make payment of the said loan money drew a cheque on 26.11.2006 being cheque no. 0000441948 of his account no. 01-684 1678-01of Standard Chartered Bank, Bangladesh Ltd. The complainant in order to encash the said cheque presented the same at Sonali Bank, Amin Bazar on 02.04.2007 and the cheque was lastly dishonoured on 04.04.2007 for insufficient of fund. Thereafter, the complainant issued a legal notice on 29.04.2007 through his engaged Advocate requesting the accused for making payment of the cheque value. But the accused did not make payment pursuant to the said legal notice. Thereafter, the complainant under compelling circumstances filed the petition of complainant in the competent Court of Metropolitan Magistrate, Dhaka on 21.06.2007. The Metropolitan Magistrate, Dhaka examining the complainant Mr. Rasel under section 200 of the Code of Criminal Procedure took cognizance of the said offence by his order dated 21.06.2007 and the case was registered as Complaint Case being no. 2121 of 2007.

5. The accused appearing in the Court of Metropolitan Magistrate sought bail and he was granted bail and when the case became ready for trial the same was transmitted in the Court of Metropolitan Sessions Judge, Dhaka where the case was registered as Metropolitan Sessions Case no. 2154 of 2007 and eventually the accused was put on trial before the Metropolitan Additional Sessions Judge, 5th Court, Dhaka where charge under section 138 of the N.I. Act against the accused Mr. Badal was framed to which he pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove the charge examined one witness and submitted some papers which were marked as exhibit nos. 1-4 and on completion of recording of the evidence of the prosecution witness the accused was examined under section 342 of the Code when he repeated his innocence and expressed his desire for examining of the defence witnesses and accordingly the defence examined 5 witnesses in the case. The trial Court on consideration of the evidence and other materials on record found the appellant guilty and convicted and sentenced him as aforesaid. The convict Mr. Badal being aggrieved by and dissatisfied with the said judgment of the trial Court dated 04.10.2011 preferred Criminal Appeal no. 6691 of 2011 in this Court.

7. The facts relevant for disposal of the Criminal Appeal no. 6692 of 2011, in short, is that Md. Nadim as complainant filed a petition of complaint under section 138 of the N.I. Act against the accused Badal alleging, inter-alia, that the accused being a relative of the complainant had approached him for a loan of Taka 10,00,000/- (ten lacs) in the 1st week of January, 2006 and the complainant in responding of the said request gave Taka 8,58,000/- to him with the stipulation that he will return back the same within the month of March of the same year. Later on, the complainant Mr. Nadim asked the accused for making payment of the said loan money and last of all the accused drew a cheque on 04.12.2006 for Taka 8,58,000/- being cheque no. 0000441950 of his Standard Chartered Bank Bangladesh Ltd. The complainant Mr. Nadim presented the cheque on several occasions at Janata Bank, Elephant Road, Dhaka and lastly the same was dishonoured on 29.04.2007. Thereafter, the complainant issued a legal notice on 24.05.2007 requesting the accused Mr. Badal for making payment of the said amount and though the accused received the legal notice on 28.05.2007 but did not respond to the said legal notice and under the said compelling circumstances the complainant Mr. Nadim filed the petition of complaint on 26.07.2007 before Metropolitan Magistrate, Dhaka.

8. The Metropolitan Magistrate, Dhaka examining the complainant Mr. Nadim under section 200 of the Code took cognizance of the said offence against the accused Mr. Badal under section 138 of the N.I. Act and the case was registered as C.R Case no 2592 of 2007.

9. The accused Mr. Badal surrendering in the Court of Metropolitan Magistrate, Dhaka sought bail and he was granted the same and when the case became ready for trial the same was transmitted into the Court of Metropolitan Sessions Judge, Dhaka where the case was registered as Metropolitan Sessions Case no. 133 of 2008 and eventually the accused was put on trial before the Court of Metropolitan Additional Sessions Judge, 5th Court, Dhaka. The trial Court framed charge against the accused under section 138 of the N.I. Act to which he pleaded not guilty and claimed to be tried.

10. The prosecution in order to prove the charge examined 1 witness and submitted some papers which were marked as exhibit nos. 1-4/1 and on completion of the recording of the prosecution evidence the accused was examined under section 342 of the Code when he repeated his innocence but expressed his desire to

examine defence witnesses and ultimately the defence examined 4 witnesses in the case and submitted some papers also. The trial Court on consideration of the evidence and other materials on record found the accused Mr. Badal guilty under section 138 of the N.I. Act and convicted and sentenced him as aforesaid.

11. The convict appellant Mr.Badal being aggrieved by and dissatisfied with the judgment of the trial Court dated 04.10.2011 preferred the appeal being no 6692 of 2011 in this Court.

12. It has been told earlier that the defence cases are almost same in both the cases. The defence case as it appears from the trend of cross-examination of the prosecution witnesses is the case of innocence, false implication and total denial of the prosecution case.

13. The further defence taken is that Feroz Mahmood Rasel is the brother's son of accused Moksedur Rahman Badal who (Feroz Mahmood Rasel) used to work in the business firm of the accused as an employee from 2000 to 2005 and on those years the accused was sick, as such, he was not in a position to look after his business attentively. Most of the work of his business firm was done by the complainant Feroz Mahmood Rasel. Since Feroz Mahmood Rasel is the family member of the accused he (accused) trusted him much. As such, all the transactions of the business firm of the accused like collection of the money from the parties, depositing of the money in the banks and payment to the other business firm for purchasing goods were also done by the complainant Feroz Mahmood Rasel. Feroz Mahmood Rasel taking the advantage of the full trustness of the accused had grabbed some pages of the cheque of the accused and when the accused came to know that Feroz Mahmood Rasel has not been working honestly and sincerely and when it was also detected that some pages of the cheque books are missing and when the total activities of the complainant Feroz Mahmood Rasel became doubtful to the accused he had ousted him from the business firm of the accused but the complainant Feroz Mahmood Rasel using the stolen cheques filed two false cases, one in his own name putting a figure of Taka 21,27,000/- in the cheque and another by his cousin Md. Nadim putting Taka 8,58,000/- in that cheque. The complainants had no financial ability t give any loan to the accused.

14. It is the further defence Case that there was no consideration for the drawing of such a cheque in favour of Feroz Mahmood Rasel. The accused did not take any loan from Feroz Mahmood Rasel and he had no any financial capacity to give loan of such amount to the accused Muksedur Rahman Badal.

15. The complainant Feroz Mahmood Rasel was not satisfied using the cheque for Taka 21,27,000/- he also filed another case through Nadim who happens to be the cousin of Feroz Mahmood Rasel and nephew of Moksedur Rahman Badal. Feroz Mahmood Rasel using another cheque of the accused putting an amount at their sweet will for Taka 8,58,000/- filed another case being C.R Case no. 2592 of 2007. The accused had no any business transaction with Md. Nadim. The accused did not take any loan from Nadim and Nadim had no any financial capacity to give loan to the accused and the accused did not drew any cheque in favour of Nadim for the amount shown in the cheque. Both the cheques were written and prepared for the purpose of the cases and there was no any reason for the accused to draw the cheques in favour of the complainants. The accused was innocent and have become the victim of circumstances.

16. At the time of hearing of these appeals Mrs. Hosneara Begum, the learned Advocate appearing for the appellant Moksedur Rahman Badal assailing the judgments of the trial Court and supporting the petition of appeals submits that the accused is a established and rising businessman who has been running the business of sands and stones at Amin bazar, Dhaka and he is a very promising businessman of that locality but from 2002 he became sick as such he was not in a position to look after his business firm closely and regularly and to cover his such absence he had inducted one of the family member Feroz Mahmood Rasel who is nobody but his brother's son to look after the business on his behalf and he Mr. Rasel had looked after of the business of the accused from 2002-2005. She further contends that the accused took treatment hither to thither trusting solely upon the complainant Feroz Mahmood Rasel who also had looked after the business properly at the early stage of his induction but at one stage he was misguided for the reasons best known to him. The complainant (Mr. Rasel) in discharging his duties in the business firm of the accused used to collect money from the parties, deposited the money in the banks and withdrew the same from the banks under and the cheque book of the accused was also in the custody of the complainant Mr. Rasel.

17. She further submits that in 2005 the accused found that some of the pages of his cheque book were missing and the total activities of the complainant Mr. Rasel had appeared to the accused very doubtful. Upon the above facts, the accused made a G.D entry recording the facts of missing of the cheques and the accused did not feel it suitable to continue Mr. Rasel from 2005 in his firm. Thereafter, he took the business in his own hand from Mr. Rasel but when he (Mr.Rasel) has been in the total responsibility of the business firm of the accused

had taken away some of pages of the cheque book and using the same filed the case in his own name showing Taka 21,27,000/- being C.R Case no. 2121 of 2007 and another case in the name of his cousin Mr. Nadim putting a figure of Taka 8,58,000/-.

18. The learned Advocate further submits that the story of loan as canvassed in both the petitions of complaint is nothing but a myth. They had no any financial capacity to give the loan to the accused. Mr. Rasel was an employee in the business firm of the accused. How could he lend an amount of Taka 21,27,000/- to the accused. Md. Nadim also had no any financial capacity to give loan of a figure like Taka 8,58,000/- to the accused. As such, there was no minimum reason on the part of the accused to draw the said two cheques in their favour in order to make payment of the cheque value.

19. She also submits that the complainant Mr. Rasel using the signed cheques of the accused which he had taken away in between 2002-2005 filed two false cases and the accused in his defence adducing sufficient numbers of witnesses including the family members who are nobody but the brothers and sisters of the accused proved this defence case and those brothers and sisters of the accused are the uncle and fufu of Mr. Rasel. They as the family members must not favour the accused only. They stand in the same distance from Mr. Rasel and the accused Mr. Badal. But the trial Court measurably failed to consider the defence case as well as the unequivocal and nitid evidences of those defence witnesses and thus came to a wrong conclusion finding the accused guilty under section 138 of the N.I. Act.

20. The learned Advocate also submits that the trial Court did not at all consider whether the complainants had any capacity to give the loans of the projected amount to the accused and also did not consider whether the accused had drawn the cheques in favour of them in order to make payment of his debts. The learned Advocate in her concluding submissions submits that in a case under section 138 of the N.I. Act in order to assert the conviction of the accused, the prosecution is under duty bound to prove that the complainants were holders of the cheques in due course as provided in section 9 of the N.I. Act but the prosecution could not prove the same. The complainants had managed to file the case using the signed cheques of the accused which they had got earlier by fraudulent means. Thus, the judgment and the order of conviction and sentence has been suffering from gross illegality and the same cannot sustain at all. So, the judgment and order of conviction and sentence passed upon the convict appellant by the trial Court in both the cases are liable to be set aside acquitting the convict appellant from the charges levelled against him.

21. On the other hand Mr. Md. Monowar Hossain, the learned Advocate appearing for the complainant-respondents in both the appeals supporting the judgment of the trial Court and opposing the appeals submits that the accused Moksedur Rahman Badol took a loan of Taka 21,27,000/- from Feroz Mahmood Rasel and also Taka 8,58,000/- from Md. Nadim. It is fact that both the complainants and the convict appellant are the relatives and that is why the convict was blessed with the said loans by the complainants but the convict failed to make payment of the said loan amount within the stipulated time, thus he drew two cheques in order to make payment of his such debts but the cheques were dishonoured by the Banks for insufficient of funds, thereafter both the complainants issued legal notice asking the convict for making payment of the cheques values but the convict intentionally did not respond to the claim of the complainants. Thus, the complainants finding no other alternative had filed the cases in the competent Court of Metropolitan Magistrate, Dhaka and at trial both the complainants Feroz Mahmood Rasel and Md. Nadim deposing in the Court proved that the cheques were drawn by the convict appellant and also proved the prosecution case and the trial Court rightly believing the evidence of the prosecution witnesses convicted and sentenced the convict accordingly. The trial Court did not commit any error of law and fact in believing the prosecution case which has been proved by the very cogent and nitid evidence of the complainants. So, the judgment and the order of conviction and sentence passed by the trial Court in both the cases are not liable to be set aside. So, the appeals are liable to be dismissed with costs.

22. I have considered the above submissions and arguments of the learned Advocates of both the parties with profound attention and have gone through the materials on record particularly the petition of complaints, the oral evidence adduced by the parties, the documentary evidences and other materials on record meticulously.

23. On going to the materials on record, it appears that in Sessions Case no. 2154 of 2007 the prosecution examined one witness and the defence examined 5 witnesses and both the parties had adduced documentary evidences. Now, in order to appreciate the arguments advanced by the learned Advocates of both the parties before me, let the oral evidence adduced by the parties in both the cases be sift and discussed.

24. In Sessions Case no. 2154 of 2007 Feroz Mahmood Rasel was examined as PW 1 who testified in the Court that accused Moksedur Rahman Badal in order to make payment of Taka 21,27,000/- had drawn a cheque

being cheque no. 0000441948 of the Standard Chartered Bank Bangladesh Ltd on 26.11.2006, the cheque has been marked as exhibit 1. He further testified that the cheque was dishonoured for insufficient of fund on 04.04.2007. The dishonor slip has been marked as exhibit 2. He also testified that on 29.04.2007 the accused was served with a legal notice, the legal notice and other supporting papers has been marked as exhibit 3 series. He further stated that he had filed the petition of complaint on 21.06.2007. The petition of complaint has been marked as exhibit 4.

25. In cross-examination of the defence, he has stated that the accused is the full brother of his father, he did not file any paper to show the ownership of the Prantik Enterprise, his father had 4 brothers and his father died in the year of 2005. He denied the defence suggestion that the accused is the owner of the Prantik Enterprise and Pentacle Intertrade and he cannot say who is the owner of Pentacle Intertratde. He denied the defence suggestion that he was an employee in the business firm of the accused from 2002-2005 and the cheques of the accused were in his custody and he filed the case using those cheques. He denied the further defence suggestion that he had no taka 21,87,000/- in his possession at any time.

26. The defence examined 5 witnesses in Sessions Case no. 2154 o 2007. DW 1 Alhaz Md. Moksedur Rahman, the accused himself testified that the complainant is his brother's son, the father of the complainant Mr. Rasel was a patient of cancer and he had suffered a lot in the said disease, he (accused Badal) has been suffering from lecuderma disease for the last 15 years and he could not perform all type of jobs, particularly the jobs which has contact with the dust. He also stated that since the father of the complainant Mr. Rasel was ailing their financial condition was bad and at the same time since he could not go in the sun light and in the meantime the father Mr. Rasel died on 09.05.2000 as such he was appointed as an employee in his business firm as Manager-Cum-Cashier and all the works of his business firm were looked after by the complainant Mr.Rasel, who used to transact the money with the parties.

27. He further stated that on 15.12.2005 he had gone at Ramzan Super Market under Pallobi Police Station along with the complainant Mr. Rasel to settle an account with a party and when he came to know that a cheque book of Standard Chartered Bank Ltd is missing and on search he did not get it, on 16.12.2005 the complainant Mr. Rasel was asked to place the accounts when he found disparity in the accounts of his business firm and from then the complainant Mr. Rasel was dropped from his job, thereafter, he has been looking for his own business, he lodged a G.D entry with Pallobi Police Station on 17.12.2005 for the missing of the cheque book being G.D entry no. 1057, marked as exhibit 'Ka'. He also stated that since the complainant Mr. Rasel was ousted from his business firm he was offering threat to him, on 15.05.2006 the complainant Mr. Rasel and his younger brother Jewel coming in his office assaulted him, he lodged an FIR to that effect with Savar Police Station. In the last part of 2007 he came to know that the complainant Mr. Rasel has filed a case under the provisions of N.I. Act against him and also came to know that the missing page of the cheque book has been used by Mr. Rasel which had been detected on 15.12.2005. He also stated that after some days he also came to know that another case has been filed by his nephew being case no. 139, in fact, that was also filed by Mr. Rasel, their family members took an attempt to settle the matter amicably and accordingly the complainant Mr. Rasel was requested to withdraw the case but he did not comply with such request whereupon all the relatives had set aside the relationship with Mr. Rasel.

28. DW 1 further stated that his financial condition is better, he did not take any loan from Rasel and he (Mr. Rasel) had no any financial capacity to give any loan to him, both the case were filed using the stolen cheques. DW 1 proved his trade license marked, exhibit (Kha); Income tax certificate, exhibit (Ga); certificate of his financial capacity, exhibit (Gha); bank deposit slips 52 pages, to show the transaction by the complainant Mr. Rasel, exhibit (Uma) series, the bank statements 78 pages, exhibit (Cha) series; a khata of 79 pages written and compiled by the complainant Mr. Rasel when he had served in his business firm, exhibit (Chha), counter parts of two cheque books, exhibit (Jha), ledger book written by the complainant, exhibit (Jhha).

29. He further stated that he cannot say how many pages were in the cheque book. He proved two receipts by which the complainant Mr. Rasel had purchased a SIM card of Grameen Phone, marked exhibit (Tha) and Tha/1, four deposit slips by which the complainant Mr. Rasel deposited money in the bank in the name of the accused, marked exhibit (Dha) series, six counter part of cheques of the Dhaka Bank Ltd written by the complainant when he was serving in his business firm, marked exhibit (Na series).

30. In cross-examination of the complainant DW 1 denied the prosecution suggestion that there was no signature of the complainant in the receipt of the Grameen Phone company. He denied the further prosecution suggestion that in the counter part of the cheque there was no hand writing of the complainant Mr.Rasel.

31. DW 2 Azizur Rahman, the full brother of Muksedur Rahman Badal has testified that the complainant Mr.Rasel is his brother's son, who used to work in the business firm of accused Muksedur Rahman Badal, since there was some differences regarding the accounts of the business of the accused, he (accused) had dropped the complainant Mr.Rasel from his business firm, thereafter, the complainant Mr.Rasel filed the case against the accused, they took an attempt to settle the matter but that did not see the light of the day. In cross-examination of the prosecution DW 1 stated that the accused is his younger brother, the accused did not draw any cheque in favour of the complainant Mr. Rasel. He denied the prosecution suggestion that he has land dispute with the complainant Mr. Rasel as such he deposed against him.

32. DW 3 Md. Abdul Haque Badal, another full brother of the accused testified that accused is his full brother while the complainant is his brother's son, the complainant (Mr. Rasel) used to work in the business firm of the accused and since there were some differences in the accounts in the business firm of the accused, the accused had dropped the complainant from his firm, the complainant Mr.Rasel stealing some pages of the cheque filed the case against the accused and after filing of the case they used to hate complainant Mr.Rasel. In cross-examination of the prosecution DW 3 stated that he did not hear anything about filing of the case for stealing of the cheque but he had heard about the GD entry for the same. He denied the prosecution suggestion that the complainant did not steal the cheque and the accused drew the cheque in order to discharge his debt to the complainant Mr.Rasel.

33. DW 4 Asuda Khatun, the full sister of the accused testified that the complainant Mr. Rasel is her brother's son while the accused is her brother, the complainant Feroz was the employee in the business firm of the accused and since there were some differences in the accounts of the said business firm, the complainant was dropped from the business firm of the accused, they asked both the parties to settle the matter amicably but they did not pay heed to it. In cross-examination of the prosecution DW 4 stated that the accused did not drew the cheque inf avour of the complainant. She denied the prosecution suggestion that since the accused is her full brothers, he has deposed falsely for him.

34. DW 5 Khorsheda Khatun, another full sister of the accused has testified that the complainant is her brother's son while the accused is her full brother, the complainant Mr.Rasel had stolen the cheque of the accused, they took an attempt to settle the matter but failed, the complainant Mr.Rasel had filed a false case. In cross-examination of the prosecution she stated that she cannot say whether the accused had filed any case for the stealing of the cheque but she is aware about the G.D entry. She denied the prosecution suggestion that on 26.11.2006 the accused drew the cheque in favour of the complainant Mr.Rasel. She further stated that her husband is dead and the accused has been maintaining her family. She denied the prosecution suggestion that for that reasons she had deposed in favour of the accused.

35. The prosecution examined 1 witness in Sessions Case no. 133 of 2008 and the defence examined 4 witnesses.

36. PW 1 Md. Nadim testified that accused Md. Muksedur Rahman Badal in order to make payment of Taka 8,58,000/- had drawn a cheque on 04.12.2006 of Standard Chartered Bank Ltd, the cheque has been marked as exhibit 1. He further testified that for encashment of the cheque, the same was presented to his Bank repeatedly but lastly on 29.04.2007 it was dishonoured for insufficient of fund, the disnonoured slip has been marked as exhibit 2 series, thereafter, he issued legal notice through his engaged Advocate on 24.05.2007, the legal notice and other papers connected to the legal notice has been marked as exhibit 3 series, since the accused did not make payment of the said amount, he filed the petition of complaint on 26.07.2007 in the Court Chief Metropolitan Magistrate, Dhaka, he proved the case and his signature on it, marked exhibit 4 and 4/1.

37. In cross-examination of the defence PW 1 stated that so far he knows the accused is a businessman of stones and sands, he had lended the money to the accused in the first week of January, 2006 but there was no any paper in support of the said transaction, he did not receive the cheque on the date of lending money, the accused is his cousin (fufato vi) and there was stipulation between them that the accused will return back the money within March, 2006. He further stated that he had deposed in Sessions Case no. 2154 of 2007 in favour of Feroz Mahmood Rasel who is his nepnew. He denied the defence suggestion that he filed the case relying on a cheque given by Feroz Mahmood Rasel in order to serve his purpose.

38. The defence examined 4 witnesses in Sessions Case no. 133 of 2008. DW 1 Muksedur Rahman Badal, the accused himself has testified that the complainant is his cousin (mamato bhai), the father of Mr. Rasel died of cancer disease, thereafter in compliance of the request of the near relatives he appointed Feroz Mahmood Rasel in his business firm as Manager-Cum-Cashier, on 15.12.2005 he and Feroz Mahmood Rasel had gone at

Ramzan Super Market under Pallabi Police Station to settle an account with one of his business partner and he coming back in his house came to know that a cheque book of Standard Chartered Bank is missing and some of the pages of the said cheque were signed by him and some of the pages were unsigned, on 16.12.2005 he found some anomaly in the accounts of his business whereupon Feroz Mahmood Rasel was dropped from his business firm, on 17.12.2005 he filed a G.D entry being no. 1057 regarding the missing of the cheque and after almost one year and five months by the by he came to know that Mr.Rasel and the present complainant Nadim have filed the cases under the provisions of Negotiable Instruments Act against him. In fact both the cases were filed using the missing cheques which was noticed to him on 15.12.2005, the complainant Nadim in collusion with Mr.Rasel filed the present case.

39. In cross-examination of the prosecution DW 1 denied the prosecution suggestion that after the death of the father of Mr.Rasel he used to look after the business firm namely Prantik Enterprise belonged to the father of Mr.Rasel. He denied the further suggestion that he did not go to Ramzan Super Market with Rasel. He cannot say exactly how many pages were lost and also cannot say how many pages were signed and unsigned. One cheque book was in the custody of Rasel. He denied the further prosecution suggestion that no cheque has been lost from him and he drew the cheque in order to make payment of his debts in favour of the complainant Nadim.

40. DW 2 Abdul Haque Badal, the full brother of accused Muksedur Rahman Badal has testified that complainant Nadim is his cousin (mamato bhai). Rasel had stolen the chque of the accused and using the same filed this case and another case. In cross-examination of the prosecution DW 2 stated that they sat two/three years ago for amicable settlement of the dispute but cannot say the exact date. They asked the complainant to withdraw the case. He denied the prosecution suggestion that Rasel did not steal the chqeue.

41. DW 3 Nurul Haque Rubel, the full brother of accused testified that complainant Nadim is his mamato bhai, the present case is false, Rasel used to serve in the company of the accused Badal and since they were some anomaly in the accounts of the business firm of accused Badal, he ousted Mr.Rasel and Mr.Rasel ultimately using the cheques which he got at the time of serving in the business firm of the accused filed one case in his own name and another through Nadim. In cross-examination of the prosecution DW 3 stated that he cannot say how many cheques were in the custody of Rasel. He denied the prosecution suggestion that since the accused is his full brother he has deposed falsely in his favour.

42. DW 4 Khorsheda Khatun, the full sister of the accused testified that Nadim is his cousin (mamato bhai), some cheques were lost from the custody of the accused Badal. Thereafter, they heard it that Rasel and Nadim have filed the cases against Badal. They requested the complainants to withdraw the case but they did not pay heed to it. In cross-examination of the prosecution she stated that 3-4 years ago the cheques were lost whereupon Badal lodged G.D entry and they took an attempt to settle the matter. She denied the prosecution suggestion that he has deposed falsely favouring his full brother accused Muksedur Rahman Badal.

43. These are the evidences that have been given by the prosecution and defence in both the cases.

44. From the evidence discussed so far it appears that in both the cases the defence case are same that Feroz Mahmood Rasel has been serving in the business firm of the accused from 2000-2005 and when all the papers of the business firm of the accused were in the custody of Rasel, he had taken some of the pages of the cheque behind the knowledge of accused and thereafter using the same, have filed two cases, one in his own name and another through his maternal uncle Nadim.

45. On the other hand the prosecution case is that both the complainants had lended money in different figure to the accused and the accused in order to make payment of the said loan money drew cheques in favour of the complainants.

46. Before amendment of section 138 of the Negotiable Instruments Act by the Act no. XVII of 2000 dated 6th July there was an open privilege for the accused to make out a case directly that he did not draw the cheque to discharge in whole or in part of any debt or other liability but in 2000 section 138 of the N.I. Act has been amended in our country omitting the following words from the section:

"for the discharge in whole or in part, of any debt or other liability".

47. Therefore, from 2000, that is, from the amendment of section 138, there appears serious hurdle on the part of the accused to claim that he did not draw the cheque to discharge any liability or debt. But the term

"holder in due course" of the cheque as envisaged in section 138 has been defined in section 9 of the N.I. Act in the following manner:

9. **"Holder in due course"-**"Holder in due course" means any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order, before it became overdue, without notice that the title of the person from whom he derived his own title was defective."

48. From the plain reading of section 9 of the N.I. Act it appears that when a person becomes the holder in due course of a cheque he must get it for consideration leaving the scope to get it without any consideration.

49. The defence from the very beginning of the cases had canvassed that there was no any consideration for drawing of the cheques in favour of the complainants. But section 118 of the Act has given some privileges to the holder of a cheque. Section 118(a) of the Negotiable Instruments Act runs as follows:

118.**Presumptions as to negotiable instruments of consideration** -Until the contrary is proved, the following presumption shall be made;

(a) That every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration.

50. From the plain reading of section 118(a) of the N.I. Act it appears that unless the contrary is proved there is a presumption that every negotiable instrument was drawn for consideration, that is, the complainant of a case presumed to have got the cheque for consideration.

51. Now from the discussion and citations made above what has been found is that in a case under section 138 of the N.I. Act, the payee or the holder of the cheque enjoys some legal privileges which has been enunciated in section 9 and 118 of the N.I. Act. In defining the 'holder in due course', section 9 provides that the holder in due course, means any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque. This indicates that whenever a person will be holder in due course, he must become holder in due course for consideration and section 118 of the N.I. Act has given more privileges to the holder in due course which provides that until the contrary is proved it is to be presumed that every negotiable instrument was made or drawn for consideration, that is, the law itself prescribed a privilege in favour of the holder of a cheque that for consideration the cheque was drawn in his favour but this presumption is a rebutable presumption.

52. 'Presumption' means to take anything without verification or prove or in other words an idea that is taken to be true on the basis of probability, as such, I find that whenever a cheque is drawn in favour of a person he enjoys a presumption that the cheque was drawn for some consideration but this presumption is a rebutable presumption . That is, the accused has a right to offer the evidence to prove that the said inference or presumption is not correct and the law has given the said privilege to the accused also, as the very section 118 of the N.I. Act starts with the words 'until the contrary is proved' that means the defence has the authority to prove the contrary fact of the presumption that every negotiable instrument was made or drawn for consideration in favour of the holder in due course.

53. The convict appellant in the two cases in order to rebut the presumption has come forward with the strong defence case that Feroz Ahmed Rasel had worked in his firm from 2002 to 2005 and within that period he used to manage all the affairs of his business and he used to deposit the money, withdraw the same and maintained the accounts of the business etcetera and taking the advantage of the same, he kept the cheque in his custody and whenever he was driven away from the business firm of the accused, he used the same in filing of two cases, one in his own name and another one in the name of his maternal uncle Mr.Nadim.

54. On the other hand complainant Feroz Mahmood Rasel all through of the case even at this stage of the hearing of the appeal categorically asserted that he did not serve in the business firm of the accused and the accused in order to discharge the liability issued the cheque and the same assertion has also been made by another complainant Mr.Nadim who is nobody but his (Rasel) maternal uncle.

55. Moksedur Rahman Badal as DW 1 in Sessions Case no. 2154 of 2007 categorically stated that Rasel had worked in his business firm of stones and sands as Manager-Cum-Cashier. DW 2 Azizur Rahman and DW 3 Abdul Haque, who are the full brothers of accused Moksedur Rahman Badal and at the same time father's brothers of Rasel, Asuda Khatun and Khorsheda Khatun who are the fufus of Rasel and full sisters of accused Badal and DW 3 Nurul Haque Rubel of Sessions Case no. 133 of 2008, the full brother of accused Muksedur

Rahman Badal Stated that Rasel had worked in the firm of Moksedur Rahman Badal. They were cross examined extensively by the Prosecution but there such evidence that complainant Mr. Rasel had worked in the business firm of accused has not been shaken away in any way.

56. Thus it is found that three full brothers and two sisters of the accused who are the uncles and fufus of accused Mr. Rasel in a clear and chorus voice very consistently testified that Rasel had worked in the business firm of the accused. It is difficult for any prudent man to disbelieve the evidence of such witnesses as both the complainant Rasel and accused Badal stand on the same distance of those witnesses. So, from the oral evidence adduced by the defence it has been proved very strongly that Rasel had worked in the business firm of the accused as his helping hand.

57. Over and above, the defence has submitted many papers to show the activities of Rasel in the business firm of the accused. The defence submitted a paper of grameen phone company by which Feroz Mahmood Rasel took a SIM from the same company, marked exhibit Tha-1 where there appears an initial signature of Feroz Mahmood Rasel. The defence submitted 52 deposit slips of bank, marked exhibits "Uma series" to show that by those deposit slips Rasel had deposited money on the various dates in the Dhaka Bank when he was in the business firm of the accused. Those deposit slips bear the initial signature of Rasel as depositor of money. Both the initial signatures appear in the deposit slips and the papers of the grameen phone are of the same man. Which established that Rasel as manager of the accused deposited money in the bank.

58. Over and above, the defence submitted one khata, the exhibit 'chha' and one ledger book, the exhibit 'jha' to prove that those khatas were maintained by the complainant Rasel in the business firm of the accused. There is nothing in the record to show that Rasel took any attempt to discard this evidence in order to establish his non involvement in the business firm of the accused.

59. The complainant Rasel did not challenge those documentary evidences in any manner. As such, relying on the oral evidence of the defence as well as the documentary evidence discussed so far. I find that though Rasel was in the business firm of the accused from 2002 to 2005 but for taking some undue advantage in the cases had denied the same.

60. As I have told it earlier that though from section 138 of the N.I Act the words "for the discharge in whole or in part, of any debt or other liability" has been omitted in 2000 by the amendment but section 118(a) of the N.I Act still allows the defence to rebut the presumption that the cheque was drawn for any consideration. The defence in this case adducing sufficient evidence proved that Rasel had worked in the business firm of the accused and taking the advantage of the same he got the cheques and used the same.

61. In answering the above defence case, there appears no attempt on the part of the complainants to prove that they got the cheque for any consideration. When the defence can prove that the cheque was drawn without any consideration the onus again shifts to the complainant to show and to prove that the cheque was drawn for consideration. In the case of Bharat Barrel & Drum Manufacturing Company-Vs-Amin Chand Payrelal (1999) 3 SCC 35 it was held by the Supreme Court of India in the following manner:

"Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit or presumption arising under section 118(a) in his favour. The Court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible for contemplated and even if led, is to be seen with a doubt."

62. From the above findings of the Supreme Court of India it appears that if the accused can discharge the initial onus to have no consideration for drawing of cheque in favour of the complainant, the latter will be under

legal obligation to prove that the accused drew the cheque to clear any bebt or other liability failing which he is not entitled to get any relief and in view of the above legal position, the complainant Rasel in order to discharge his such liability that he got the cheque for any consideration did not lead any evidence in this case. He and another complainant simply has stated in their evidence that accused Muksedur Rahman Badal in order to satisfy their debts drew the cheques in their favour. But the definite case of the defence is that Rasel and Nadim had no any financial capacity to give any loan to the accused. As it has been found that Rasel was the employee in the business firm of the accused from 2002 to 2005. So, the lending of money by Rasel to his uncle accused Muksedur Rahman Badal appears to be very farce which have no legs to stand at all. And though Nadim was not a staff of the accused but Nadim also could not lead any evidence in the case to show his financial ability that he can lend Taka 8,58,000/- to the accused.

63. Moreover, can a court of law rely on the evidence of PW 1 Feroz Mahmood Rasel who as PW 1 in Metro Sessions Case no. 2154 of 2007 stated in his cross-examination in the following ways:

"আমি প্রান্তিক এন্টারপ্রাইজের মালিক আমি। পেন্টাকল ইন্টারট্রেড এর মালিক কে বলতে পারব না।"

64. Exhibit 'Ta' will go to show that Feroz Mahmood Rasel filed C.R Case no. 29 of 2007 before the Magistrate Court, Dhaka against Muksedur Rahman Badal inserting his (Badal) address as proprietor of Pentacle Intertrade. Thus, it reveals that Rasel is a man did not know how a man tell the truth. So, there is no scope to rely on the oral evidence of PW 1 Md. Rasel that he had lended money more than taka 21,00,000/- to his uncle Muksedur Rahman Badal.

65. The defence proved the copy of a diary dated 17.12.2005 being Pallabi Thana G.D in 1051 which has been marked as exhibit 'Ka' and through the said diary Muksedur Rahman Badal informed the Police Station that a cheque book of Standard Chartered Bank with some pages have been lost. Though in the said G.D entry there appears no cheque numbers but as I have found from the reported case of Indian Supreme Court that whenever the accused adducing sufficient evidence rebuts the presumption that cheque was drawn for consideration the burden of proof heavily shifts and lies upon the complainant to show that cheque was drawn for consideration. From the whole record I find nothing to hold that for any consideration the cheques were drawn in favour of the complainant Rasel and Nadim. The trial Court without taking consideration of the defence case as well as the evidences led by the defence and without going into the root of the facts involved with the case found the accused guilty very arbitrarily in both the cases.

66. From the discussions made above, I am of the opinion that the trial Court totally failed to consider the facts of the case as well as the law involved with a case under section 138 of the N.I Act.

67. In this case the other issues particularly issuing of the legal notice, presentation of the cheque within time is not at all disputed. So, there is no necessity to give any attention to those points.

68. In a case under section 138 of the N.I Act, the legal presumption exists in favour of the "holder in due course of the cheque" that he got the cheque for consideration and that has been ensured by the provisions of sections 9 and 118 of the N.I Act but at the same time this presumption is a rebuttable presumption. Whenever any accused leads the evidence to rebut such presumption the burden again shifts to the complainant who is the holder in due course of the chque to proof by the legal evidence that the cheque was drawn in his favour for consideration. But in this case there appears nothing in the record to show that Rasel or Nadim had taken any attempt to prove that they got the cheque from Badal for any consideration. So, in my consideration the defence by the cogent evidence has been able to prove that Rasel had worked in the business firm of the accused Badal when he got some pages of the cheque and he using the said pages of the cheque filed the case one his own name and another by his maternal uncle Nadim. So, the conviction and sentence of Muksedur Rahman Badal did not justify at all under section 138 of the N.I. Act.

69. In the result, both the appeals are allowed. The order of conviction and sentence of accused Muksedur Rahman Badal dated 04.10.2011 passed by the Additional Metropolitan Sessions Judge, 5th Court, Dhaka in Metro Sessions Case no. 2154 of 2007 and 133 of 2008 are herby set aside. The convict-appellant is acquitted from the charge of both the cases. The accused is entitled to withdraw the money as deposited in the Court at the eve of filing of the appeals.

70. Let a copy of this judgment and order along with the lower Court's record be sent to the concerned Court for information and necessary action.

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1 SCOB [2015] HCD 73

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 6220 of 2007

Md. Hafizur Rahman
... Petitioner
-Verses -

Secretary, Ministry of Public Works and others.
...Respondents

Mr. Kazi Abdul Khalaque, Advocate
..... for the petitioner.
None appears
..... for the respondents

Heard on: 12.03.2014, 16.04.2014
and Judgment on: 22.05.2014.

Present:
Mr. Justice Quazi Reza-Ul Hoque
And
Mr. Justice A.B.M. Altaf Hossain

Article 102(2) of the Constitution of the People's Republic of Bangladesh.
Locus Standi:
We find that that the petitioner Samity does not have any *locus-standi* to move the writ petition to ventilate the causes of its aggrieved members since it is not a public purpose, rather the purpose for the benefits of individual members of the samity who have individually bought the land and thereafter formed the samity, and as such, we do not find the instant Rule maintainable.
...(Para 30)

Judgment

Quazi Reza-Ul Hoque, J:

1. The instant Rule was issued on 31.07.2007 calling upon the respondents to show cause as to why the impugned proceedings of L.A. Case No. 6/2001-2002 in respect of acquiring the land measuring 7.50 acres belonging to the members of the Rajdhani Avijat Bohumukhi Samabaya Samity Ltd. appertaining to C.S., S.A. Plot No. 297, R.S. Plots 316, 317, 318 of C.S. Khatian 525, S.A. Khatian No. 427 and R.S. Khatian No. 426, Mouza Digoon, P.S. Pallabi, District- Dhaka should not be declared to have been made 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.

2. The facts necessary for disposal of the Rule, as has been stated by the petitioner, in short, is that the petitioner is the Secretary of the Rajdhani Avijit Bohumukhi Samabaya Samity Ltd. having 1195 members is registered vide No. 463/98 under Co-operative Ordinance 1984 under the Ministry of Local Government and Rural Development and Co-Operative, Government of Bangladesh (annexure- A).

3. The Government of Bangladesh has made a policy decision to develop the country by ameliorating the condition of the people's of the country on the basis of co-operative spirit and to that necessary rules and laws have been framed and different kinds of organisations with the participation of the people on the spirit and ideals of co-operative society have been formed all over the country at the initiation and inspiration of the Government. There are numbers co-operative banks, co-operative textiles, and jute mills and many factories, co-operative fisheries samities, co-operative agricultural societies, co-operative housing & residential projects etc. were created. The Constitution of Bangladesh has outlined the spirit of co-operative in its preamble. So the society or samity of the petitioner has got its existence with its objectives and ideals rooted in the rules and laws of the country sanctioned by the Constitution of the country.

4. This Samity has got ideals and objective sanctioned by the Co-Operative Ordinance 1984, amongst others as follows:
ঝ) সভ্যগণের এবং সংগঠনের স্বার্থে গৃহ নির্মাণ, পরিবহন, কুটির শিল্প, হাস মুরগী ও গবাদী পশুপালন প্রভৃতি বিষয়ে প্রকল্প গ্রহণ এবং অন্যান্য যে কোন প্রকল্প প্রণয়ন ও বাস্তবায়ন । According to the above quoted objectives and ideals, this Samity has been established and have undertaken a house building residential project for the members of the saimty in the year 1999 and

have arranged more or less $7\frac{1}{2}$ acres of land and have entered into a bainapatra with the then owners of the said land with the possession of the same. This project is named as Pallabi Avijit New Nivash.

5. As the Pallabi Avijit New Nivash is not a profit making house building scheme and it has no profit making house building scheme and it has no profit making fund and that is why, the organization could not or did not take up double expenditure first getting registration of the বায়নাকৃত সম্পত্তি in the name of the organization Pallabi Avijit New Nivash and thereafter registering the same land have allotted plots to its members, which would have involved extra expenditure of a few crores of Taka and as such the organization have arranged registration of each plot to each allottee member through the organization from the original owners from whom the organization purchased the same through baina and got possession thereof (annexure- C, C-1 and C-2).

6. The Samity started registering the said lands and got 3.90 acres registered in different sub-kabala deeds. In the meantime, the Notification acquiring lands including the Samity's lands having been made and the Registry Office stopped further registration. The registered lands covers an area of 3.90 acres of land in R.S. plot Nos. 316, 317, 318 and C.S. and S.A. Plot No. 297, under C.S. Khatian 525, S.A. Khatian 527, R.S. Khatian 426, Mouza-Digoon, P.S. Pallabi, previously Mirpur, Dahka (annexure-D).

7. Thereafter the Samity earth filled the low lands, levelled the same and divided some portions into 63 plots of 3 kathas for 81 members and the rest lands are in process of being arranged for about 100 members of the Samity and for masjid, school, playground, parks etc. And the member-purchasers mutated their names in respect of their respective plots even during the recent Maha Nagar zarip and are paying Government rents. In the matter of developing these land huge expenditure had been made and the petitioner has already prepared a building construction layout plan for the whole area of 3.90 acres with the provision for masjid, madrasha, school, park, playground and wide road and streets with all modern amenities and has also prepared a common building construction layout plan for all the residential plots and also an Area of Map and these plans are more or less similar to the plans and project of the Uttara Shahar Residential Scheme following all building construction rules and regulations of Rajdhani Unnayan Kartipakkha (RAJUK) and the same are in the process of being submitted to RAJUK for approval (annexure- E, E-1 and E-2).

8. In the meantime RAJUK has taken up an extension plan for the Utttara Residential Shahar and has included 7.50 acres of land of the Samity into the lands of the extension project, which are acquired along with other lands in L.A. Case No. 6/2001-2002 for "প্রস্তাবিত উত্তরা শহর সম্প্রসারিত প্রকল্পের ৩য় পর্বের ২য় অংশে"। It is found from the Map (annexure- E) that the land of this Samity and lands owned by other organization are situated on the South and on the West Bank of the khal flowing in between the case lands and the South and West side of the Uttara Shahar Extension Project. The Mirpur Cantonment and the Eastern Housing are situated on the West and South of the case land and so there is no further lands beyond the Samity's land with any scope for further extension of the Uttara Residential Shahar on that side.

9. There is also huge land belonging to the Water Development Board for their housing project for staff and land of the Eastern Housing adjacent and contiguous to the Uttara Shahar Project but the said lands of the Water Development Board and Eastern Housing, which are also on the same footing in the case lands have not been acquired and as such this action is *mala-fide*, arbitrary and against equity.

10. It is found that playgrounds, parks, khals, tanks, open space etc. are essential for healthy atmosphere of the Dhaka City and recently all the experts have opined that the existing khals and big tanks, open space, park which will serve as a window to the citizens, should be protected for overall good, sanitary sewerage, healthy living atmosphere of the Dhaka City, which is going now to be a Mega City and as such the khal, flowing on the North and East sides of the Samity's land should be protected for environmental healthy atmosphere. The same khal on its Western end falls on the Turag river through a big culvert under the Beri Badh about one mile North to the Botanical Garden and the khal flows towards the East along the North border of the case land and bends towards the South keeping the case land on the West. If the ongoing extension of the Uttara Project is allowed further across over the khal, then there is every apprehension of the khal being filled up under the camouflage of public interest for allotments of plots, which transaction bring forth monetary benefit to all persons involved in the making of extension of project, as such, the release of the case land is also essential for maintaining congenial health and well being of the citizens (annexures- F and F-1).

11. The petitioner has approached the RAJUK, Ministry of Works, the Ministry of L.G.R.D. and Co-operative and other concerned authority repeatedly with the prayer to keep the Samity's land out of the Uttara

Shahar Extension Plan stating that the Uttara Shahar is a residential area and its Extension Plan is also residential, the petitioner Samity's project is also a residential project, the purpose of both the project is the same and similar, that is, for residential accommodation because the future allottees of the Uttara Shahar Extension Project will construct residential buildings as approved by RAJUK, so is the case with the Samity's members also, and there is no basic difference between the two accommodation plans, more so, the Samity has already filled up the low lands and divided some portion of the lands into 63 plots measuring 3 kathas each for 81 members and a layout plan for construction of residential building with a layout plan of the whole area of 3.90 acres and an area of map of 7.50 acres has been prepared and the rest portions of the land is being arranged for further 100 members and for masjid, school, playground, parks, etc. and the same is in the process of being submitted to RAJUK for approval, if approved, building for accommodation for accommodation will be constructed within 6 to 12 months but the authority concerned did not consider the lawful claim of the Samity and have not taken any step to release the same (annexures -G, G-1 and G-2).

12. On the other hand Uttara Shahar Extension Plan is only proposed and only notice is given for acquisition and much will be required to finalize the project. Furthermore, if these 7.50 acres land of the Samity are released, the extension purpose of the Uttara Shahar Extension Project will not at all be hampered whereas on the other hand the ready and finalized accommodation for the members of the Samity with so much cost and expenditure, their hope for better life and living all will be washed away at the cost of an extension project to Uttara Shahar and these members of the Samity have invested all their hard earnings of the whole life, for the purpose of the land, developing the same, finalizing all activities short of getting approval of the RAJUK, and upon approval, buildings for their living will be ready within 6 to 12 months and unless the land is released these 81 members will be doomed forever. The acquisition of the Samity's land for extension of Uttara Shahar is obviously shown for the interest of the general public to be more specific, in the interest of some 81 probable allottees to be selected by the RAJUK, so also the same public interest that is, interest of 81 members of the Samity, both interest standing on the same footing.

13. It is further to state that RAJUK has neither taken possession of the Samity's land, nor paid any compensation, and as such, there will be no legal or other hurdles for release and in such facts and circumstances the Samity is entitled to get back their lands by way of release by RAJUK.

14. The Government of Bangladesh is always been sympathetic towards the right and lawful claims of the public and recently the Government released by an order published in News Paper Dainik Khabar on 05.05.01993 about 175.283 acres of land under Mouza- Vatara and Joar Sahara within Gulshan Police Station, Dhaka, which were acquired in L. A. Case. No. 138/61-62 and in the light of such benevolent attitude the refusal of release of only 7.50 acres of land of the Samity without disturbing the Uttara Shahar Residential extension Scheme will be an act of benefit of such concept of benevolence already shown to the other citizens (annexure-H). The housing scheme of the petitioner society for construction of dwelling house as per common plan and campus as shown in the map made in accordance with RAJUK's rules and regulation under the Master plan of Dhaka City for those Members of a Co-Operative Society who have no house or land in Dhaka City shall serve a public purpose and while the Co-operative Society of the petitioners has already taken up a housing scheme for its members on the same basis of public purpose of housing project as taken up by the RAJUK, the acquisition of the Co-operative Society land for the same purpose is redundant, unnecessary, *mala-fide* and illegal and without lawful authority, killing another public purpose.

15. Mr. Kazi Abdul Khalaque, the learned Advocate appearing for the petitioner submits that the impugned proceedings in respect of acquiring the land of the members of the Samity of the petitioner having been made under the camouflage of the public interest but in fact and against the general interest of more or less 81 owners of similar number of plots is arbitrary, *mala-fide* and illegal.

16. He further submitted that the land of the Samity having been demarcated and bounded by a khal flowing in between the last border of the South Western side of the Uttara Shahar Extension Plan and the Samity's land having been situated on the other side of the khal and there being no land beyond the Samity's land with any scope of further extension of the Uttara Shahar, release of the Samity's land will not hamper the interest of execution of the Uttara Shahar plan and as such refusal of the release of the concerned land, as well as, the L.A. Case proceedings are arbitrary, illegal and *mala-fide*.

17. He again submitted that the acquisition of this land will not serve better public interest than the interest of the members Samity because the purpose of both the organizations that is Uttara Shahar Extension and the Samity is residential and interest of both parties are similar and stands on the same footing and there is no

cogent lawful reason to merely extend a proposed similar project by abolishing a similar established project, therefore the impugned proceedings is arbitrary misconceived *mala-fide*, illegal and against better public interest and as such the order is liable to be declared to have been made without lawful authority and of no legal effect.

18. He again submitted that the Samity has finalized all activities towards construction of residential buildings for its members, by fill in up the low lands by levelling the same, by dividing the same into 63 plots by registering the plot in the name of the members who have mutated their names and are paying rents to the Government and construction layout plan and a general plan for the whole area of the Samity have been made ready in full compliance with the rules and regulation of RAJUK and the same are in the process of being submitted to it for approval, and if approved, works of construction of residential building will be completed within 6 to 12 months whereas the proposed plan of the Uttara Shahar Extension will take unlimited time for its final shape for construction of buildings by the future allottees, and as such, the benefits and fruits of the Samity's project will be enjoyed by the public (members of the Samity) much before its final shape for construction of building by the future allottees and as such the benefits and fruits of the Samity project will be enjoyed by the Public (member of the Samity) many years earlier to those arising out of the proposed extension, in this view of the matter the respondents shall be deemed performing duties of public interest in releasing the concerned land rather than stopping ongoing project of the Samity for a similar proposed project, which will take indefinite period for its final shape and as such the acquisition of this land is misconceived, arbitrary, illegal, *mala-fide* and against the public interest and so with the refusal by RAJUK to release the same.

19. Mr. Khalaque, again submitted that the Samity's members have invested their hard earned money of whole life in the expectation of being owner of a living place and they have nearly completed the project short of getting approval of RAJUK for starting construction and upon approval by RAJUK will be able to complete and construction of their buildings and under such positions the refusal to release this land thereby stopping and destroying the almost nearly completed residential project will be completed within a period of 6 to 12 months at the altar of the merely proposed extension project of similar nature will require indefinite period for its final shape is against the public interest and is *mala-fide*, arbitrary and illegal and the same is liable to be set aside.

20. He further submitted that the Samity has lawful existence sanctioned under Co-operative Society Ordinance, 1984 and approved by the Ministry of L. G. R. D. and Co-operative by way of registering the same vide Registry No. 463/93, which is also within the principles of social justice, equity and maintenance of social equilibrium as outlined in the Constitution of Bangladesh and as such the members of the Samity has got a vested right of life and property guaranteed in the Constitution, which should not be affected adversely by way of acquisition of the Samity's land.

21. He further submitted that the Government has accepted the lawful and reasonable claims of the public and released 175.283 acres of land in Mouza- Vatara and Joar Sahara in Gulshan Police Station, Dhaka from acquisition in L. A. Case No. 138/61-62, and the claims of the Samity are reasonable, lawful and considerable since purpose of both the organizations is similar and same and the project of the Samity is nearly completed, whereas the completion of the proposed extension project of Uttara Shahar will require indefinite years and in such position public interest will be better served by the Samity's project than by the proposed extension project.

22. He again submitted that the right of property of the members of the Samity in the lands having been acquired under the camouflage of public interest for about the same number of future allottees of the proposed extension project at the cost of the same number of members of the Samity who are nearly completing their project. There are lands for residential purpose belonging to Eastern Housing on the South side of the river with Water Development lands on the same side of the river contiguous to the Uttara extension plan but the same have not been acquired though those are on the same footing with the lands of the petitioners and as such the petitioner Samity has been discriminated in the matter of acquiring the lands, which being in violation of law of equity guaranteed under the Constitution, L.A. proceedings in respect of the case lands are illegal, arbitrary, whimsical, and against public interest .

23. Mr. Khalaque, again submitted that the up-keeping and protection of khal, tanks, parks, open space, playgrounds are all essential for healthy ecosystem for health and well being and longevity of the citizens and to that end the petitioner has made provision for a plot of 7 decimals for a mosque, 10 decimal for children park,

20 decimal for a school and wide road similar to those of the Uttara Shahar and as such there cannot be any public interest for residential purpose better and more congenial by the Uttara Project than by the Samity's purpose, therefore, the proceedings in L. A. Case in respect of case land is liable to be set aside.

24. He further submitted that there is every apprehension that in case the ongoing extension of Uttara Project is further allowed, then the khal itself and open space on either bank of the khal will be converted into residential plots thereby blocking the open air space, degrading the quality of the environment in the area and its neighbourhoods, which are necessary for health and well being of the citizens.

25. He again submitted that due to heavy rainfall and due to floods occurring almost every year, the Dhaka City is inundated under water and also water logged and for rescue from such eventuality, the experts opine that all the khals and rivers across the city should be reclaimed and shall be protected for exit and excretion o the flood and rainfall water, which will also open up scope for widows for open air space congenial health atmosphere for the well-being and longevity not only of the petitioner and his member but for all of the Dhaka City dwellers and these essential scope for life are also vested rights guaranteed under the Constitution and if the case of the lands are not released and Uttara extension is allowed then the river will be filled up and the above vested rights of the petitioner and the citizen of the Dhaka City will be infringed.

26. He further submitted that the Appellate Division of the Supreme Court of Bangladesh in 7 BLD (AD) 95 observed that "Any purpose which benefits the public or a section of the public is a public purpose."

27. He also referred to the observation mad in Mohammad Mansur Rahman vs. Prov. of East Pak. and others, 14 DLR 604, wherein it was observed that:

> The nature of the purpose, namely whether it in public or private, will depend upon the fact whether it will serve the general interest of the community or the particular interest of individuals. It is not necessary that the entire community must be benefited. In circumstances, even benefit to a class, such as coolies, can be said to serve public interest, ... Requisition of land for such Societies undoubtedly, will be for public purpose.
>
> The main purpose is to lessen congestion in towns and bring into existence houses will due regard to sanitary arrangements and other amenities of life.
>
> The reason for requisition was not to benefit the members only but to further a public cause, in the execution of which some benefit will accrue to them ....

28. None one appears for the respondents when the matter is taken up for hearing.

29. On perusal of the submission of the learned Advocate for the petitioner, the petition and the annexed documents it is quite apparent to note that the instant petitioner has obtained the present Rule as and on behalf of the Rajdhani Avijat Bohumukhi Samabaya Samity Ltd. (Reg.), as its Secretary. It is quite pertinent note that as per observations made in 43 DLR (AD) 126, the meaning and dimension of person aggrieved means:

> In our Constitution the petitioner seeking enforcement of a fundamental right must be a person aggrieved. Our Constitution is not at *pari materia* with the Indian Constitution on this point. The decisions of the Indian jurisdiction on pubic interest litigation are hardly apt in our situation. The petitioner is not acting pro bono public but in the interest of its members. The real question in this case is whether the petitioner has the right to move the writ petition in a representative capacity. The High Court Division has rightly relied upon the caser of 29 DLR 188 where the question has been answered in the negative. The petitioner may represent the employers in the Wage Board but its *locus-standi* to act on behalf of its members in an application under Art. 102 of the Constitution is just not there.

30. So, we find that that the petitioner Samity does not have any *locus-standi* to move the writ petition to ventilate the causes of its aggrieved members since it is not a public purpose, rather the purpose for the benefits individual members of the samity who have individually bought the land and thereafter formed the samity, and as such, we do not find the instant Rule maintainable.

31. In the result, the Rule is discharged.

32. There is no order as to cost.

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1 SCOB [2015] HCD 78

HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION NO. 5210 of 2013

Delta Spinners Limited
…... Petitioner

-Versus-

Bangladesh Bank and others.
….. . Respondents

WRIT PETITION NO. 9305 of 2013

Roseburg Industries Limited.
…... Petitioner

-Versus-

Bangladesh Bank and others.
….. . Respondents

Mr. Shamsuddin Babul, Advocate with
Mr. Kanailal Shaha, Advocate
...For the petitioner in Writ Petition No. 5210 of 2013.

Mr. Md. Abdul Haque, Advocate
...For the respondent no.3 in Writ Petition No. 5210 of 2013.

Mr. Fida M. Kamal, Advcoate with
Mr. Miah Mohammed Kausar Alam, Advocate
...For the petitioner in Writ Petition No. 9305 of 2013.

Mr. Md. Taherul Islam, Advocate
...For the respondent no.3 in Writ Petition No. 9305 of 2013.

Mrs. Hosneara Begum, Advocate
...For the respondent no. 4 in Writ Petition No. 9305 of 2013.

Heard on: 09.03.2014, 05.05.2014, 18.05.2014 and 08.06.2014 and Judgment on: 15.06.2014

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Mohammad Ullah

A depositor, when deposits his money in the bank, is entitled to expect that his banker, under any circumstances, will not dishonour his cheque when he has sufficient fund in the account or will not stop him from withdrawing money from his account or transferring the same to another account, unless the banker is directed by a competent court, or in some cases by the regulatory authority like Bangladesh Bank, to stop such payment or transaction. Even if some bills or LCs are the subject matter of any investigation by any agency, we do not find any provision in the relevant laws under which a bank can stop payment or re-imbursement on such LCs. ...(Para 19)

A bank under the law and banking practice, in particular in accordance with the relevant provisions of UCP-600, is bound to make payment or re-imbursement in respect of the accepted bills once they are accepted by the issuing banks, and in view of the said provisions of the UCP-600, namely Article-16, once such acceptance is given, the matter is closed and the concerned banks are precluded from raising any issue thereafter. ...(Para 22)

Even if the banks have in the meantime filed any criminal case against the petitioner for commission of such fraud, the payment in respect of the said bills cannot be stopped unless and until the banks obtain an order from a competent Court for stoppage of re-imbursement. ...(Para 23)

Judgment

SHEIKH HASSAN ARIF, J:

1. Since the questions of law and facts involved in the aforesaid two writ petitions are almost same, they have been taken up together for hearing, and are now being disposed of by this single judgment.

2. **In Writ Petition No. 5210 of 2013**, Rule Nisi was issued calling upon the respondent Nos. 1, 2 and 3 to show cause as to why the inaction of the respondent No. 3 in payment of the outstanding export bills of the petitioner amounting to Tk. US$ 10,89,000.00 along with the interest as per the terms of the Letters of Credit (L/C) for non-payment on the date of maturity overdue interest of the Proforma-respondent Nos. 4 against the L/C being Nos. 037011041230, 037011041235, 037011041236, 037011041237, 037011041238, 037011041239, 037011041949, 037011041950 and 037011041951, Annexure-B series, if the same do not fall under the cause of fraud of the petitioner by any investigation, specially conducted by Anti-corruption Commission, should not be declared to be without any lawful authority and is of no legal effect, and as to why the respondent Nos. 1, 2 and 3 should not be directed to take necessary steps for payment of the said outstanding export bills of the petitioner amounting to US$ 10,89,000.00 along with the interest of the respondent No.4 bank at 16% per annum for delay period and other overdue charges.

3. **In Writ Petition No. 9305 of 2013,** Rule Nisi was also issued in similar terms, namely that the respondent Nos. 1-5 were asked to show cause as to why inaction of the respondent Nos. 2-5 in making payment against the accepted bills of the petitioner under the Letters of Credit (L/Cs) (Annexures- D and E series) should not be declared to be without lawful authority and is of no legal effect and as to why the respondent No. 1 should not be directed to take necessary actions under Section 45 of the Bank Companies Act, 1991 for making payment against the said accepted bills along with overdue interests if the same do not fall under the cause of fraud of the petitioner by any investigation specially conducted by the Anti corruption Commission.

BACKGROUND FACTS:

4. Short facts, relevant for the Rules, are given below:-

In Writ Petition No. 5210 of 2013, the petitioner, a Limited Company, is engaged in the business of manufacturing and supplying of yarn being registered with the Board of Investment and BTMA. In the course of its business, the petitioner received nine back to back L/Cs ("BB L/Cs"), being LC Nos. 037011041230, 037011041235, 037011041236, 037011041237, 037011041238, 037011041239, 037011041949, 037011041950 and 037011041951, issued by Sonali Bank (respondent No. 3) for supply of yarn to purchasers. The expiry dates of the said LCs were 20.08.2011 and 25.09.2011, stipulating that the negotiating bank, namely the Agrani Bank Limited, Amin Court Branch, Dhaka (respondent No. 4), would get the payment against the said L/Cs after twenty days on maturity and that the payment would only be due upon fulfillment of conditions in the said LCs and letter of acceptance of the said L/Cs issued by the L/C issuing bank. Upon receipt of the said L/Cs, after endorsement by the negotiating bank, the petitioner manufactured the said goods and supplied the same upon fulfilling the terms and conditions mentioned in the said L.Cs and, accordingly, submitted the delivery documents, such as delivery chalans, Mushak-11 forms etc., before the negotiating bank. Thereupon, since the negotiating bank found no discrepancy in the said documents and found the same incompliance with the terms of the said L/Cs, it issued forwarding letters to the L.C issuing bank indicating that the said supply of yarns were made by the petitioner as against the said L/Cs. Upon receipt of the said supply by the purchasers, the negotiating bank made the payments against the said bills to the petitioner and, accordingly, forwarded the said bills to the L/C issuing bank through official channel for re-imbursement. However, even after expiry of the maturity dates as stipulated in the said L/Cs, the L/C issuing Bank (Sonali Bank) having not paid or re-imbursed the said L/C amounts, the negotiating bank issued several letters addressing the Sonali Bank for taking necessary steps to re-emburse the said amounts upon honouring the said bills, but got no positive response. This being so, the negotiating bank started taking steps for realizing the said amounts from the petitioner and issued letter dated 02.05.2013 stating that since the L/C issuing bank-Sonali Bank did not honour the said bills, petitioner was liable to pay the same. It is further stated that since the negotiating bank has taken steps for realizing the said amounts from the petitioner for no fault of the petitioner, but for the default of the L/C issuing bank in honouring the said LC's in accordance with law, the petitioner is at high risk of being treated as defaulter-borrower and classified in the CIB report published by the Bangladesh Bank, thereby, depriving it from getting any credit facilities from any bank or financial institutions. Consequently, since the business of the petitioner is facing serious impacts by such attempts by the negotiating bank because of the default of the L/C issuing Bank, the petitioner moved this Court and obtained the aforesaid Rule. By way of the supplementary affidavit, it is further stated by the petitioner that even the Board of Directors of the L/C issuing bank-Sonali Bank in its 362nd meeting resolved to honour 94 (ninety four) inland bills including those of the petitioners, and since the concerned bills of the petitioner are admittedly not the subject matter of any enquiry or investigation by the Anti Corruption Commission in respect of any financial scam, the inactions of the Sonali Bank, and the inaction of the Bangladesh Bank in taking appropriate actions against Sonali Bank as regulating authority, are malafide and arbitrary.

5. In **Writ Petition No. 9305 of 2013**, it is stated that the petitioner, being engaged in the business of dyeing yarn, bleaching, washing etc., received 16 (sixteen) BB L/Cs from Bangladesh Krishi Bank (respondent No. 4) and 18 BB L.Cs from Sonali Bank (respondent No. 3) to supply different garment accessories to various purchaser companies. The description of the said LCs are as follows;

6. **LC issuing Bank- Bangladesh Krishi Bank (respondent No. 4)**

Sl No	Acceptance Letter No. & date	L/C No. & Date	Bill No. & date	Amount
1	BKB/KBCB/F.Ex/LC-154/5167 dated- 20.10.11	050711990154 dated 19.10.11	2011/688 dated 20.10.11	US$ 93,004.00
2	BKB/KBCB/F.Ex/LC-155/5168 dated- 20.10.11	050711990155 dated 19.10.11	2011/689 dated 20.10.11	US$ 89,996.00
3	BKB/KBCB/F.Ex/LC-156/5546 dated- 27.10.11	050711990156 dated 25.10.11	2011/728 dated 27.10.11	US$ 44,998.50
4	BKB/KBCB/F.Ex/LC-156/5545 dated- 27.10.11	050711990156 dated 25.10.11	2011/727 dated 27.10.11	US$ 55,001.50
5	BKB/KBCB/F.Ex/LC-157/5544 dated- 27.10.11	050711990157 dated 25.10.11	2011/724 dated 27.10.11	US$ 42,000.00
6	BKB/KBCB/F.Ex/LC-157/5543 dated- 27.10.11	050711990157 dated 25.10.11	2011/723 dated 27.10.11	US$ 58,000.00
7	BKB/KBCB/F.Ex/LC-158/5547 dated- 27.10.11	050711990158 dated 25.10.11	2011/725 dated 27.10.11	US$ 55,000.00
8	BKB/KBCB/F.Ex/LC-158/5548 dated- 27.10.11	050711990158 dated 25.10.11	2011/726 dated 27.10.11	US$ 45,000.00
9	BKB/KBCB/F.Ex/LC-187/8058 dated- 21.12.11	050711990187 dated 19.12.11	2011/877 dated 21.12.11	US$ 37,000.00
10	BKB/KBCB/F.Ex/LC-188/8059 dated- 21.12.11	050711990188 dated 19.12.11	2011/878 dated 21.12.11	US$ 39,600.00
11	BKB/KBCB/F.Ex/LC-189/8060 dated- 21.12.11	050711990189 dated 19.12.11	2011/879 dated 21.12.11	US$ 38,500.00
12	BKB/KBCB/F.Ex/LC-190/8061 dated- 21.12.11	050711990190 dated 19.12.11	2011/880 dated 21.12.11	US$ 30,000.00
13	BKB/KBCB/F.Ex/LC-191/8062 dated- 21.12.11	050711990191 dated 19.12.11	2011/881 dated 21.12.11	US$ 24,900.00
14	BKB/KBCB/F.Ex/LC-0001/8775 dated- 08.01.12	050712990001 dated 01.01.12	2014/14 dated 08.01.12	US$ 53,500.00
15	BKB/KBCB/F.Ex/LC-0002/8776 dated- 08.01.12	050712990002 dated 01.01.12	2012/15 dated 08.01.12	US$ 52,950.00
16	BKB/KBCB/F.Ex/LC-0003/8777 dated- 08.01.12	050712990003 dated 01.01.12	2012/16 dated 08.01.12	US$ 53,550.00

7. **LC issuing Bank-Sonali Bank (respondent No. 3)**

Sl. No	Acceptance Letter No. & Date	L/C No. & Date	Our Bill No.	Amount
1.	SBL/SHERA/F.EX/2011/1938 dated 04.12.2011	037011043343 dated 29.11.2011	MTBL/DIL/IDBP/74345 /11	51,450.00
2.	SBL/SHERA/F.EX/2011/1939 dated 04.12.2011	037011043344 dated 29.11.2011	MTBL/DIL/IDBP/74354 /11	48,450.00
3.	SBL/SHERA/F.EX/2011/1940 04.12.2011	037011043345 dated 29.11.2011	MTBL/DIL/IDBP/74336 /11	50,100.00
4.	SBL/SHERA/F.EX/2011/1941 dated 04.12.2011	037011043346 dated 29.11.2011	MTBL/DIL/IDBP/74381 /11	50,400.00
5.	SBL/SHERA/F.EX/2011/1942 dated 04.12.2011	037011043347 dated 29.11.2011	MTBL/DIL/IDBP/74372 /11	49,600.00
6.	SBL/SHERA/F.EX/2011/1943 dated 04.12.2011	037011043348 dated 29.11.2011	MTBL/DIL/IDBP/74363 /11	50,000.00

Sl. No	Acceptance Letter No. & Date	L/C No. & Date	Our Bill No.	Amount
7.	SBL/SHERA/F.EX/2011/1919 dated 13.12.2011	037011043354 dated 02.12.2011	MTBL/DIL/IDBP/74701 /11	45,450.00
8.	SBL/SHERA/F.EX/2011/1918 dated 13.12.2011	037011043355 dated 02.12.2011	MTBL/DIL/IDBP/74729 /11	53,550.00
9.	SBL/SHERA/F.EX/2011/1917 dated 13.12.2011	037011043356 dated 02.12.2011	MTBL/DIL/IDBP/74710 /11	52,600.00
10.	SBL/SHERA/F.EX/2011/1916 dated 13.12.2011	037011043357 dated 02.12.2011	MTBL/DIL/IDBP/74738 /11	48,400.00
11.	SBL/SHERA/F.EX/2012/226/03 dated 03.01.2012	037011043745 dated 28.12.2011	MTBL/DIL/IDBP/75380 /12	49,850.00
12.	SBL/SHERA/F.EX/2012/226/04 dated 03.01.2012	037011043747 dated 28.12.2011	MTBL/DIL/IDBP/75362 /12	50,170.00
13.	SBL/SHERA/F.EX/2012/226/07 dated 03.01.2012	037011043750 dated 28.12.2011	MTBL/DIL/IDBP/75399 /12	49,600.00
14.	SBL/SHERA/F.EX/2012/226/06 dated 03.01.2012	037011043746 dated 28.12.2011	MTBL/DIL/IDBP/75371 /12	49,980.00
15.	SBL/SHERA/F.EX/2012/226/05 dated 03.01.2012	037011043748 dated 28.12.2011	MTBL/DIL/IDBP/75344 /12	50,100.00
16.	SBL/SHERA/F.EX/2012/50 dated 02.02.2012	037011044074 dated 29.12.11	MTBL/DIL/IDBP/76245 /12	100,500.00
17.	SBL/SHERA/F.EX/2012/09 dated 02/02/2012	037011044075 dated 29.12.2011	MTBL/DIL/IDBP/76236 /12	99,500.00
18.	SBL/SHERA/F.EX/2012/224/08 dated 03/01/2012	037011043749 dated 28.12.2011	BKB/KBCB/FEX/12/07/ 18551	50,300.00

8. The said LCs being endorsed by the respective negotiating banks, namely the Mutual Trust Bank Limited, National Bank Limited and Sonali Bank Limited (respondent Nos. 6, 7 and 8), the petitioner produced the said raw materials and, accordingly, supplied the same in compliance with the conditions mentioned in the said L/Cs. The petitioner, accordingly, submitted the delivery documents of the said goods before the respective negotiating banks, whereupon the negotiating banks forwarded the same to the L/C issuing Banks as no discrepancy therein was detected. Thereupon, the L/C issuing Banks, namely the Krishi Bank and Sonali Bank, accepted the said bills and issued acceptance letters. However, though long time, namely more than one year, has elapsed, the said bills are yet to be re-imbursed by the LC issuing banks, thereby, putting the petitioner at the risk of becoming defaulter-borrower and depriving it from obtaining any credit facilities from any bank or financial institutions in view of the provisions under Section 27 Ka Ka of the Bank Companies Act, 1991. It is further stated, by way of supplementary affidavit, that in respect of the said bills no investigation or enquiry is going on by the Anti-Corruption Commission and the bills accepted by the Sonali Bank are included in the said 94 (ninety four) bills as mentioned in the resolution of the Board of Directors of Sonali Bank in its 362nd meeting resolving that those bills should be honoured.

9. The above Rules are opposed by the L/C issuing Banks through learned Advocates, who filled affidavits-in-opposition, mainly contending that those bills are the subject matter of the un-precedented financial scam as perpetrated by the Hallmark group, and after investigation of the said scam, the Anti-Corruption Commission (ACC) has already submitted charge sheets against the people behind such scam including some high officials of the Sonali Bank. It is further contended that since the writ petitions are mainly for realization of money which is disputed, this Court, under writ jurisdiction, is not the proper forum for resolving such dispute. It is further stated through the Krishi Bank's affidavit in opposition in Writ Petition No. 9305 of 2013 that the ultimate foreign currency against those bills has never repatriated in the country as no exports in fact took place and that in view of the instructions given by the Bangladesh Bank in BRPD Circular Nos. 10 and 13 dated 11.07.2012

and 09.09.2012 respectively, the L/C issuing banks are entitled to withhold payments until investigation initiated by those L/C issuing banks in respect of the said bills are completed.

SUBMISSIONS:

10. Mr. Shamsuddin Babul, learned advocate appearing for the petitioner in Writ Petition No. 5210 of 2013, submits that this Court and the superior Courts of this sub-continent have time and again held that in documentary credits the bank deals with documents and not with the goods and as such the moment the documents are found to be without any discrepancy, any underlying disputes regarding actual supply or short supply or defective supply of the said goods cannot in any way impact upon the payment on the L/Cs. Referring to the relevant annexures in the writ petition, in particular letters of the concerned negotiating bank addressing the Sonali Bank that the bills have been accepted by the Sonali Bank as the same were found without any discrepancy, Mr. Babul submits that under the provisions of UCP-600, the L/C issuing Bank, under no circumstances, can stop re-imbursement as against those bills unless it is directed to do so either by any competent Court or the regulatory authority like Bangladesh Bank. Since, according to him, there is no such restriction, the Sonali Bank, as the L/C issuing bank, has got no legal authority to stop the imbursement after acceptance of those bills and as such it is also the obligation of the Bangladesh Bank to take appropriate regulatory actions against the Sonali Bank to ensure re-imbursement of the said L/C amounts.

11. Mr. Meah. Mohammd Kawsar Alam, learned Advocate appearing for the petitioner in Writ Petition No. 9305 of 2013, upon adopting the submissions of Mr. Babul, submits that in respect of both sets of LCs of the petitioner, the L/C issuing banks, namely Krishi Bank and Sonali Bank, issued specific acceptance letters as against the said bills and raised no issue of any discrepancy in respect of the documents submitted by the petitioner in support of actual delivery of the said goods. This being so, he continues, the L/C issuing banks have been acting without legal authority and in violation of the norms and practice of banking—in particular the provisions under UCP-600—the terms of which have been made specifically applicable in respect of the said LC's by mentioning the same in each L/C. Referring to different Articles of the said UCP-600, in particular Articles-7, 14, 15 and 16, Mr. Alam points out that in issuing the said BB L/Cs the L/C issuing banks accepted the terms and conditions of the UCP-600 and thereby made itself liable to pay once the documents submitted by the supplier are found to be without discrepancy. Since the same were accordingly accepted by the LC issuing banks having found the same without any discrepancy, it is now the legal obligation of the Bangladesh Bank to exercise its regulatory authority upon the L/C issuing banks in view of the provisions under Section 45 and other provisions of the Bank Companies Act, 1991 to ensure strict compliance of the said terms of the UCP-600 for the sake of protection of the reputation of the documentary credits in Bangladesh, he argues. Otherwise, according to him, the commercial world of Bangladesh will internationally suffer a serious blow and loose confidence reposed in it by the international business enterprises. Referring to the resolution of the 362nd Board meeting of the Sonali Bank (Annexure-K to the supplementary affidavit of the petitioner), ACC's two letters dated 07.04.2014 (Annexure-5 series to affidavit in opposition of respondent No. 3 dated 29.05.2014) and 01.10.2013 (Annexure-I to the supplementary affidavit of the petitioner dated 13.04.2014), Mr. Alam submits that whatever scam-issue was raised by the ACC or the concerned banks at the relevant time, the same have been resolved long ago as the ACC by those letters categorically mentioned that the ACC had nothing to do with the bills of the petitioner and the enquiry in respect of the said bills were already disposed of and that it was the concerned bank's internal matter as to whether it would re-emburse the said amount as against the said bills. Referring to various decisions of this Court, namely the cases of **Uttara Bank Limited vs. Macklin and Kilburn Ltd., 33 DLR (AD)-298, Standard bank Limited Vs Tripos Engineering, 2005 BLD (AD)-137, Samrat Apparels Vs. Hanvit Bank 57 DLR (AD), 194-196, Gooriyonly (BD) Vs Chartkar holding, 54 DLR (Ad) 2002-71 and Zyta Garments Ltd. Vs Union Bank, 55 DLR (AD0 (2003)-56,** Mr. Alam submits that this Court and the superior Courts of this sub-continent have repeatedly declared that the Letter of Credit is the blood flow of the commercial world and under no circumstances the same can be disturbed unless the documents are found discrepant or that the bills are the result of fraud.

12. Mr. Md. Abdul Haque, learned Advocate appearing for the Sonali Bank (respondent No. 3) in Writ Petition No. 5210 of 2013, submits that the country has suffered a huge blow because of the financial scam as perpetrated recently by the Hall Mark group, and this petitioner was also involved in the said scam. In support of his submission, he refers to a letter dated 10.03.2013 (Annexure-2 to the affidavit in opposition dated (21.11.2013) wherein the ACC sought entire documents and papers concerning the Hall Mark group as well as the bills of the petitioner. This being so, Mr. Haque submits that, since the ACC has in the meantime submitted charge sheets against the persons behind such financial scam and the matter is pending before the concerned Courts, the Sonali Bank is entitled to stop the re-imbursement in respect of the said bills as the said bills are the product of fraud and fraudulent activities committed by the petitioner. Mr. Hoque further argues that since the

case of the petitioner is in fact for realization of money from the bank and the claim is a disputed claim, this Court should not direct the Sonali Bank to pay the said amount in respect of the said bills as the writ jurisdiction is not the proper forum for resolving such disputes. In support of his submissions, he refers to a decision of our Apex court in **Water Development Board vs. Shamsul Huq, 51 DLR (AD)-169.**

13. Opposing the Rule in Writ Petition No. 9305 of 2013, Ms. Hosneara Begum, learned advocate appearing for the Bangladesh Krishi Bank (respondent No. 4), submits that in respect of the said bills the ultimate export to a foreign country was not even done and no foreign exchange was repatriated by the ultimate exporters. This being so, she argues, it is clear that those bills are the product of fraud and as such the Krishi Bank as well as the other LC issuing banks of the said bills are entitled to stop re-imbursement thereon though the same were accepted earlier. Referring to the guidelines of the Bangladesh Bank regarding acceptance of inland bills, Ms. Hosneara submits that the UCP-600 is not applicable in respect of inland bills, rather only the Bangladesh Bank guidelines are applicable, and in accordance with such guidelines, the LC issuing banks as well as the negotiating banks are entitled to conduct enquiry/investigation to determine whether actual supply of goods was made in respect of the said bills. Thus, since in the instant cases such investigation is still going on, this Court should not direct those LC issuing banks to reimburse any amount as against those bills. Further referring to Annuexures-3 and 4 to the affidavit-in-opposition of respondent No. 4, which are two Circulars of Bangladesh Bank dated 11.07.2012 and 09.09.2012, Ms. Hosneara submits that the LC issuing banks as well as the negotiating banks are obliged to comply with the directions as contained in those circulars issued by the regulating authority and in the said circulars it has been clearly provided that unless the banks are satisfied about the real supply of the goods in respect of the inland bills, the same cannot be accepted.

ANALYSIS AND FINDINGS:

14. It appears from the concerned LCs, namely Annexure-B series to the Writ Petition No. 5210 of 2013 and Annexure-L series to the supplementary affidavit of the petitioner dated 18.05.2014 in Writ Petition 9305 of 2013, that each and every BB LCs stipulates therein, in clear terms, the following words:

".....this documentary credit is subject to uniform customs and practice for documentary credit 2007 (Revision) International Chamber of Commerce Publication No. 600....."

15. This means, the UCP-600 was made an integral part of the said LCs. Apart from that, we do not see anything in the said LCs that the same would be governed by any separate instruction to be issued by the Bangladesh Bank or already issued by the Bangladesh Bank. This being so, we are unable to accept the submissions as put forward by Ms. Hosneara that UCP-600 will not apply in the concerned LCs, and the instructions as contained in BRPD circulars of Bangladesh Bank will only apply, though, as a statutory regulatory authority, Bangladesh Bank will always have regulatory control over all Banks in Bangladesh.

16. Letters of Credit or back to back Letters of Credit are called documentary credits. In such credits, the document prevails over everything else. In this regards, a copy of UCP-600, as placed before us by the learned Advocates deserves some scrutiny and examination by this Court. Under Article-7 of the said UCP-600, it has been provided that the issuing bank must honour the concerned LC, and by issuance of such LC, the issuing bank undertakes to re-emburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Article-14 then provides procedure for examination of the documents submitted before the negotiating bank in order to negotiate the said LC, wherein it has been provided that the negotiating bank and the LC issuing bank must examine a presentation to determine **on the basis of the documents alone,** whether or not the documents appear on their face to constitute a complying presentation. Article15 provides that when a confirming bank or negotiating bank determines that a presentation is complying, it must forward the documents to the LC issuing bank. The same Article further provides that when an issuing bank determines that a presentation is complying, it must honour. However, Article-16 confers a right on the issuing bank as well as the negotiating bank not to accept or negotiate LCs once the documents are found not complying, meaning that any discrepancy is found therein. Article-16, however, further provides that if such discrepancy is detected, the purchaser or the applicant of LC may waive such discrepancy, and in that case, the LC issuing bank and the negotiating Bank may accept and negotiate the said LC upon such waiver by the said applicant. **Clause-f of Article-16** is very important in the facts and circumstances of the cases in hand and in the commercial world. The said **Clause-f of Article-16** is quoted below:

Article-16:

Discrepant Documents, Waiver and Notice

"a .....
b.....
c.....
d.....
e.....
f. If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.
g....."

17. Thus, if any discrepancy in the presentation of documents is found, the negotiating bank as well as the LC issuing bank have the right to raise the issue of discrepancy and once such discrepancy is waived by the applicant of the LC, the banks may accept the said LCs. However, according to Clause-f of Article-16, if such discrepancy issue is not raised before, or for any reason the concerned banks fail to act in accordance with the provision of this Article in respect of raising the issue of discrepancy, it cannot subsequently claim that the documents submitted do not constitute complying presentation. It may be noted here that in accordance with the definition of 'complying presentation' as provided by Article- 2 of the said UCP-600, a complying presentation means-a presentation in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.

18. Now, the question is, when, or under what circumstances, an LC issuing bank or a negotiating bank can stop payment or reimbursement as against LCs. In other words, if any investigating agency takes up an inquiry or investigation regarding a financial scam committed by a business group in which some LCs may be involved, whether the concerned bank, on its own volition, can stop payment or reimbursement on a documentary credit.

19. The superior Courts of this sub-continent including our Apex court have repeatedly declared that the faith of the clients and depositors in the bank are the utmost important thing in the commercial word. A depositor, when deposits his money in the bank, is entitled to expect that his banker, under any circumstances, will not dishonour his cheque when he has sufficient fund in the account or will not stop him from withdrawing money from his account or transferring the same to another account, unless the banker is directed by a competent court, or in some cases by the regulatory authority like Bangladesh Bank, to stop such payment or transaction. Even if some bills or LCs are the subject matter of any investigation by any agency, we do not find any provision in the relevant laws under which a bank can stop payment or re-imbursement on such LCs. In the present cases as well, we find that the Bangladesh Bank, by its letters dated 06.06.2013 and 22.10.2013 (see Annexure-5 series to the Affidavit in Reply dated 29.05.2014 of respondent No.3) firmly stated the said position of law by saying that even in respect of matters which are under investigation by the ACC it is up to the respective banks to honour or dishonour any bill or make any payment therein in accordance with the banking practice. This Court in a very recent unreported case, namely in Writ Petition No. 4081 of 2012, has re-iterated the said position wherein the operation of bank accounts of Jubilee Bank was stopped by its bankers on the basis of some allegations by some directors of the said bank. In the said case, we specifically directed the Bangladesh Bank to take actions against those banks when those banks were found practicing illegal activities in respect of the depositors money by stopping transactions on their accounts without any order either from the competent court or from the Bangladesh Bank to do so. In another unreported case, namely in Writ Petition Nos. 3958 and 3959 of 2013, a particular amount was transferred from the account of the account holder-petitioner to the government collection account on the ground that the auditors and C.A.G. office raised objection in respect of some payments made in the said account and the said objection was endorsed by the Parliamentary Standing Committee of the Finance Ministry. After discussing relevant provisions of law, this Court again held that no amount of any depositor can be transacted or withdrawn or transferred without consent of the said depositor. In deciding those cases, this Court reiterated the sanctity of the client and banker relationship in the banking business.

20. In the cases in hand, we are confronted with almost same scenario, though it may be looked at from different angles. In these cases, the allegation on the basis of which the admittedly accepted BB LCs were not honoured or reimbursed by the LC issuing banks was that those bills were related to the Hall Mark financial scam, the scam that recently jolted the commercial world of this country. To strengthen the said contention, the

learned advocates for the banks repeatedly referred to a letter of the ACC dated 18.03.2013 asking the concerned banks to supply copy of certain documents and bills for the purpose of enquiry in respect of the said financial scam. It appears that the concerned banks, accordingly, responded to the said requests of ACC and supplied those documents. However, in such process, the concerned banks, on their own volition, stopped re-imbursement in respect of some admittedly accepted bills including the bills which are the subject matter of the instant writ petitions. Nowhere in the affidavit-in-oppositions or the submissions of the learned advocates of the banks, we find any legal reference or authority on the basis of which they unilaterally stopped re-imbursements as against the said accepted bills, in particular when the Bangladesh Bank in its above mentioned letter dated 22.10.2013 specifically mentioned that even the bills under investigation could be honoured in accordance with the banking practice. Now, when the learned advocates for the petitioners refer to two letters of the ACC, namely the letter dated 07.04.2014 (Annexure-5 series to the affidavit-in-opposition of respondent No. 3 dated 29.05.2014) and letter dated 01.10.2013 (Annexure-I to the supplementary affidavit of the petitioner dated 13.04.2014), whereby the ACC itself communicated an information to the concerned banks that the bills in question were no more inquired into and that the concerned banks were at liberty to act in accordance with law and banking practice as regards the re-imbursement against the said bills, the learned advocates for the banks find it difficult to support their standing.

21. Again, to strengthen the position of the banks, Ms. Hosneara has tried to rely on two circulars, namely **BRPD Circular No. 10 and 13 dated 11.07.2012 and 09.09.2012 respectively,** issued by the Bangladesh Bank, wherein the Bangladesh Bank emphasized on the need for being assured by the negotiating and LC issuing banks in respect of the actual supply of the goods concerned under the BB LCs or inland bills before giving acceptance thereon. However, we do not see any relevance of those circulars and guidelines of the Bangladesh Bank in respect of the issues raised in the instant writ petitions in particular when the admitted position is that the stage of acceptance of those bills has gone long ago. Therefore, the issue of giving acceptance on the bills is a closed issue now. If the concerned banks are of the opinion that in providing acceptance of the bills the officials of the banks did not strictly comply with the directions, instructions or guidelines issued by the Bangladesh Bank, it is their internal matter and they are at liberty to take appropriate legal actions against those officials. But, we do not find any cogent reason as to how any internal irregularity or illegality committed by any officials of the concerned banks at the relevant time of acceptance of the bills will have any bearing on the re-imbursement of the said bills in particular when the ACC itself has in the meantime observed that it got nothing to do with the said bills.

22. We do not know whether the concerned LC issuing banks have stopped re-imbursement on the plea of investigation of the alleged irregularity or illegality at the time of acceptance of the said bills long after such acceptances were given by them just to save the backs of those concerned officials, if any, who were allegedly responsible for violating the circulars or guidelines issued by the Bangladesh Banks. If that is so, this Court cannot allow such practice by any banking enterprise in this country. One cannot suffer the loss for the fault of others. A bank under the law and banking practice, in particular in accordance with the relevant provisions of UCP-600, is bound to make payment or re-imbursement in respect of the accepted bills once they are accepted by the issuing banks, and in view of the said provisions of the UCP-600, namely Article-16, once such acceptance is given, the matter is closed and the concerned banks are precluded from raising any issue thereafter.

23. Now, the question of fraud as allegedly committed by the petitioners or that they played a role in the said fraud. Apart from making statements of allegation of fraud or playing a role in the alleged fraud, we have not found any solid steps as taken by the said banks either by asking any investigating agency to inquire in to such allegations or by filing any case before any competent Court against the petitioner. Even if the banks have in the meantime filed any criminal case against the petitioner for commission of such fraud, the payment in respect of the said bills cannot be stopped unless and until the banks obtain an order from a competent Court for stoppage of re-imbursement. Commencing from the Uttara Banks case decided long ago by our Apex Court, this Court has always given high sanctity to the documentary credits as otherwise it would have had serious impact on the international trade. Though the bills in question are inland bills, it cannot be forgotten that they are parts of the international bills, namely that those back to back LCs have been issued under master LCs issued by a foreign purchasers to import some goods or garments from this country. Once this chain of transaction on documentary credits is interrupted without any legal reason, the entire fabric of international trade with

Bangladesh will fall apart and the confidence of the international market in the banking transaction of Bangladesh will suffer a huge disaster. This being so, this Court is of the view that the Bangladesh Bank has a vital role to play in respect of the said bills in view of the provisions of the Bank Companies Act, 1991, which gave it regulatory power. Under Section 45 of the Bank Companies Act, 1991, the Bangladesh Bank is empowered to give any directions upon any bank or financial institutions for public interest or for the development of banking practice and for the proper management of a concerned bank. However, in this case we are surprised to note that though notice demanding justices by the petitioners were served upon the Bangladesh Bank, it refrained from taking any actions against the concerned LC issuing banks.

24. Now, the issue as submitted by the learned Advocate Ms. Hosneara that the goods were ultimately not exported to the foreign country or that the ultimate foreign currency has never repatriated. Since we do not find anything on record in support of such allegation except a mere statement that the foreign currency has never repatriated in respect of those bills, we cannot but hold that even if they are true, those are events long after the acceptance of the concerned bills and as such law will take its own course in respect of those allegations. In so far as the acceptance of the bills is concerned, we do not see any legal authority under which the concerned LC issuing banks can re-open the entire issue merely on the pretext of some investigations and accordingly stop reimbursements on the said accepted bills. It is true that they can investigate their internal irregularities and illegalities at any time they wish, but for such internal investigation a client of the bank cannot suffer when the expectation of the client is that the documentary credit will follow its own law and it will not be impacted upon by any under-lying transactions either between the parties or between the banks or even by any underlying irregularity or illegality committed by the bank officials.

25. Again, as regards the submission that the claim of payment of money is a disputed claim, this Court is of the view that evidently the amount of LC is not disputed. What is disputed is the underlying contract regarding supply of the goods. Therefore, we come to the same conclusion that the said underlying dispute has no role to play in so far as the documentary credit is concerned. Though the LCs are inland LCs in a country, it has international impact and that is why when the banks which are issuing the internal back to back LCs, they are specifically mentioning UCP-600 therein. Since this inland/internal back to back LCs have international links as the same are connected directly to the confidence of the international players in the commercial world of Bangladesh, this Court should give high priority to such confidence. This Court is of the view that though initially it was the utmost responsibility of the LC issuing banks to reimburse the amounts as against the said accepted LCs once the same are accepted, it has now become the obligation of the Bangladesh Bank to take appropriate actions against concerned LC issuing banks for their illegal role in stopping re-imbursement against those LCs. Besides, it appears from the Board resolution of the 362nd Board meeting of the Sonali Bank that out of total 116 such inland bills 94 bills were singled out as the same were found to be payable on the basis of its inspection reports. It is also admitted by the affidavit of respondent No. 3-Sonali Bank in Writ Petition No. 9305 of 2012 that the concerned bills in the instant writ petitions are included in the said 94 clean bills.

26. Regard being had to the above facts and circumstance of the cases and the relevant law and practice, we are of the view that the Rules have substance and as such the same should be made absolute.

27. In the result, the Rules are made absolute. The LC issuing banks as well as the Bangladesh Bank are directed to to ensure re-imbursement of the said bills of the petitioners by the LC issuing banks (Sonali Bank and Krishi Bank in the aforesaid cases) within a period of two months from receipt of the copy of this judgment. However, since the claims of interests by the petitioners need determination of facts upon adducing evidences, we are not inclined at this stage to direct the respondents to pay any interests. But the petitioners would be at liberty to realize interests, if applicable, through proper forum in accordance with law.

28. Communicate this order.

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1 SCOB [2015] HCD 87

HIGH COURT DIVISION
(Criminal Revisional Jurisdiction)

Criminal Revision No.329 of 2006
with
Criminal Revision No.334 of 2006
with
Criminal Revision No.335of 2006
with
Criminal Revision No.336 of 2006
with
Criminal Revision No.337 of 2006

Zakir Hossain Sarkar, son of late Abdul Hakim Sarkar, of Village Durgapur, Post Office Shatibari, Upazilla Mithapukur, District Rangpur.

... Petitioner in all the revisions

-Versus-

1. **The State**,

2. **Shah Md. Solaiman Alam** M.P, son of late Gaisuddin Shah Fakir, former Chairman, Mithapukur UCCA Ltd., of Village Chithali Uttarpara, Mithapukur, Rangpur.

...Opposite parties in all the revisions

Mr. Sk. Baharul Islam, Advocate
... for the petitioner

Mr. S.M. Abul Hossain, Advocate
... for opposite party 2

Mr. Mansurul Haque Chowdhury, Advocate
… for the co-accused-applicant

Judgment on 24.04.2014

Bench:
Mr. Justice Muhammad Abdul Hafiz
and
Mr. Justice Md. Ruhul Quddus

Section 21 of the Penal Code and section 2 of the Prevention of Corruption Act, 1947:
A Member of Parliament is not a 'public servant' within the meaning of section 21 of the Penal Code or section 2 of the Act II of 1947. We, therefore, accept the submission advanced by the learned Advocate for the petitioner only to the extent that in order to prosecute opposite party 2, no sanction from the Government was required. ...(Para 25)

Judgment

Md. Ruhul Quddus, J:

1. All the five Rules involving common questions of law and facts have been heard together and are disposed of by this judgment.

2. The Rule in Criminal Revision No. 329 of 2006 was issued calling in question the order dated 18.04.2004 passed by the Special Judge, Rangpur in Special Case No. 9 of 2003 arising out of Mithapukur Police Station Case No. 20 (4) 01 under sections 418, 420, 409 and 109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947). In this case allegation of misappropriation of Taka 40,000/- on account of a power tiller leased out to Mst. Rabeya Begum, a Member of Mithapukur Upazila Central Co-operative Association Ltd. (in brief UCCA Ltd.) was brought.

3. The Rule in Criminal Revision No. 334 of 2006 was issued against similar order passed on 18.04.2004 in Special Case No. 8 of 2003 arising out of Mithapukur Police Station Case No. 27 (3) 2001 under the same penal sections. In this case allegation of misappropriation of Taka 29,000/- on account of a power tiller leased out to Md. Abdul Awal, another Member of UCCA Ltd. was brought.

4. The Rule in Criminal Revision No. 335 of 2006 was issued against similar order passed on the same date in Special Case No. 6 of 2003 arising out of Mithapukur Police Station Case No. 28 (4) 2001 under the same

penal sections. In this case allegation of misappropriation of Taka 28,000/- on account of a power tiller leased out to Md. Saju Miah, another Member of UCCA Ltd. was brought.

5. The Rule in Criminal Revision No. 336 of 2006 was issued against similar order passed on the same date in Special Case No. 5 of 2003 arising out of Mithapukur Police Station Case No. 26 (4) 2001 under the same penal sections. In this case allegation of misappropriation of Taka 24,000/- on account of a power tiller leased out to Md. Nurun Nabi, another Member of UCCA ltd. was brought.

6. The Rule in Criminal Revision No. 337 of 2006 was issued against similar order passed on the same date in Special Case No. 7 of 2003 arising out of Mithapukur Police Station Case No. 8 (4) 2001 under the same penal sections. In this case allegation of misappropriation of Taka 32,000/- on account of a power tiller leased out to Md. Yousuf Uddin, another Member of UCCA Ltd. was brought. In all the cases the respective lessees of the power tillers and opposite party 2 with some others were made accused.

7. Informant Jatan Kumar Roy, District Anti-corruption Officer of the then Bureau of Anti-Corruption lodged all the said cases with Mithapukur police station on different dates in 2001. The Informant himself investigated the cases and submitted charge sheets all dated 25.03.2003 under sections 418, 420, 409, 109 of the Penal Code read with section 5 (2) of the Act II of 1947 against the accused excluding opposite party 2 on the ground that the money allegedly appropriated was already paid and that being Chairman of UCCA Ltd., he was an ornamental head, not the chief executive. The Special Judge, however, did not accept the charge sheet as it is, and took cognizance of offence against him as well, but subsequently discharged him by the impugned orders all dated 18.04.2004 as no sanction to prosecute him was accorded from the office of the Hon'ble Prime Minister, which according to him was a requirement of law. Challenging the said orders the petitioner, a witness of the cases moved in this Court and obtained the Rules with ad-interim orders of stay.

8. During pendency of the Rules, one of the co-accused Md. Ali Haider Prodhan filed applications for addition of party in all the criminal revisions, which were kept with the records for disposal at the time of hearing of the Rules.

9. Mr. Sk. Baharul Islam, learned Advocate for the petitioner submits that there are clear allegations of misappropriation of public money against the accused-opposite party 2. The Upazila Central Co-operative Association Ltd., Mithapukur is an association of co-operative societies, which works with the assistance of Bangladesh Rural Development Board, and the Government of Bangladesh has no financial or administrative involvement with UCCA Ltd. Opposite party 2 as its Chairman does not fall within the meaning of a public servant and his identity as a Member of Parliament is not relevant in the instant cases. More so, a Member of Parliament does not fall within the definition of public servant and as such no sanction from the office of the Hon'ble Prime Minister was required to be accorded. The exclusion of opposite party 2 from the cases on the plea of Government sanction is, therefore, illegal.

10. Mr. Abul Hossain, learned Advocate appearing for the opposite party 2 submits that the petitioner is a stranger in the cases and has brought these criminal revisions out of local enmity just to humiliate and harass his opponent i.e. present opposite party 2. Mr. Hossain further submits that in view of clause 12 of section 21 of the Penal Code a Member of Parliament being remunerated by the Government falls under the definition of public servant and the trial Court rightly exonerated him for want of Government sanction.

11. In reply thereto Mr. Islam submits that the petitioner is a witness of the cases and being a member as well as a former Chairman of UCCA Ltd. has got interest in the same. So, he is not a stranger in the cases and the criminal revisions are maintainable.

12. Mr. Md. Mansurul Haque Chowdhury, learned Advocate appearing for the co-accused-applicant in the application for addition of party submits that because of the stay orders passed in the instant criminal revisions, the original cases are still pending and causing endless harassment to the applicant. He has come forward only for early disposal of the Rules and would not make any submissions touching the merit of the cases.

13. Since the Rules are being disposed of, Mr. Chowdhury would have no more grievances with the stay orders passed therein. The purpose of filing these applications having been fulfilled, it is needless either to allow or reject them.

14. However, we have gone through the record and considered the submissions of the learned Advocates for the contesting parties. Whether a Member of Parliament is a public servant and sanction from Government was

required to prosecute opposite party 2 is a question of law to be looked into in these criminal revisions. The words 'public servant' have been defined in sections 21 of the Penal Code, 2 of the Act II of 1947 and 2(b) of the Criminal Law Amendment Act, 1958 which are quoted below:

15. Section 21 of the Penal Code:

"*21. The words 'public servant' denote a person falling under any of the descriptions hereinafter following, namely:-*

Second.- Every Commissioned officer in the Military [Naval or Air] Forces of [Bangladesh];

[Third.-Every Judge including any person empowered by any law to perform, whether by himself or as a member of any body of persons, any adjudicatory function;]

Fourth.- Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any Property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of justice to perform any of such duties;

Fifth.- Every juryman, assessor, or member of a panchayat *assisting a Court of justice or public servant;*

Sixth.- Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh.- Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth.- Every officer of [the Government] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth.- Every officer whose duty it is, as such officer to take, receive, keep or expend any property on behalf of [the Government] or to make any survey, assessment or contract on behalf of [the Government], or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of [the Government], or to make, authenticate or keep an document relating to the pecuniary interests of [the Government], or to prevent the infraction of any law for the protection of the pecuniary interests of [the Government];

Tenth.- Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

Eleventh.- Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;

A Municipal Commissioner is a public servant.

[Twelfth.- Every person-

(a) in the service or pay of the Government or remunerated by the Government by fees or commissions for the performance of any public duty;

(b) in the service or pay of a local authority or of a corporation, body or authority established by or under any law or of a firm or company in which any part of the interest or share capital is held by, or vested in, the Government.]

16. Section 2 (b) of the Criminal Law Amendment Act, 1958:

"2(b) "Public servant" means a public servant as defined in section 21 of the Penal Code and includes a Chairman, Director, Trustee, Member, Commissioner, Officer or other employee of any local authority, statutory corporation or body corporate or of any other body or organization constituted or established under any law;"

17. Section 2 of the Prevention of Corruption Act, 1947:

"2. Interpretation.- For the purposes of this Act, "Public Servant" means a Public servant as defined in section 21 of the Penal Code and includes an employee of any corporation or other body or organization set by the Government and includes a Chairman, Vice-Chairman, Member, Officer or other employee of a local authority, or a Chairman, Director, Managing Director, Trustee, Member, Officer or other employee of any corporation, or other body or organization constituted or established under any law."

18. In all the above definitions so many persons under different categories including the Municipal Commissioners, Members of *Panchayat* and Local Authority are described as public servants. But a Member of Parliament, who is the People's representative in the Legislature to make laws being directly elected by the People, is not included anywhere. This exclusion is not meaningless. It was not the intention of the Legislature to include them in public servants.

19. 'Public servant' has also been defined in the case of Ramesh Balkrishna Kulkarni Vs. State of Moharashtra, (1985) 3 SCC 606 as *"…an authority who must be appointed by the Government or a semi-governmental body and should be in the pay or salary of the same. Secondly a 'public servant' is to discharge his duties in accordance with the rules and regulations made by the Government."*

20. The question as to whether a Member of Legislative Assembly (MLA) is a public servant as defined in the Penal Code as well as in the Act II of 1947 was raised in the Case of R S Nayak Vs. A R Antuly, (1984) 2 SCC 183 = AIR 1984 SC 684. It was strenuously argued that an MLA was a public servant as he fell within the meaning of the expression in section 21, clause 12 (a) of the Penal Code and also within the contemplation of clauses 3 and 7 thereof. The Supreme Court of India upon thorough analysis referring to the entire history and evolution of the concept of 'public servant' held that an MLA was not a public servant within the meaning of section 21, clauses 12 (a), 7 and 3 of the Penal Code.

21. In our jurisdiction, the Appellate Division in the case of Sheikh Abdus Sabur vs. Returning Officer and others, 41 DLR (AD) 30 held the Member of Parliament not to be a public servant unlike the Member of a Union Parisad. The Appellate Division distinguishing the functions of Legislature and that of Union Parisad held that *"… Above all, members of a Union Parishad are 'public servants' within the meaning of S.21 of the Penal Code. The term 'Public Servants' denotes some executive control over them and they are subject to disciplinary rules which are applicable to regular government servants. In view of these differences in respect of functions and duties the Legislature thought it proper and expedient to treat them as separate class of people's representatives…."(*para 40*)*

22. In an unreported decision passed in Writ Petition No. 9905 of 2007 (Mohammad Shahidul Islam vs. National Board of Revenue and others) Justice Mohammad Abdur Rashid with reference to the principles expounded in the above cases observed and held:

"…We do not find any difficulty to say that a Member of Parliament is not a public servant within the meaning of section 2 of the Prevention of Corruption Act, 1947 and section 21 of the Penal Code."

23. It should be borne in mind that our Constitution has accepted the well defined doctrine of separation of powers between legislature, executive and judiciary. Function of the Legislature mainly is to make laws and thus the duty of the Members of Parliament is to participate in the law making process where the executive or Government has nothing to do but to implement the laws passed by the Legislature. In a democracy, a Member of Parliament has a distinct position and status especially in relation to the exercise of his freedom of expression, opinion and conscience for the People. He is so free that he cannot only criticize the Government but also can call for change of the Constitution criticizing its provisions if he feels necessary. It also reflects from the oath of his office as prescribed in the third schedule of the Constitution. Unlike the President, Prime Minister, Ministers and other constitutional functionaries, he does not have to swear (or affirm) to preserve, protect and defend the Constitution.

24. A Member of Parliament represents the people, the owners of the country and their authority moves with him. He is neither appointed by the Government nor is he in the pay of the executive Government. He discharges his constitutional duties of law making in accordance with the laws made by them not by rules and regulations made by the executive. It will frustrate the very purpose of separation of powers if a Member of Parliament is treated a public servant.

25. In view of the above, this Court is of the firm opinion that a Member of Parliament is not a 'public servant' within the meaning of section 21 of the Penal Code or section 2 of the Act II of 1947. We, therefore, accept the submission advanced by the learned Advocate for the petitioner only to the extent that in order to prosecute opposite party 2, no sanction from the Government was required.

26. So far the merit of the case is concerned we find that in all the police reports it was found that the money allegedly misappropriated was paid and as such the opposite party 2 was not sent up. The delayed payment of lease money to a private association cannot be construed as 'criminal misconduct' within the meaning of section 5 (1) of the Act II of 1947. Besides, opposite party 2 being Chairman of UCCA Ltd. was an ornamental head, not the chief executive and he had only recommended the co-accused-lessees of the power tillers on their applications for lease. The allegation of misappropriation was mainly directed against the lessees and opposite party 2 was made an accused for abatement. Realization of lease money is actually a routine work of the association, for non-performance of which opposite party 2 being an ornamental head of the association should not be held liable. We do not think that the allegation of misappropriation of public money at all lies against him. There is nothing wrong in the ultimate decisions of the Special Judge in exonerating him from the charge.

27. In the result, all the Rules are discharged. The applications for addition of party are accordingly disposed of. The orders of stay passed earlier at the time of issuance of the Rules stand vacated.

1 SCOB [2015] HCD 92

HIGH COURT DIVISION
(Criminal Miscellaneous Jurisdiction)

Criminal Miscellaneous Case No.26782 of 2014

Jalil
....Petitioner
-Versus-

The State .... Respondent

Mr. Mohammad Ali, Advocate
.... For the petitioner
Mr. Delowar Hossain Sommadar, D.A.G
… For the State

Heard and Judgment on:26.07.2015

Present:
Mr.Justice Bhabani Prasad Singha
And
Mr. Justice S.M. Mozibur Rahman

Code of Criminal Procedure, 1898
Section 561A
and
Explosive Substances Act, 1908
Sections 3/4:
On perusal of the FIR of the case, it appears that there is no specific allegation or overt act against the accused-petitioner therein which shows that no prima-facie case is revealed against the accused-petitioner. The column no.5 of the charge-sheet of the case in respect of any seized articles shows that said column is blank meaning thereby that no incriminating articles although the case is under sections 3/4 of the Explosive Substances Act, 1908, has been recovered. It is also required to be mentioned that there is no seizure list in the record in respect of any seized article. So, there is no incriminating article with regard to the occurrence for connecting the accused petitioner in the case. ...(Para 9)

Judgment

Bhabani Prasad Singha,J:

1. This Rule was issued calling upon the opposite party to show cause as to why the proceeding of Speedy Trial Tribunal Case No.5 of 2006, Barisal arising out of Kotwali P.S. Case No.1 dated 01.11.2001 under sections 3/4 of the Explosive Substances Act, 1908 now pending in the Court of Speedy Trial Tribunal, Barisal should not be quashed and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The facts of the case are that the opposite party Mujibar Rahman Sarwar filed a petition case before the court of learned Magistrate, 1st C lass, Barisal on 04.09.2001 against the accused-petitioner and others alleging that since 29.12.1998 to 31.12.1999 the accused-persons created nuisance in his factory area and that behind those period the aforesaid accused-persons exploded explosives in the area making obstruction in the way of the Bidi materials supply to his factory. Therefore, production was disrupting in the factory. As per the order of the learned Magistrate, the case was registered as Kotwali P.S. Case No.1 dated 01.11.2001 under sections 3/4 of the Explosive Substances Act, 1908.

3. After investigation police submitted charge sheet no.267 dated 08.06.2002 under sections 3/4 of the Explosive Substances Act, 1908 against the accused-petitioner and others.

4. At the commencement of trial of the case, charge under sections 3/4 of the Explosive Substances Act, 1908 was framed against the accued-petitioner and others.

5. As against that the accused-petitioner moved this court and obtained the Rule.

6. Mr. Mohammad Ali, the learned Advocate appearing for the accused-petitioner submits that although allegedly the alleged occurrence of the case took place on 29.12.1998 to 03.01.1999, the FIR was lodged near

about 2 years and 11 months after the alleged occurrence; that there being no seizure list in the case and that no incriminating articles being seized in the case, the proceedings is not sustainable in the eye of law. The learned Advocate prays for quashment of the same.

7. On the other hand, Mr. Delowar Hossain Samaddar, the learned Deputy Attorney General(DAG) appearing for the State submits that the case was filed long about 3 years after the alleged occurrence; that no explosive substances in connection with the case was recovered; that two feed grudge the case was filed.

8. Heard the submissions of the learned Advocates representing the parties and perused the materials on record.

9. On perusal of the FIR of the case, it appears that there is no specific allegation or overt act against the accused-petitioner therein which shows that no prima-facie case is revealed against the accused-petitioner. The column no.5 of the charge-sheet of the case in respect of any seized articles shows that said column is blank meaning thereby that no incriminating articles although the case is under sections 3/4 of the Explosive Substances Act,1908 has been recovered. It is also required to be mentioned that there is no seizure list in the record in respect of any seized article. So, there is no incriminating article with regard to the occurrence for connecting the accused petitioner in the case. The Investigating Officer himself stated in the charge sheet that he could not recover any incriminating article during investigation of the case.

10. From the discussion made so far, we find that the proceedings of the Speedy Trial Tribunal Case no.05 of 2006 is nothing but the abuse of the process of the Court and the abuse of law.

11. Be it mentioned here that on 23.06.2014 the public prosecutor Barisal field an application under section 494 of the Code of Criminal Procedure annexing the Memo dated 01.09.2009 of the Home Ministry (Ain)-1 for withdrawal of the case.

12. In view of the discussion made here above, we find merit in the Criminal Miscellaneous Case and as such, the Rule deserves to be made absolute.

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

14. The proceedings Speedy Trial Tribunal Case No.5 of 2006, Barisal arising out of Kotwali P.S. Case No.1 dated 01.11.2001 under sections 3/4 of the Explosive Substances Act, 1908 now pending in the Court of Speedy Trial Tribunal, Barisal is hereby quashed.

15. The accused-petitioner be discharged from his bail bond.

16. The interim order passed at the time of issuance of the Rule stands vacated.

17. Let a copy of this judgment be sent down to the concerned court below at once.

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[2015] 1 SCOB HCD 94

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 9204 of 2013
With
Writ Petition No. 9205 of 2013

Marrine Vegetable Oil Ltd
……..Petitioner
(In Writ Petition No. 9204 of 2013)

Jasmir Vegetable Oil Limited
..... Petitioner
(In writ Petition No. 9205 of 2013)

-Versus-

Bangladesh Oil, Gas & Mineral Corporation (Petrobangla) represented by its Chairman, Kawran Bazar, Dhaka and others
…….Respondents

Mr. Probir Neoge, Senior Advocate with
Mr. Mizanul Hoque Chowdhury, Advocate
Mr. Hasan Mohammad Reyad, Advocate
Mr. Redwan Ahmed, Advocate
..... For the petitioners

Mr. Shamim Khaled Ahmed, Advocate with
Mr. Abul Nashar Azad, Advocate
..... For the respondent No. 3

Heard on: 03.12.2014, 04.12.2014, 08.12.2014, 11.12.2014, 14.12.2014, 15.12.2014 and judgment on: 08.02.2015.

Present:
Mr. Justice Moyeenul Islam Chowdhury
And
Mr. Justice Md. Ashraful Kamal

Article 102 (2) of the Constitution
Aggrieved person:
For a person to seek remedy under the writ of certiorari he must show that he is aggrieved by an act done or proceeding taken which the High Court Division may declare to have been done or taken without lawful authority. There must be a nexus between such person's grievance and the act or proceeding that is under challenge inasmuch as the person must be aggrieved by the act or proceeding under challenge. ...(Para 28)

গ্যাস বিপনন নিয়মাবলী, ২০০৪
Clause 5.7:
In the instant case, Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ is under challenge but the petitioners are not aggrieved by the same because গ্যাস বিপনন নিয়মাবলী, ২০০৪ has no compelling or binding effect upon the petitioners since admittedly the same is not law or has no force of law. Therefore, a nexus between the petitioners' grievance and Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ by itself cannot be established that the petitioner can seek remedy under Article 102 (2) (a) (ii) of the Constitution, and therefore it is wrong on the part of the petitioner to claim that even if clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪ has no force of law, the same can still be challenged under writ of certiorari. ...(Para 29)

The writ petitioner did not disclose in the writ petition that it had sent the aforesaid letter dated 03.032013 to KGDCL promising to pay the outstanding bills within the given period of time and therefore the same amounts to suppression of material fact and disentitles the writ petitioners to any relief under the principle of acquiescence. ...(Para 30)

The petitioners have not come up before this Court with clean hands, therefore, they cannot get any remedy from any court of law. ...(Para 31)

In the present case, clause 17 of the contracts ... contains an arbitration clause...we are of the firm view that these writ petitions are not maintainable and the petitioners have to go for arbitration in terms of clause 17 of the contracts, if they have any grievance at all. ...(Para 37& 38)

Judgment

Md. Ashraful Kamal, J:

1. These Rules Nisi were issued calling upon the respondent No. 3 to show cause as to why the Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ providing provision to realize/charge 50%-60% of the sanction load as minimum bill from the Industrial/Power Plant consumers instead of charging bill on the actual consumption basis shall not be declared to have been made without lawful authority and is of no legal effect.

2. Brief facts, necessary for the disposal of these Rules, are as follows: The petitioners are private limited companies and established industries for refining of Vegetable Oil and have been registered with all required Government Authorities including Board of investment and VAT authority and started production in the year 2005.

3. The petitioner Marine Vegetable Oil Ltd. (In Writ Petition No. 9204 of 2013) and the petitioner Jasmir Oil Ltd. (In Writ Petition No. 9205 of 2013) have entered into an agreement with the respondent No. 2, i.e. previously Bhakrabad Gas System Ltd, a subsidiary of the respondent No. 1 and subsequently a new company namely Karnofully Gas Distribution Company Ltd. was formed and took up the business of Gas distribution in Chittagong area. Thereafter all functions of the Bhakrabad Gas System Ltd have been transferred to Karnafully Gas Distribution company Ltd. (the respondent No. 2).

4. As per the agreement, the sanction load of supply of Gas to the petitioner Marine Vegetable Oil Ltd. (W.P. No. 9204 of 2013) is 400 standard Cubic Miter/ Hour and 2,80,173 standard Cubic Miter/ Month and monthly minimum load has been calculated at 1,68,104 Cubic Miter being 60% of the monthly loaded capacity for the purpose of the industry. The said minimum load has been calculated on the basis of the clause 5.7 of the গ্যাস বিপনন নিয়মাবলী ২০০৪. The petitioner also took another gas line for its captive Power Plant having sanction load of 3,22,483 Cubic meter per month and minimum load has been calculated at 1,93,489.92 Cubic Meter per month.

5. As per agreement, the sanction load of supply of Gas to the petitioner Jasmir Vegetable Oil Ltd (In Writ Petition No. 9205 of 2013) is 951 standard Cubic Miter/ Hour and 3,16,4933 standard Cubic Miter/Month and monthly minimum load has been calculated at 1,89,895 Cubic Miter being 60% of the monthly loaded capacity for the purpose of the industry. The said minimum load has been calculated on the basis of the clause 5.7 of the গ্যাস বিপনন নিয়মাবলী ২০০৪. The petitioner also took another gas line for captive Power Plant having sanction load of 1,13,152 Cubic meter per month and minimum load has been calculated at 67,891.20 Cubic Meter per month.

6. The petitioners have been paying the Gas bill regularly. But, from January 2012, the petitioner companies have been suffering from serious financial hardship and could not procure raw materials for running their industries and the production of the industries has dropped remarkably.

7. On 29.07.2013, the respondent No. 3 issued letter to the petitioner of both the writ petitions to pay outstanding bill. Accordingly, on 02.09.2013, they paid bill upto February, 2013 and from March 2013, the bills remained outstanding.

8. The respondents being public statutory authority cannot charge gas bill in excess of consumption. The petitioner in the meantime had paid huge amount on account of minimum charge in order to avoid disconnection of the gas line, but in the meantime became financially sick.

9. Being aggrieved by the said impugned Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ providing provision to realize/charge 50%-60% of the sanction load as minimum bill from the Industrial/Power Plant consumers instead of charging bill on the actual consumption basis, the petitioners preferred these two writ petitions and obtained the present Rules.

10. The respondent No. 3 by filling affidavit-in-opposition contended that the petitioners had entered into the said contracts with Bakhrabad Gas System Ltd. bifurcating which KGDCL i.e. the Respondent No. 3 was formed. His further contention is that clause Nos. 2, 3 and 14 of the aforesaid Contracts incorporate the impugned provisions under Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ which require certain consumers/ customers of gas, including industrial consumers like the petitioners, to pay a minimum gas bill every month. Clause 5.7 of গ্যাস বিপণন নিয়মাবল ২০০৪ provides that industries, along with other categories of gas-customers such as commercial, captive power, seasonal and CNG customers, which use gas for less than 16 hours per day shall pay for at least 50% (minimum load) of the monthly load of gas sanctioned to be supplied to them and those which use gas for more than 16 hours per day shall pay for at least 60% (minimum load) of the monthly load of gas

sanctioned to be supplied to them. All customers/consumers of natural gas agree in writing to such provisions before receiving gas connection from the concerned gas distribution companies, and KGDCL, being one such gas distribution company, issues bills in accordance with the same whenever applicable.

11. The respondent No. 3 further stated that the petitioners started its industry from 20.04.2005, and that lack of production or financial hardship suffered by the petitioner, if any, are irrelevant and immaterial to the instant case. Respondent No.3 further stated that the petitioner as mentioned above, is under contractual obligation to pay minimum gas bills as per Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ and has admittedly paid the bills issued by KGDCL as per the said Clause 5.7 of গ্যাস বিপণন নিয়মাবল ২০০৪ till February-2013.

12. On 03.09.2013 the petitioners sent a letter to KGDCL wherein they promised, in clear words, that they would pay the outstanding bills in March-2013 and in April-2013 before 18.09.2013 subsequent to which they would pay the remaining outstanding bills one after another. However, instead of paying the outstanding bills, the petitioners filed the instant writ petitions on 15.09.2013 and 17.09.2013 before 18.09.2013.

13. Mr. Probir Neoge, Senior Advocate along with Mr. Mizanul Hoque Chowdhury, Mr. Hasan Mohammad Reyad and Mr. Redwan Ahmed the learned Advocates appearing for the petitioners submits that it does not matter if Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ is law or not. He further submits that it is an executive decision of Petro Bangla and therefore it can be subject to judicial review. He further submits that the instant writ is not a writ of mandamus but certiorari. He also submits that if the petitioner had come to enforce Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪, then the argument that Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ is not law would stand.

14. He further submits that the Respondent No. 3 acted illegally, unlawfully and arbitrarily in fixing minimum charge of the commercial/ industrial use of natural gas at the rate of 60% of total approved load of monthly use of natural gas for use of 16 hours or above daily and at the rate of 50% of total approved load of monthly use of natural gas for use of less than 16 hours daily vide clause 5.7 of গ্যাস বিপনন নিয়মাবলী 2004 because the Respondent No. 1 by way of fixing minimum charge having no nexus to the actual consumption has in effect fixed the price of gas on its own, when under section 29(2) (M) of the Bangladesh Gas Act, 2010 only the Respondent No. 2 has jurisdiction to fix the price of Gas by way of publishing the same in the official Gazette with the approval of the Government and under no provision of law the Respondent No. 1 has any jurisdiction to fix price of gas.

15. The said গ্যাস বিপনন নিয়মাবলী, 2004 has neither been published in the official Gazette, nor has been framed by the Respondent No. 2 and therefore, the action of the Respondent No. 1 in fixing the price of gas in the said Clause 5.7 is without lawful authority and nullity and further the action of the Respondent No. 3 charging the petitioner on the basis of said Clause 5.7 of গ্যাস বিপনন নিয়মাবলী, 2004 is without lawful authority and of no legal effect.

16. He also submits that the gas marketing policy is not law, it is an executive decision/action by a statutory public authority within the meaning of Article 152 of the constitution. The present writ petitioners are seeking judicial review of an executive decision/action namely clause 5.2 of the গ্যাস বিপনন নিয়মাবলী, 2004. An executive decision/action in the shape of policy can well be challenged in a writ petition in the nature of certiorari. It is not the contemplation of the relevant provision of the Constitution that only a law can be challenged in certiorari. He also submits that an executive action may be challenged in certiorari if the action is unreasonable, arbitrary, irrational and unfair.

17. Mr. Neogi also submits that whether by signing the contract where gas marketing policy, 2004 with its impugned Clause 5.7 is included, the petitioners is barred by the principle of waiver to press its case. Waiver operates in the form of estoppel. By pleading waiver, the adversary tries to say that a party has waived it. So he is estopped from pleading it. Finally, he submits that for certiorari, no specific legal right of petitioners has to be shown to maintain a writ petition. For mandamus, earlier view required establishment of legal rights of the petitioners, but the present position of constitutional and administrative law does not require it. All that required is that a person is going to be adversely affected by the impugned action.

18. Mr. Shamim Khaled Ahmed with Mr. Abdul Nasar Azad, the learned Advocates appearing for the respondent No. 3 submits that the Petitioner's abovementioned conduct of agreeing under the Contracts to pay minimum bills as per Clause 5.7 of গ্যাস বিপনন নিয়মাবলী, 2004, and then of having already paid bills as per the said Clause 5.7, and finally agreeing to pay the remainder of bills as per the said Clause 5.7, shows the petitioner's acceptance of Clause 5.7 of গ্যাস বিপনন নিয়মাবলী, 2004 which, under the settled principles of acquiescence, amounts to conduct disentitling the petitioner to any relief.

19. Mr. Shamim Khaled Ahmed also submits that with regard to KGDCL demanding "bill without providing goods/services" are denied. KGDCL has never denied the petitioner the monthly load of gas that was sanctioned to be supplied to the petitioners under the contracts and the said sanctioned amount of gas always there for consumption which, however, the petitioners intentionally left unutilized for reasons best known to themselves. Furthermore, Mr. Ahmed submits that that Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ does not provide for charging bill without supplying gas, rather it requires gas consumers to pay a minimum bill for the minimum amount of gas the consumers confirm they will purchase every month out of the total load of gas that is sanctioned to be supplied to them and which is always there for consumption and the petitioners had full knowledge of such provision before agreeing to take gas from KGDCL.

20. He also submits that the provision of minimum charge on sanctioned load of gas under Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ has been brought into effect in order to ensure that the huge amount of capital invested by gas distribution companies are recovered in time and so that fixed costs, such as costs for, inter alia, distribution system maintenance, safety and inspection programs, customer service, metering, billing etc, are covered which otherwise payments from low-spending gas-consumers, to whom Clause 5.7 is applicable, would not cover. If such costs, expenditures and liabilities are not met every month then not only will every aspect of the entire gas distribution process be adversely affected in terms of safety, efficiency and overall workability, but also a number of illegal gas connections and unaccounted gas usage will increase owing to which the Government will lose revenue. He also submits that the number of cases of meter-tampering that is being done by gas-consumers so that they can pay only the minimum or average gas bills is overwhelmingly large, and if there was no provision for payment of minimum gas bills at all then such consumers would get away without paying anything for the unaccounted amount of gas that they would steal, meaning thereby that the Government would lose much more revenue than they are losing now.

21. He also submits that the challenging the requirement to pay minimum bill under Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ which has been incorporated into the contracts as a term vide clause Nos. 2, 3 and 14 of the contracts, is against public interest and public good, and issuance of the writ prayed for would work injustice and perpetuate illegality.

22. He further submits that because the provisions under Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ have their binding effect on the writ petitioners through the aforesaid clause Nos. 2, 3 and 14 of the contracts and therefore by challenging the legality of Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪, the petitioners are actually purporting to challenge the legality and / or validity of the said clause Nos. 2, 3 and 14 of the Contracts and given that the petitioners are purporting to impeach their contractual obligations under the said clause.

23. Mr. Shamim Khaled further submits that the petitioners did not disclose in the instant writ petitions that it had sent the abovementioned letter dated 03.09.13 to KGDCL promising to pay the outstanding bills within the given period of time, which is clear suppression of the material fact.

24. He also submits that in addition to the scope to seek remedy under a civil court's ordinary original jurisdiction, the petitioners are bound to refer the instant dispute in respect of the terms of the Contracts to arbitration as per clause No. 17 of the Contracts, and therefore the instant writ petition is not maintainable due to the availability of alternative remedies.

25. Mr. Shamim Khaled Ahmed submits that the provisions for minimum gas bill were brought into effect for valid reasons and out of necessity and the said provisions are applicable to all industrial customers/consumers of natural gas of Bangladesh meaning that the petitioners have not been discriminated against by KGDCL in any manner. He also submits that the burden of proof of showing that the said clause 5.7 of গ্যাস বিপনন নিয়মাবলী, or any other provision for that matter, is violative of the Petitioners fundamental rights is on the petitioners themselves and it has failed to discharge such burden and to disclose how their rights have been infringed.

26. He finally submits that the grounds formulated in the writ petitions are illegal, misleading and not sustainable in law and submits that in the facts and circumstances and legal position stated above, the Rule is liable to be discharged with cost.

27. We have gone through the writ petitions, annexures therein and affidavit-in-opposition.

It is necessary to quote the Article 102 (2) of the Constitution which states:

"(2) 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-

(ii) declaring that any act done or proceeding taken by a person performing functions 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."

28. For a person to seek remedy under the writ of certiorari he must show that he is aggrieved by an act done or proceeding taken which the High Court Division may declare to have been done or taken without lawful authority. There must be a nexus between such person's grievance and the act or proceeding that is under challenge inasmuch as the person must be aggrieved by the act or proceeding under challenge.

29. In the instant case, Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ is under challenge but the petitioners are not aggrieved by the same because গ্যাস বিপনন নিয়মাবলী, ২০০৪ has no compelling or binding effect upon the petitioners since admittedly the same is not law or has no force of law. Therefore, a nexus between the petitioners' grievance and Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ by itself cannot be established that the petitioner can seek remedy under Article 102 (2) (a) (ii) of the Constitution, and therefore it is wrong on the part of the petitioner to claim that even if clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪ has no force of law, the same can still be challenged under writ of certiorari.

30. The writ petitioner did not disclose in the writ petition that it had sent the aforesaid letter dated 03.032013 to KGDCL promising to pay the outstanding bills within the given period of time and therefore the same amounts to suppression of material fact and disentitles the writ petitioners to any relief under the principle of acquiescence.

31. Admittedly, the writ petitioners have paid the minimum gas bills issued by KGDCL as per the provisions under Clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪, incorporated into the Contracts vide clause Nos. 2, 3 and 14 of the Contracts, till February-2013. On 03.09.2013 the writ petitioners sent a letter to KGDCL wherein they promised, in clear words, that they would pay the outstanding bills of March-2013 and April-2013 (which were also minimum bills) before 18.09.2013 subsequent to which they would pay the remaining outstanding bills one after another. However, instead of paying the said outstanding bills as promised, the writ petitioners filed these writ petitions on 15.09.2013, three days before 18.09.2013 which is tantamount that the petitioners have not come up before this Court with clean hands, therefore, they cannot get any remedy from any court of law.

32. Moreover, challenging the requirement to pay minimum bill under Clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪ which has been incorporated into the Contracts as a term vide clause Nos. 2, 3 and 14 of the Contracts, is against public interest and public good.

33. The only way a nexus between the petitioners' grievance and Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ can be established is to treat clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪ as a contractual term because the said clause 5.7 which is directly incorporated as a contractual term under clause No. 14 of the contract for supply of natural gas, will have a compelling and binding effect upon the petitioner which is necessary to show grievance. Therefore, it is safe to conclude that the petitioner has come to the writ forum challenging a contractual term because otherwise a writ of certiorari would not lie in the first place.

34. Apart from that the provision under Clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪ have their binding effect on the writ petitioners through the aforesaid Clause Nos. 2, 3 and 14 of the Contracts and therefore, by challenging the legality of clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪ the petitioner is actually purporting to challenge the legality and / or validity of the said clause Nos. 2, 3 and 14 of the contracts.

35. The contracts in question contain a clause providing inter-alia for settlements of dispute by reference to arbitration (Clause 17 of the Contracts). The Arbitrators can decide both questions of fact as well as questions of law.

36. Where the contracts themselves provide for a mode of settlement of disputes arising therefrom, there is no reason why the parties should not follow and adopt that remedy instead of invoking the extraordinary jurisdiction of the High Court Division under Article 102.

37. In the present case, clause 17 of the contracts dated 03.02.2009 entered into between the petitioners and the KGDCL contains an arbitration clause. The petitioners are trying to interpret the contracts in the writ petitions in a manner which is impermissible, particularly when the petitioners are having a remedy to go for arbitration under the contracts signed by them. The petitioners having signed the contracts with open eyes after reading the terms and conditions, it is unconscionable to raise these kinds of contention in the writ petitions.

38. In the light of the above findings, we are of the firm view that these writ petitions are not maintainable and the petitioners have to go for arbitration in terms of clause 17 of the contracts, if they have any grievance at all.

39. In the result, both the Rules are discharged. The ad-interim order granted earlier by this court are hereby vacated accordingly. There is no order as to costs.

40. Communicate this judgment and order at once.

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1 SCOB [2015] HCD 99

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 5420 of 2014

Md. Safiqul Islam ... Petitioner

-Versus-

The Government of Bangladesh and others. ... Respondents

Mr. Subrata Saha with
Mr. Kamal Hossain, Advocates
...For the petitioner

Mr. Md. Borhan Uddin, Advocate
...For respondent nos. 7-10

Heard on 29.04.2015, 30.04.2015, 06.05.2015, 12.05.2015 and Judgment on 18.05.2015

Present:
Mr. Justice Md. Emdadul Huq
&
Mr. Justice Muhammad Khurshid Alam Sarkar.

State Acquisition Tenancy Act, 1950
Section 143:
Respondent nos. 7-9 were not legally allowed to approach the A/C Land for correction of the record-of-rights at a time, when the same dispute and grievance is being taken care of by a competent civil Court.
...(Para 22)

The Revenue Officers are not performing any judicial function under the provisions of the SAT Act:
Provisions of Section 75 of the SAT Act and rule 39 of the State Acquisition Rules, 1951 and rules 14 & 36 of the State Tenancy Rules, 1955 give the Revenue Officers the powers of a civil Court merely to the extent of enforcing attendance of witnesses or of any person, having interest in the estate, and production of documents for the purpose of conducting any enquiry and, thus, not for adjudication upon a lis between the parties.
Our above view is reinforced by the provision of Section 146 of the SAT Act and rule 17 of the State Acquisition Rules, 1951 inasmuch as from a plain reading of the said Section 146 of the SAT Act and rule 17 of the State Acquisition Rules, 1951, we find that the functions of the Revenue Officers under Section 75 of the SAT Act and rule 39 of the State Acquisition Rules, 1951 and rules 14 & 36 of the State Tenancy Rules, 1955 are not sufficient to brand them within the category of Court.
...(Para 25 & 26)

Absence of the finality in the orders of the Revenue Officers, reduces them to the administrative functionaries only:
The Provision of Section 146 of the SAT Act as well as rule 17 of the Rules, 1951 clearly indicate the absence of the finality in the orders of the Revenue Officers, reducing them to the administrative functionaries only under the Board of Land Administration and the Government. Thus, from this point of view as well, the Revenue Officers are not performing any judicial function under the provisions of the SAT Act. **...(Para 29)**

If there is a case pending in a competent Court of law regarding any dispute over any land property and on the same dispute, pending disposal of the said case, a Revenue Officer is subsequently approached by any claimant with a prayer to update a record-of-rights in the form of amendment or the correction of the record-of-rights, the Revenue Officer should abstain from proceeding with the mutation case.
...(Para 38)

Unless a Revenue authority is presented with a registered instrument of amicable settlement or the contending parties of a mutation case agrees on their respective shares, no Revenue Authority is competent to change the record-of-rights by apportioning/allocating shares to the claimants of any landed property. **...(Para 39)**

Revenue Officer must not proceed further when a civil suit is pending:

In dealing with the mutation proceedings the Revenue Officers' duties are only to record the names of the owners of the land upon examining the relevant papers and documents, if the same are produced before them without raising/taking any objection thereto. But the moment the Revenue Officer would come to know, either through an enquiry conducted by him with the assistance of the Tahshilder or any other staff of his office, or through an application filed by a private party for mutation, that there are disputes regarding the produced papers and documents and there are contending claimants over any land and the matter is pending in the Court for disposal, the concerned Revenue Officer must not proceed further with regard to the said mutation case until the said civil suit is finally disposed of.

...(Para 40)

Judgment

MUHAMMAD KHURSHID ALAM SARKAR, J:

1. This Rule was issued calling upon the respondents to show cause as to why the impugned judgment and order dated 18.05.2014, passed by the Full Board in Review Case no. 5-08/2014 (Mutation) Full Board, Satkhira (Annexure-L) filed against the Land Appeal Board's order dated 17.04.2014 in Appeal no. 5-06/2013 (Mutation Appeal), Satkhira affirming the order dated 31.12.2012, passed by the Additional Divisional Commissioner (Revenue), Khulna, in Miscellaneous Appeal no. 25 of 2012 dismissing the appeal, which was preferred against the order of the Additional Deputy Commissioner (Revenue) Satkhira in Miscellaneous Appeal no. 47 of 2010 reversing the order dated 18.05.2009 passed in Mutation Case no. 380/85-86, shall not be declared to have been passed without lawful authority and is of no legal effect and/or such other or further order or orders as may seem fit and proper to this Court.

2. Succinctly, the facts of the case, as stated in the writ petition, are that the CS recorded tenants, namely Kalipada Karmakar and Jitendra Nath Karmakar, filed Rent Suit no. 1785 of 1950 for recovery of arrears of rents against two full brothers, namely Md. Abdul Wahab Mondal and Md. Abdul Latif Mondal, in the Court of Munsif, 2nd Court, Satkhira on 27.09.1950 and through a compromise agreement (Solenama) Md. Abdul Wahab Mondal got $\frac{3}{4}$ share and his brother Abdul Latif Mondal got $\frac{1}{4}$ share of 15.08 acres of land. On 05.04.1956 Md. Abdul Latif Mondal sold out his above $\frac{1}{4}$ share i.e. entire 4.00 annas shares of the above entire 15.08 acres of land by the registered sale deed no. 2036 dated 05.04.1956 to Most. Hasne Banu, Most. Futfuti, Most. Bedana and Most. Kamala. Out of above $\frac{3}{4}$ share i.e. 12.00 annas share of the entire 15.08 acres of land, Md. Abdul Wahab Mondal gifted .50 annas share of land to his brother's daughter Ambia Khatun and, accordingly, in the SA Khatian no. 452, 11.50 annas share was recorded in the name of Md. Abdul Wahab Mondal, .50 annas share was recorded in the name of Ambia Khatun and 4.00 annas share was recorded in the names of Hasne Banu, Futfuti Bibi, Bedana Bibi and Kamala Bibi being 1.00 anna for each of them. Thereafter, Md. Abdul Wahab Mondal sold his remaining entire share of 11.50 annas, which is 10.33 acres of land, to the petitioner by the registered sale deed no. 5363 dated 03.06.1985 and, pursuant to the said transfer on 03.10.1985, the Mutation Case no. 380(IX-I)/85-86 was filed before the Assistant Commissioner of Debhatta Land Office (hereinafter referred to as the A/C Land, Debhatta) and vide the order dated 15.10.1985 the mutation was done in favour of the petitioner and, accordingly, the SA Khatian no. 233/2 was prepared in the name of the petitioner in respect of 10.33 acres of land. It is stated that after creation of the SA Khatian no. 233/2, the petitioner conjointly with Bedana Bibi, Kamala Bibi sold 40 decimals of land to one Abdul Gaffur Gazi under the record shown in the SA Khatian no. 233/2.

3. On 05.05.2005, Mst. Futfuti Bibi, Mst. Bedana @ Vejali Bibi, Mst. Kamala Bibi and others filed Title Suit no. 25 of 2005 before the Assistant Judge, Debhatta, Satkhira against the petitioner and others praying for partition and cancellation of the petitioner's aforesaid deed no. 5363 dated 03.06.1985 when the plaint of the aforesaid suit was returned by the said Court under Order 7 rule 10 of the Code of Civil Procedure (shortly, the CPC) by the order dated 25.03.2013. Subsequently, on 20.06.2013 the same was instituted in the Court of learned Joint District Judge, 2nd Court, Satkhira and was renumbered as Title Suit no. 50 of 2013 which is still pending. Thereafter, Mst. Futfuti Bibi, Bedana Bibi, Kamala Bibi and Amina Bibi filed an application to the A/C Land, Debhatta and the said application was registered as Miscellaneous Case no. 02/08-09 under Section 149 of the State Acquisition Tenancy Act, 1950 and (hereinafter referred to as the SAT Act) for review of the order passed in Mutation Case no. 380/85-86 with a prayer for cancellation of the petitioner's mutation and,

thereby, to restore the previous status of the mutation with six names as was recorded in the SA Khatian no. 233. The above review application was rejected on 18.05.2009 and against the said order they moved the Collector who, by his order dated 28.12.2011, registered their representation as Miscellaneous Appeal no. 47 of 2010 and allowed the same. Against the aforesaid order dated 28.12.2011 the petitioner filed Miscellaneous Appeal no. 25 of 2011 before the Divisional Commissioner, Khulna who dismissed it by his order dated 31.02.2012. Against the said order the petitioner filed Appeal no. 5-06/2013 (Mutation), Satkhira before the Land Appeal Board and the same was dismissed on 17.04.2014. Against which the petitioner filed a review case being no. 5-08/2014 (Mutation) Full Board, Satkhira and the Full Board dismissed the said review case by its order dated 18.05.2014.

4. The petitioner being aggrieved and dissatisfied with the said order dated 18.05.2014 approached this Court and obtained this Rule.

5. Respondent nos. 7 to 9 contested the Rule by filing an affidavit-in-opposition contending, *inter-alia,* that the total land under the SA Khatian no. 233 is 15.08 acres and there were 6 (six) recorded owners and each of them had equal share of 2.51 acres of land. It is claimed that Md. Abdul Wahab Mondal was entitled to have a share of 2.51 acres of land only under the SA Khatian no. 233 and, accordingly, he did not have any right and title to sell 10.33 acres of land. It is alleged that the statements regarding Rent Suit no. 1785 of 1950 are concocted as no such a suit had ever been instituted by the CS recorded tenants against Md. Abdul Wahab Mondal and Md. Abdul Latif Mondal and, further, no Solenama was ever made between the said CS recorded tenants and the two brothers and the judgment and decree dated 27.09.1950 is a forged and fraudulent one. It is further alleged that the registered deed no. 5363 dated 03.06.1985 is also a forged one. It is claimed that the Mutation Case no. 380(IX-1)/85-86 was allowed by the A/C Land, Debhatta without issuing any notice to all the recorded owners of the SA Khatian no. 233. It is stated that the petitioner and respondent nos. 7-10 are 12 brothers and sisters and they have some other paternal land properties and since it was necessary for partition and declaration of title of the property among them, the Partition Suit no. 25 of 2005 was instituted initially in a Court which did not have jurisdiction to entertain the said suit and subsequently the said suit was filed in a competent Court. It is stated that the Collector had rightly allowed the appeal of these respondents and, thereafter, the Divisional Commissioner, then, the Land Appeal Board had correctly dismissed the appeals and, finally, vide the impugned order the Full Board of the Land Appeal Board also rightly dismissed the review case.

6. Respondent no. 10 filed an affidavit on 03.03.2015 having complained that she never authorized any person to contest this case and, further, alleged that her purported signature shown in the letter of authority, annexed as annexures Z-2 to the affidavit-in-opposition filed by respondent nos. 7-9, is a forged one.

7. Mr. Subrata Saha, the learned Advocate appearing for the petitioner, at the very outset, takes us through the impugned order in tandem with the preceding orders thereto namely, the orders passed by the A/C Land, Debhatta of Satkhira, the Collector (Additional Deputy Commissioner) of Satkhira and the Divisional Commissioner of Khulna and submits that while the order passed by the A/C Land appears to be in consonance with the provisions of the SAT Act, the subsequent orders passed by the appellate authorities namely, the Collector (the Additional Deputy Commissioner), the Divisional Commissioner and finally the Land Appeal Board, are beyond the provisions of the SAT Act. In an endeavor to elaborate his submission on this point, he places Section 143 of the SAT Act and submits that the Collectors and all other Revenue Officers, while performing the functions of mutation, subdivision, amalgamation etc, are carrying out executive nature of jobs/tasks and their duty is only to record the names of the present tenants as per the papers and information presented to them by the Tahshilders or as per the information provided by the applicant. He continues to submit that in the case at hand, however, the appellate authorities have exceeded their jurisdictions in directing the A/C Land to apportion the shares of the owners of the case land and then mutate their names against their respective shares inasmuch as ascertainment of sahams among the co-sharers can only be done by a competent civil Court, and the Revenue Officers under the SAT Act, having not the status and power of a Court, cannot order for apportionments of the saham. He, then, places Section 143B of the SAT Act and forcefully submits that a revision in the record-of-rights by distribution of the respective shares of any land to the co-sharers can only be done by fulfilling the requirements outlined therein. In continuation of his submission on this point, he argues that if there are conflicting claims by the co-sharers as to the title and possession of a landed property, the A/C Land cannot proceed with a mutation case until the dispute is settled by a competent Court of law.

8. He, then, points out to the fact that the mutation in the name of the petitioner was done in the year 1985 and long after 20 years of the said mutation, the respondents filed the civil suit in the year 2005, claiming their sahams as well as for cancellation of the said mutation case. He submits that since it is evident that they sought to cancel the mutation of the petitioner in the year 2005, thus, at the time of filing the application before the A/C

Land in the year 2009 for cancellation of the petitioner's mutation, the respondents were under an obligation to disclose the said fact to the A/C Land and also to all the appellate authorities. In an endeavour to clarify this facet of his submission, he canvasses that had this fact been disclosed before the first appellate authority namely, the Collector, Satkhira, the outcome might have been different inasmuch as he might have taken the fact into consideration that since the competent civil Court is in seisin of the matter, he should not proceed with the mutation case.

9. Then, Mr. Shaha, by placing the observation and finding portion of the final authority, namely, the Full Board of the Land Appeal Board, submits that even though the fact, as to filing the civil case by the respondents, was placed by this petitioner before the Full Board and, thus, the same was available before the said authority for their consideration, but in arriving at a decision the said Full Board of the Land Appeal Board completely failed to address the said fact for their consideration and, consequently, arrived at an erroneous decision. He submits that the Land Appeal Board utterly failed to apply their mind judiciously in adjudication upon the matter as they missed to frame a crucial issue for their consideration and decision that since the matter is being dealt with by a competent civil Court, they are legally debarred from proceeding further. He, then, submits that since it is evident that the respondents Bedana Bibi and Kamala Bibi had clear knowledge about creation of the SA Khatian no. 233/2 when the petitioner conjointly with them had sold some portion of the property from the SA Khatian no. 233/2, therefore, under Section 115 of the Evidence Act, 1872 they are estopped from challenging the said SA Khatian no. 233/2.

10. By making the aforesaid submissions, the learned Advocate for the petitioner prays for making the Rule absolute.

11. Per contra, Mr. Md. Borhanuddin, the learned Advocate claims that he represents respondent nos. 7-10. At the very outset, he refers to annexure-Z to the affidavit-in-opposition and submits that the basis of the petitioner's claim is Rent Suit no.1785 of 1950 but from the annexure-Z, it is evident that the said suit was not about the present suit land and, accordingly, he submits that the papers and documents produced in corroboration of the title and possession of the suit land on the basis of the said Rent Suit no. 1785 of 1950 are forged. He, then, refers to annexure-Z1 to the affidavit-in-opposition filed by respondent nos. 7-10, which is the SA Khatian no. 233, and submits that the said respondents are the co-sharers with the petitioner's vendor Md. Abdul Wahab, and since no share was stated in the said SA Khatian, it is to be taken that all the 6 (six) persons named in the SA Khatian are the owners with equal shares and, accordingly, it is the submission of the learned Advocate for respondent nos. 7-10 that while Md. Abdul Wahab was legally owner of only 2.51 acres of land, he was not competent and entitled to sell 10.33 acres of land and to execute and register the sale deed no. 5365 dated 03.06.1985 in favour of the petitioner. Finally, he submits that the civil suit has been instituted by these respondents for partition of the ejmali properties and, on the other hand, the application for review under Section 150 of the SAT Act, which has been registered as Miscellaneous Case no. 2/08-09, was filed by them before the A/C Land for correction of mutation cancelling the petitioner's Mutation Case no. 380(IX-I)/85-86 and, thus, it is argued that given the nature of the remedy sought for by respondent nos. 7-10 in the civil suit and in the mutation proceedings, the above two moves were required to make in two different fora and, further, in view of the provisions of the SAT Act, barring institution of any suit against the orders passed by the Revenue Officers, these respondents have rightly moved the A/C Land and, thus, there is no wrong in the impugned order.

12. By making the above submissions, the learned Advocate for respondent nos. 7-10 prays for discharging the Rule.

13. On the other hand, by filing a separate affidavit, though respondent no. 10 has alleged that she has not authorized respondent nos. 7-9 or any other attorney to contest this writ petition and annexure- Z-2 is a product of forgery, but none appeared before this Court to make any submissions. However, there is a submission in her affidavit that this Court should take legal action against the respondent nos. 7-10 for committing forgery. Given the above categorical disowning by respondent no. 10 by swearing affidavit, which has not been protested and resisted by any counter affidavit by the learned Advocate for respondent nos. 7-9, presence of respondent no. 10 as a party to this writ petition is ignored henceforth.

14. We have heard the learned Advocates for the petitioner and respondent nos. 7-9, perused the writ petition, affidavit-in-opposition and the affidavit filed by respondent no. 10 together with the annexures appended thereto and we have also gone through the relevant laws and decisions placed before us and considered the same carefully towards an effective disposal of the case at hand.

15. The issues to be examined by this Court are that whether respondent nos. 7-10 were competent to approach the A/C Land after invoking the jurisdiction of the civil Court seeking partition and declaration of title to the case property as well as for cancellation of mutation of the writ petitioner and, simultaneously, whether the Revenue Officers, starting from the A/C Land upto the Land Appeal Board, possess any authority to deal with a mutation case, when a civil suit is pending over a claim and counter-claim as to the title of any landed property.

16. Before embarking upon the examination of the above issues of this case, for which we will be engaged to look at the relevant provisions of the SAT Act scatterdly, it would be a prudent exercise for this Court to get acquainted with the scheme of the SAT Act.

17. The SAT Act deals with multi-mode subjects relating to acquisition and tenancy by the State. Broadly, the SAT Act may be divided in to two portions. The extent of the first portion of the Act is from Section 1 to Section 78 and the said provisions are concerned with the acquisition of different classes of rent-receivers, rent-receiving interests together with some other interests. For the purpose of application of these provisions, in some cases for their implementation, the State Acquisition Rules, 1951 were framed, and operational space of the said rule is confined within Section 1 to Section 78 of the SAT Act.

18. The second portion starts with Section 79 under Part V of the SAT Act and extends upto the end of the Act, that is, to Section 152, the last Section of the said Act. This portion deals with the law of tenancy in its different aspects. For proper application of the provisions of this portion of the SAT Act, the Legislature framed State Tenancy Rules, 1955.

19. It is the submission of the learned Advocate for respondent nos. 7-9 that the functions performed or orders passed by the Revenue Officers are beyond the periphery of the jurisdiction of the civil Courts and, thus, alongside the civil suit, which would determine and adjudicate mainly the saham and title but not be capable of changing the names in the record-of-rights, they had to approach the A/C Land for correction of the record-of-rights. In order to deal with the above submission, we are required to look at the concerned Sections of the SAT Act seeking to oust the jurisdiction of the civil Courts. The following Sections, namely Sections 30, 46B, 69, 72, 86A, 115, 134, 144B and 145F of the SAT Act put an embargo to take recourse to the jurisdiction of the civil Courts.

20. From a minute reading of the above provisions, it appears that Section 30 prohibits resorting to the jurisdiction of the civil Courts when an order is made directing preparation or revision of a record-of-rights, Section 46B puts the said embargo when Compensation Assessment-roll has been prepared. Also, as per Section 69, until all the rent receivers' interests, which were liable to be acquired, have been acquired, the rent receivers were made ineligible to file any execution case for recovery of their interests, Section 72 prohibits resorting to the jurisdiction of the civil Courts when Compensation Assessment-roll has been published, Section 86A puts a bar to sue with regard to the right in any land which re-appears on account of alluvion or abatement of rent on account of diluvion, Section 115 ousts the jurisdiction of the civil Courts in respect of the determination of rent-rates, Section 134 prohibits resorting to the jurisdiction of the civil Courts when an order is passed relating to consolidation of holdings of raiyats, Section 144B prohibits resorting to the jurisdiction of the civil Courts when an order has been made under Section 144(1) directing the preparation of revision of the record-of-rights in respect of any area and Section 145F puts an embargo to institute a suit in the civil Court with regard to a matter which is triable by the Land Survey Tribunal. Out of the above Sections, while Sections 30, 46B, 69 and 72 are the relevant provisions for acquisition, the rest Sections are linked up with the provisions of resolving the tenancy issues.

21. Our understanding from the perusal of these ouster provisions is that there are some purposes behind barring to take recourse to the jurisdiction of the civil Courts. The first motto is that the massive and gigantic task of acquisition of different classes of rent-receivers and rent-receiving interests undertaken by the State was intended by the Legislature to complete without being interrupted and, secondly, the process of ascertaining the tenancy matters, which requires to be commenced by the State from time to time, also is expected by the Legislature to be carried out without encountering any obstacle.

22. However, the fact of the instant case does not attract any of the above barring provisions of the SAT Act given that the petitioner's case is covered by Section 143 of the SAT Act which does not put any bar to seek remedy in the civil Court. In view of the fact that the petitioner is claiming the case property on the basis of a registered sale deed, respondent nos. 7-9 appear to have rightly invoked the civil Court's jurisdiction where they will have all the opportunity to examine their title & partition vis-a-vis that of their co-sharers on the case land

and, then, pursuant to the judgment and decree from the civil Court, the A/C Land shall be duty bound to update the record-of-rights on the case land. It follows that respondent nos. 7-9 were not legally allowed to approach the A/C Land for correction of the record-of-rights at a time, when the same dispute and grievance is being taken care of by a competent civil Court.

23. Now, let us see whether the Revenue Officers, ranking from the A/C Land to the Land Appeal Board, have any authority to deal and proceed with a mutation case when a civil suit over the selfsame matter is pending. In order to adjudicate upon the issue effectively, we have gone through all the provisions of the SAT Act from Sections 1 to 152 together with the State Acquisition Rules, 1951 and State Tenancy Rules, 1955. To say it more specifically, our searching was aimed at spotting the nature of the duties and functions of the Revenue Officers as to whether they carry out the performance of a Court, or of an administrative body. Upon skimming through the entire SAT Act, it appears to us that only the forums created under Sections 51, 53, 111 of the SAT Act by appointing judicial officers as the appellate authorities and the Land Survey Tribunals and Land Survey Appellate Tribunals constituted under Sections 145A and 145B of the SAT Act respectively hold/enjoy the status of a Court and perform the functions of a Court and all other Revenue Officers are to be taken as executive officers or forums.

24. However, a few provisions of the SAT Act and State Acquisition Rules, 1951 and State Tenancy Rules, 1955 have caught sight of us to be apparently different from the above provisions. These are Section 75 of the SAT Act and rule 39 of the State Acquisition Rules, 1951 and rules 14 & 36 of the State Tenancy Rules, 1955, which are quoted below:

Section 75 of the SAT Act:

For the purposes of any enquiry under this Act, a Revenue Officer shall have power to summon and enforce the attendance of witnesses or of any person having any interest in any estate, tenure, holding or land and to compel the production of documents by the same means, and so far as may be, in the same manner as in provided in the case of Civil Court under the Code of Civil Procedure, 1908.

Rule 39 of the State Acquisition Rules, 1951 is as under:

When Revenue Officer is appointed for the purpose of preparation or revision of a record-of-rights, or for the purpose of preparation of Compensation Assessment Roll under Part IV of the Act, within any district, part of a district or local area, he shall be appointed either with or without the additional designation of 'Settlement Officer' or 'Assistant Settlement Officer'. Every such officer is hereby vested with-

(a) the power to cut and thresh the crops on any such land and to weigh the produce with a view to estimating the capabilities of the soil; and

(b) the power to take down evidence with his own hand in the English language in proceedings held under Part IV of the Act in which an appeal is allowed in accordance with the procedure in the Code of Civil Procedure, 1908, for the trial of suits.

Rule 14 of the State Acquisition Rules, 1955 runs as follows:

14. Powers of Revenue-officers under Chapter XIV of the Act:-(1) When a Revenue-office is appointed for the purpose of determination of rent-rates and for setting fair and equitable rents under Chapter XIV, of the Act, within any district, part of a district or local area, he shall be appointed either with or without the additional designation of "Settlement Officer" or "Assistant Settlement Officer". Every such officer shall have-

(a) The power to cut and thresh the crop of any land included within the area in respect of which an order under section 99 has been made, and to weigh the produce with a view to determine the productive capacity of the soil;

(b) The power to take down evidence in his own hand in English language in proceedings held under the said chapter in accordance with the procedure laid down in the Code of Civil Procedure, 1908, for the trial of suits; and

(c) .....

(2) .....

(3) .....

(4) A Revenue Officer appointed with additional designation of "Settlement Officer" or "Assistant settlement Officer" shall also have all the powers exercisable by a Civil Court in the trial of suits under the Civil Procedure Code, 1908 Act V of 1908).

Rule 36 of the State Acquisition Rules, 1955 runs as follows:

36. Power vested in Revenue Officers- When a Revenue-officer is appointed for the purpose of revision of a record-of-rights under chapter XVII of the Act within any district, part of a district or local area, he shall be appointed either with or without the additional designation of "Settlement Officer" or "Assistant Settlement Officer". Every such Officer shall have,-

(a) the power to take down evidence in his own hand in English language in proceedings held under the said Chapter, in which an appeal is allowed, in accordance with the procedure land down in the Code of Civil procedure, 1908, for the trial of suits; and

(b) to enter upon any land included within the area in respect of which an order under section 144 has been made to survey and demarcate and prepare a map of the same.

25. Although from the reading of Section 75 of the SAT Act, rule 39 of the State Acquisition Rules, 1951 and rules 14 & 36 of the Tenancy Rules, 1955, it may appear that the powers and functions of the Revenue Officers, as disclosed above by the Act and Rules, clothe them with all the qualities of a Court and those also tend to indicate the judicial nature of their work, however, when any one would read through the whole SAT Act, he would be of the view that the provisions of Section 75 of the SAT Act and rule 39 of the State Acquisition Rules, 1951 and rules 14 & 36 of the State Tenancy Rules, 1955 give the Revenue Officers the powers of a civil Court merely to the extent of enforcing attendance of witnesses or of any person, having interest in the estate, and production of documents for the purpose of conducting any enquiry and, thus, not for adjudication upon a lis between the parties.

26. Our above view is reinforced by the provision of Section 146 of the SAT Act and rule 17 of the State Acquisition Rules, 1951 inasmuch as from a plain reading of the said Section 146 of the SAT Act and rule 17 of the State Acquisition Rules, 1951, we find that the functions of the Revenue Officers under Section 75 of the SAT Act and rule 39 of the State Acquisition Rules, 1951 and rules 14 & 36 of the State Tenancy Rules, 1955 are not sufficient to brand them within the category of Court.

27. Section 146 of the SAT Act is as under:

146(1) The general superintendence and control over all Revenue Officers shall be vested in, and all such officers shall be subordinate to, the Board of Land Administration.

(2) Subject to the provisions of sub-section (1), a Commissioner of Division shall exercise control over all other Revenue Officers in his Division.

(3) Subject as aforesaid and to the control of the Commissioner of the Division, a Collector shall exercise control over all other Revenue Officers in his district.

28. Rule 17 of the Rules, 1951 is as under:

Except as otherwise provided for by the Act or by these Rules, all proceedings and orders of a Revenue Officer passed in the discharge of any duty imposed upon him by the Act or these Rules shall be subject to the supervision and control of the Provincial Government; and the proceedings and orders of each Revenue Officer under the Act or these Rules shall be subject to the supervision and control of the Revenue Officer or Revenue Officers to whom he may be declared or ordered by the Provincial Government to be, for the purpose of the Act or these Rules, subordinate.

29. The Provision of Section 146 of the SAT Act as well as rule 17 of the Rules, 1951 clearly indicate the absence of the finality in the orders of the Revenue Officers, reducing them to the administrative functionaries only under the Board of Land Administration and the Government. Thus, from this point of view as well, the Revenue Officers are not performing any judicial function under the provisions of the SAT Act.

30. The Apex Courts of this sub-continent are sharply divided in opining on the issue as to whether the word/expression 'Court' used in Section 195(1)(c) of the Criminal Procedure Code (CRPC) includes the Revenue Officers under the SAT Act. Our Apex Court in the case of Sahera Khatun Vs Abdur Rahim Sheikh 13 BLC (AD) 24 upon examining the cases of Abul Hossain Vs State 55 DLR (AD) 125, Abdul Hai Khan & another Vs State 8 BLD (AD) 195 & Nur Mohammad VS Kalimuddin BCR 1987 (AD) 152 and some other conflicting opinions of the High Court Division passed in the cases of Malik Fateh Khan Vs Najibullah Khan 9 DLR(WP) Lahore 40, SM Lutfullah Vs Bibi Badrunnessa and others 20 DLR 1019, Idris Ali and another Vs State 38 DLR 270, Ajit Kumar Sarkar Vs Radha Kanta Sarkar 44 DLR 533 and Chitta Ranjan Das Vs Shashi Mohan Das 56 DLR 276 opined that while the Revenue Officers are carrying out their duties under Section 143 of the SAT Act, they should be regarded as executive functionaries, but when they are performing their duties under Section 144 of the SAT Act they should be considered as the Courts. However, the *ratio* laid down therein is not applicable in this case inasmuch as in all the afore-cited cases, the jurisdiction of Section 561A of the

CRPC was sought to be invoked in an attempt to quash the criminal proceedings on the ground that the Revenue Officers, while discharging their functions under the provisions of the SAT Act, are not functioning as the Courts and, accordingly, in the afore-cited cases there were occasions for this Court to examine as to what kind of Court was meant in couching the words under Section 195(1)(c) of the CRPC. Be that as it may, if the *ratio,* even, is to be taken to be applicable, nevertheless, the present case's fact having arisen out of a proceeding under Section 143 of the SAT Act, our opinion on this issue, as expressed hereinbefore, is in conformity with that of the Apex Court.

31. To this end, Section 143 of the SAT Act requires to be taken up and discussed towards adjudication of this case. Section 143 runs as follows:

143. **Maintenance of the record-or-rights**: The Collector shall maintain up-to-date, in the prescribed manner, the record-or-rights prepared or revised under Part IV, or under this Part by correcting clerical mistakes and by incorporating therein the changes on account of-

(a) the mutation of names as a result of transfer or inheritance;
(b) the subdivision, amalgamation or consolidation of holdings;
(c) the new settlement of lands or of holdings purchased by the Government; and
(d) the abatement of rent on account of abandonment or diluvion or acquisition of land.

32. From a minute reading of the above provisions of law, it appears that the duty of maintenance of the record-of-rights has been conferred upon the Collectors and he, with the assistance of the sub-ordinate Revenue Officers, shall perform the said duty apparently on two occasions. Firstly, when a clerical mistake occurs in passing an order on mutation, or after preparation of the record-of-rights or after revision of the same under Part VI of the SAT Act and, secondly, when there is any change in the ownership of the land as a result of transfer/inheritance, or on account of the events having taken place as enunciated in sub-Sections (b) to (d) of Section 143 of the SAT Act.

33. To put the provisions of Section 143(a) in a bit detail, it may be said that under Section 89 of the SAT Act, the happening of any transfer of land, upon being registered by the registering officer, must be notified to the Revenue Officer whose duty, then, becomes to open a file for mutation of record of rights and issue notice to the co-sharers of the transferred land, as provided in Section 143C of the SAT Act. However, if the landed property is acquired by inheritance and the partition taken place amicably through a registered instrument upon observing the provisions of the personal laws, Section 143B(2) of the SAT Act empowers the Revenue Officers to cause changes in the record-of-rights. On the other hand, the provisions of Section 143(b) to (d) of the SAT Act provide that if there is any amalgamation of land under Section 116 of the SAT Act, or subdivision of a joint tenancy under Section 117 of the SAT Act, or there happens a consolidation of holdings under Section 125 of the SAT Act, the Revenue Officer under the authority of the Collector shall incorporate the said changes in the record-of-rights. Also, whenever there is the new settlement of the lands or the Government purchases holdings, or there is abatement of rent on account of abandonment, diluvion and acquisition of land, the Collector's duty is to cause the said changes in the record-of-rights.

34. From the facts of the case at hand, it surfaces that there has been a transfer, as per the claim of the petitioner, by Md. Abdul Wahab Mondal, who is the father of the petitioner as well as of respondent nos. 7-9 and, accordingly, the petitioner had approached the concerned Revenue Officer namely, A/C Land, Debhatta, Stakhira, in the year 1985 by filing an application under Section 117 read with Section 143 of the SAT Act and through opening up the Mutation Case no. 380 (IX-I) 85-86 under the authority of Section 143(C) of the SAT Act, the A/C Land, Debhatta, Satkhira, at first, on 03/10/1985 had asked the Tahshilddar to submit a report thereon after making necessary inquires and on 15.10.1985, upon receiving the said report from the Tahshilddar, the record-of-rights was updated by the said Revenue Officer, Debhatta, Satkhira and, accordingly, in our way of scrutiny, we find that the duty performed by the said Revenue Officer namely, A/C Land, Debhatta, Satkhira, was completely in conformity with the provisions of Sections 117, 143 and 143C of the SAT Act and Rules 22-24 of the Tenancy Rules, 1955 inasmuch as under Section 143 of the SAT Act together with the provisions of relevant rules, namely rules 22-24 of the Tenancy Rules, 1955, the Collectors, with the aid of the Revenue Officers, have been vested with the duty to maintain the record-of-rights of the lands of this country and they are empowered to correct any clerical mistakes occurred in preparation or revision of the record-of-rights and, also, to amend the same when any change takes place in the ownership of the land, be it for sale, inheritance, vesting the property in the Government, acquisition or purchase by the Government etc.

35. Now, let us deal with the subsequent event namely, the steps taken by respondent nos. 7-9 by filing an application before the A/C. Land, Debhatta, Satkhira in the year 2009 for cancellation of the Mutation Case no. 380 (IX-I) 85-86, which was registered as Miscellaneous Case no. 02/08-09. The aforesaid move made by the said respondents may be seen as an application for review under Section 150 of the SAT Act. After receiving

the said application, a Revenue Officer is duty bound under Section 150(c) of the SAT Act to give notice to the contending parties and, then, dispose of the claim upon hearing them. From the order dated 18.05.2009 passed by the A/C Land, Debhatta, Satkhira, it appears that the said Miscellaneous Case no. 02/08-09 was heard in presence of both the parties and the same was rejected holding that since the mutation was done in the name of the petitioner pursuant to a registered sale deed and the writ petitioner is in possession of the case land, there is no reason to cancel the writ petitioner's mutation.

36. However, there is no observation by the said A/C Land as to the pendency of the civil suit. Though both the sides now unequivocally admit that a civil suit is pending before the competent Court of law with regard to the claim on the suit property, however, nothing was mentioned about it before the A/C Land, Debhatta, Satkhira neither by respondent nos. 7-9, nor by the writ petitioner. The reasons and motives of non-mentioning about the pendency of the suit are different for the petitioner and respondent nos. 7-9 and, in fact, opposite to each other. While it appears from the contents of the application, which was registered as Miscellaneous Case no. 02/08-09, made by respondent nos. 7-10 before the A/C Land, Debhatta, Satkhira, which has been placed before this Court as annexure-Y, that respondent nos. 7-9 cunningly remained silent about it, in contrast, the petitioner appears to have felt it not necessary to present this information to the A/C Land. Although the A/C Land, Debhatta, Satkhira rejected the said Miscellaneous Case no. 02/08-09 filed by respondent nos. 7-10, however, had the fact of the pendency of the civil suit been stated in the application by respondent nos. 7-10, the A/C Land would have an occasion to make his observation on this fact as well. When these respondents approached the appellate authority namely, Collector the appeal was allowed in absence of the petitioner and, thus, there was no scope for the petitioner to inform the Collector about the pendency of the civil suit on the same claim. Under the circumstance, the petitioner approached the superior appellate authority namely, Divisional Commissioner, Khulna who affirmed the order of the Collector, Satkhira without discussing the fact of institution of the civil suit. Finally, when the petitioner moved the Land Appeal Board where it transpires that the petitioner stated about the facts of the civil suit but the said final appellate authority did not take up the said issue for its consideration and simply arrived at a decision that the order passed by the Collector, Debhatta, Satkhira, to the effect that the record is required to be upgraded by distributing the share to the co-sharers named in the S.A. Khatian no. 233, does not suffer from any infirmity. As the last and final authority on the mutation matters, the Full Board of Land Appeal Board was expected to be astute in discharging their duties, for, a judicious order passed by the said final authority not only minimises the hassle of the parties to a mutation proceeding, which the litigant experience in dealing with the mutation cases, but it also saves the invaluable time of this Court.

37. The purpose behind carrying out the above lengthy exercise as to whether the Revenue Officers under the SAT Act are to be taken as the Courts or the executive functionaries was that if their positions are revealed to be of the Courts, then the next issue for our examination would be to find out whether the subsequent step taken in the Court of the A/C Land was barred by the principles of *res-judicata*. However, in the light of the revelation/outcome of our scrutiny that the duties and functions of the Revenue Officers, which they perform under the mandate of Section 143 of the SAT Act together with rules 22-24 of the Tenancy Rules, 1955, as have been carried out by them in this case, can not in any manner be considered as the judicial functions, as their functions are of administrative nature and they are competent only to pass executive order, which emerges from the *ratio* of the preponderance of the cases of our jurisdiction, we are not required to dwell on these issues any further. To this end, the only issue that becomes pivotal for our consideration is whether the Revenue Officers, from the posts of the A/C Land to the Land Appeal Board, being the executive functionaries as revealed hereinbefore, are competent to take up a matter for their consideration and decision when the same subject matter is pending before a civil Court.

38. The above core issue of this case surfaces to be a rare one of its kind in this Court as our research could not trace out any similar case on this point. On the other hand, there is no statutory provision as well to guide us a clear-cut path for adjudication upon the point. Under the circumstances, we have no other option but to put our best effort, based on sound and pertinent reasoning to adjudicate upon the issue. It is a universally recognized rule that Parliament or Executive does not take up any sub-judice matter for their consideration. The principle is rooted in our Constitution as well as in many of statutes of our country, including the Rules of the Procedure of Parliament, and, accordingly, it would be a sound and rational view to hold that if there is a case pending in a competent Court of law regarding any dispute over any land property and on the same dispute, pending disposal of the said case, a Revenue Officer is subsequently approached by any claimant with a prayer to update a record-of-rights in the form of amendment or the correction of the record-of-rights, the Revenue Officer should abstain from proceeding with the mutation case.

39. In the case at hand, all the Revenue Officers, from the A/C Land to the Land Appeal Board, utterly failed to address this issue. While it is apparent that the parties to this case were at fault at the initial stage before the A/C Land and the Collector for not disclosing the fact of pendency of the civil suit and, later on, when the petitioner had presented the said fact, although belatedly, the Divisional Commissioner and the Land Appeal Board failed to take up the fact for their consideration. Moreover, unless a Revenue authority is presented with a registered instrument of amicable settlement or the contending parties of a mutation case agrees on their respective shares, no Revenue Authority is competent to change the record-of-rights by apportioning/allocating shares to the claimants of any landed property. Thus, in the instant case, the first appellate authority namely, Collector, Satkhira when passed the order stating that the A/C Land, Debhatta, Satkhira should update the record by distributing the share, we find that the said appellate authority exceeded its jurisdiction having attempted to usurp the functions of a civil Court inasmuch as it is for the civil Court to decide the share of the landed property in a situation where the claimed co-sharers are not in agreement as to their respective shares.

40. We are of the view that in dealing with the mutation proceedings the Revenue Officers' duties are only to record the names of the owners of the land upon examining the relevant papers and documents, if the same are produced before them without raising/taking any objection thereto. But the moment the Revenue Officer would come to know, either through an enquiry conducted by him with the assistance of the Tahshilder or any other staff of his office, or through an application filed by a private party for mutation, that there are disputes regarding the produced papers and documents and there are contending claimants over any land and the matter is pending in the Court for disposal, the concerned Revenue Officer must not proceed further with regard to the said mutation case until the said civil suit is finally disposed of.

41. In this case, it is an admitted fact that respondent nos. 7-9 have already invoked the competent jurisdiction, namely the jurisdiction of the civil Court, seeking cancellation of the mutation recorded in favour of the petitioner in the year 1985 together with a prayer for partition of the suit land and, thus, we are of the view that until their respective title is settled by the civil Court, the Revenue Officer shall not be in a position to distribute or apportion the respective portions of the share of the petitioner and that of respondent nos. 7-9 for recording the same in their respective record-of-rights.

42. Accordingly, we hold that the order passed by all the appellate authorities, starting from the Collector of Satkhira upto the Land Appeal Board, committed illegality in holding that the record-of-rights should be amended upon allocating the sahams among the contending parties. It follows that the impugned order is destined to be declared illegal and, thereby, the same requires to be set aside.

43. Resultantly, the Rule is made absolute without any order as to costs in the following terms:

(1) The order dated 18.05.2014 passed by the Full Board of Land Appeal Board (ভূমি আপীল বোর্ড) in Review Case ৫-০৮/২০১৪ (এমঃ) ফুল বোর্ড, (সাতক্ষীরা), affirming the order dated 31.12.2012 passed by the Additional Divisional Commissioner, Khulna in Miscellaneous Appeal no. 25 of 2012 and thereby affirming the order dated 28.12.2011 passed by the ADC (Revenue), Satkhira in Miscellaneous Appeal no. 47 of 2010 is hereby declared illegal.

(2) Respondent no. 6, being the Assistant Commissioner (Land), Debhatta, Satkhira, is directed to take his decision on updating the record-of-rights of the parties of Miscellaneous Case no. 47 of 2010 only when the adjudication of the Title Suit no. 50 of 2013, now pending before the Court of learned 2nd Joint District Judge, Satkhira, is finally completed.

(3) Respondent no. 1, being the Secretary of the Land Ministry, is directed that he shall, in an endeavour to prevent the recurrence of recording a mutation during pendency of a civil suit, issue a circular notifying all the Revenue Officers of Bangladesh and also the fvg Avcxj †ewW that if a civil suit is pending involving claim of title on the basis of transfer or inheritance of an immovable property, the said Officers and the Board shall not, whether *suo-motu* or upon an application of any person, entertain a case for mutation of names in the record-of-rights under Section 143(a) of the State Acquisition and Tenancy Act, 1950 till a final decision is arrived at in such civil suit through exhausting appeal or revision arising therefrom.

(4) The Secretary, Land Ministry (Respondent no. 1) is further directed to take necessary steps for-

(1) ascertaining the exact powers and functions of the fvlg Avcxj †evW as contemplated in Section 5 of the fvlg Avcxj †evW AvBb, 1989, if not so ascertained already and to circulate it to all concerned,

(2) for effecting textual amendment of the State Acquisition and Tenancy Act, 1950 and the State Acquisition Rules, 1951 and the State Tenancy Rules, 1955 for substitution/incorporation of appropriate words in place of the 'Land Administration Board', 'Provincial Government' and other obsolete expressions, which have remained unattended in the aforesaid statutes.

44. Office is directed to send at once a copy of this judgment to Respondent no. 1 being the Secretary, Land Ministry and also a copy to the AC (Land), Debhata, Satkhira (Respondent no. 6).

45. Respondent no. 3 is directed to file an affidavit-in-compliance thereto on or before 09.09.2015.

46. Let the matter appear in the daily cause list on 10.09.2015 for necessary orders.

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1 SCOB [2015] HCD 110

High Court Division
(Special Original Jurisdiction)

Writ Petition No. 6328 OF 2003

Abul Hossain Khan & another … Petitioners

-Versus-

Artha Rin Adalat, Barguna and others.
… Respondents

Mr. Md. Afzal Hossain
… for the petitioners

Mr. A.B.Siddique with
Mr. Ziaul Hasan,
Mr. K.M.Salauddin Ahmed and
Mr. Kalipada Mridha
… For the respondent No.2 Bank

Heard on 7.4.2014 & 13.4.2014
&
Judgment on the 20th April, 2014.

Present:
Mr. Justice Syed Refaat Ahmed
And
Mr. Justice Mahmudul Hoque

Article 102 (2)(a)(ii) of the Constitution of the People's Republic of Bangladesh
&
Section 6(5) of the Artha Rin Adalat Ain, 2003:

In the event of execution of a decree for realization of decretal amount the court shall proceed with the property of the borrower first and then the property of the third-party mortgagors.
...(Para 13)

Judgment

Mahmudul Hoque, J:

1. On an application under Article 102 of the Constitution of Bangladesh this Rule Nisi has been issued at the instance of the petitioners calling upon the respondents to show cause as to why the impugned proceeding of Money Execution Case No. 01 of 1999 subsequently renumbered as Money Execution Case No. 96 of 2003 arising out of Artha Rin Case No. 03 of 1997 pending in Artha Rin Adalat, Barguna, respondent No.1 so far as it relates to the property of Schedule "Ka" of the plaint (as well as of the decree) should not be declared to have been passed without lawful authority and is of no legal effect, and/or such other or further order or orders passed as this Court may deem fit and proper.

2. Facts relevant for disposal of this Rule Nisi, in short, are that the respondent No.2 Bank as plaintiff instituted Artha Rin Suit No. 03 of 1997 before the Artha Rin Adalat, Barguna, against the petitioners and respondent No.4 as defendants in the suit for recovery of Tk. 10,69,705/- stating inter alia, that the respondent No.4 as proprietor of M/S. Hydraulic Engineering availed of a loan for Tk.4(four) lac from the respondent No.2 bank. The petitioners mortgaged their landed property as security against loan with the respondent No.2 bank. Since the respondent No.4 borrower failed to pay the said loan along with interest within time inspite of repeated demands of the respondent No.2 bank, the bank has filed the instant suit for realization of money against the respondent No.4 and the present petitioners as defendants in the suit.

3. The petitioners contested the suit by filing written statement contending inter alia that they stood guarantors as third party mortgagors for Tk. 4 Lac against Work Order No.6/470 and the respondent No.4 borrower paid back the said amount within the stipulated time as per terms and condition of the sanction letter but subsequently the respondent No.4 in collusion with the respondent No.2, the Manager of the bank on the basis of a false work order being No. W6/330 took loan of Tk.5 Lac more without the knowledge and consent of the petitioners for which the petitioners never stood as guarantors nor mortgaged their property as security to the bank and as such the suit is liable to be dismissed against them. The trial court decreed the suit against the respondent No.4 borrower (defendant No.1 in the suit). Unfortunately at the time of drawing decree the land of the petitioners as mentioned in Schedule 'Ka' to the plaint was also included though the said land was mortgaged by the petitioners as guarantors and which can be sold for realization of the decreetal amount if there be any shortfall after selling the mortgaged property of the borrower first and adjustment of the sale proceeds.

4. The decree holder bank filed Money Execution Case being No. 01 of 1999 subsequently renumbered as No.96 of 2003 in the Artha Rin Adalat, Barguna for realization of decretal money and in the execution proceedings the court put the property of the petitioners in auction alongwith the landed property of the borrower fixing 28.10.2003 for holding auction without holding auction of the borrower's property first. The petitioners by filing a supplementary affidavit on 10.04.2014 further stated that the petitioners being the third party mortgagors their property cannot be sold in auction without selling the mortgaged property of the borrower first as per Section 6(5) of the Artha Rin Adalat Ain 2003 ("Ain") but in the instant case the decree holder bank published auction notice for selling the petitioners' mortgaged property along with the borrower's mortgaged property in violation of the provision of Section 6 (5) of the Ain. At this stage the petitioners moved this court by filing this application under Article 102 of the constitution of Bangladesh and obtained the present Rule Nisi and order of stay.

5. The respondent No. 2 bank contested the Rule Nisi by filing an affidavit-in-opposition and supplementary affidavit-in-opposition contending inter alia that the respondent no. 4 availed a loan of Tk. 4 Lac against mortgage of the properties owned by the writ petitioners. Thereafter, he further applied for enhancement of the loan up to Tk. 10 Lac upon renewal of the loan facility. The respondent no. 2 allowed enhancement up to Tk. 5 Lac and subsequently sanctioned a TOD limit of Tk. 2 Lac totaling Tk. 7 Lac against the mortgage of the petitioners' properties. The respondent no. 4 having failed to repay the loan money within specified time the bank filed Artha Rin Suit against the respondent no. 4 and the petitioners. The suit was decreed against the petitioners on contest and ex parte against the respondent no. 4. For execution of the said decree the respondent no. 2 bank filed Execution Case No. 96 of 2003 and the mortgaged properties were put in auction upon compliance of all procedures as provided in law and there was no illegality and hence the present writ petition is not maintainable and the rule is liable to be discharged.

6. Mr. Md. Afzal Hossain, the learned Advocate appearing for the petitioners submits that the decree passed in Artha Rin Suit No. 3 of 1997 is against the respondent no. 4 as specifically mentioned in the judgment and order of the trial court. But the execution case has been filed against the petitioners and respondent No.4 as judgment-debtors and putting the petitioners' mortgaged property in auction is absolutely contrary to the operative portion of the judgment of the Artha Rin Adalat and as such the impugned proceedings of the said Execution Case are illegal and liable to be declared without lawful authority. Mr. Hossain further submits that since the petitioners are third party mortgagors the mortgaged property mentioned in "Ka" Schedule to the plaint is not liable to be sold in auction without selling the property of the borrowers mortgaged property first as per Section 6 (5) of the Ain.

7. Mr. A.B.Siddique, the learned advocate appearing for the respondent No.2 bank in reply to the submissions made by the petitioners' counsel submits that the petitioners mortgaged their landed property as security against loan granted to the respondent No.4 who ultimately failed to pay the bank dues as per terms and conditions of the sanction and the bank filed the suit being No. 3 of 1997 in the Court of Artha Rin Adalat, Barguna for recovery of the bank dues against the petitioners as guarantors and the borrower respondent No.4. The suit was decreed on contest against the petitioners and ex parte against the borrower respondent No.4. Thereafter the decree holder bank respondent No.2 put the decree into execution and in the execution proceedings the mortgaged property of the judgment debtors has been put in auction as per provisions of Section 33(1) of the Ain and as such there is no illegality in the execution proceedings and publishing the auction notice inviting seal quotation. Mr. Siddique further submits that the mortgaged property of the borrower-respondent No.4 is situated in a rural area and not so valuable and the claim of the bank will not be satisfied by the sale of the borrower's property as mentioned in Schedule "Kha" without selling the mortgaged property of the third party mortgagors petitioners. For that reason, and for satisfaction of the decree in its entirety the mortgaged property of the petitioners and the borrower have been put in auction at the same time for the sake of saving time and expenditure. It is also argued that the decree was passed by the court against the petitioners and the borrower –respondent No.4 jointly and as such there is no illegality in filing the execution case against the petitioners along with the respondent No.4 and putting the mortgaged property in auction for recovery of the banks dues.

8. Heard the learned Advocates for the parties, perused the petition, supplementary affidavits, Affidavit-in-opposition, Supplementary Affidavits-in-opposition and the Annexures annexed there to.

9. In the instant case the petitioners have challenged the execution proceedings in Execution Case No. 1 of 1999 renumbered as No. 96 of 2003 in its entirety on the grounds that the decree for recovery of money has

been passed against the borrower –respondent No.4 only and not against the present petitioners- defendant Nos. 2 and 3 in the suit and the mortgaged property of the petitioners being a third-party mortgage cannot be sold in auction without selling the property of the borrower first as per Section 6(5) of the Ain.

10. Before entering into the merit of the case let us have a look into the operative portion of the judgment and order dated 17.10.1998 passed in Artha Rin Suit No.3 of 1997 (Annexure-A) which runs thus:-

আদেশ হয় যে,

অত্র অর্থঋন মোকদ্দমা দোতরফা সূত্রে ২/৩ নং বিবাদীর বিরুদ্ধে এবং একতরফা সূত্রে ১ নং বিবাদীর বিরুদ্ধে খরচাসহ ডিক্রী হয় । বাদী ব্যাংকপক্ষ ১ নং বিবাদীর নিকট ইং ৩০/১২/৯৬ তারিখ পর্যন্ত ১০,৬৯,৭০৫/= টাকা সুদাসলে পাইবেন এবং উক্ত টাকা আদায় পর্যন্ত ব্যাংকের প্রচলিত হারে ডিক্রীকৃত টাকার উপর সুদ পাইবেন ।

11. It appears from the operative portion of the judgment as quoted above that the decree was passed against all the defendants in the suit and not against the borrower respondent No.4 (defendant No.1 in the suit) only as claimed by the present petitioners. From a perusal of the decree it also appears that the present petitioners are defendant Nos. 2 and 3 in the Artha Rin Suit No.3 of 1997. So, the decree holder bank-respondent No.2 rightly initiated the execution proceedings against the petitioners along with respondent No.4 borrower as judgment-debtors. In these circumstances this Court does not find any illegality in initiating the execution proceeding against the present petitioners and as such the execution proceedings are quite maintainable against the present petitioners. The next question raised by the petitioners' counsel Mr. Hossain by referring to Section 6(5) of the Ain is that as per provisions therein in the event of realization of money by execution of the decree the court shall sell the property of the borrower defendant first and then the property of the third-party mortgagors if there be any shortfall. But in the present case the Artha Rin Adalat put the petitioners property in auction along with the mortgaged property of the borrower-respondent No.4 in violation of the provisions contained in the 1st proviso to 6 (5) of the Ain.

12. To appreciate the submissions of Mr. Hossain Section 6(5) is reproduced below:-

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 একই সাথে পরিচালিত হইবেঃ

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 করিবেঃ

13. From a perusal of the first proviso to Section 6(5) it appears that in the event of execution of a decree for realization of decretal amount the court shall proceed with the property of the borrower first and then the property of the third-party mortgagors. In the present case admittedly the Schedule "Ka" property belongs to the present petitioners which was placed as security against the loan to the bank as third-party mortgage. Given these facts and circumstances, this Court finds that as per provision of law as quoted above the Artha Rin Adalat ought to have proceeded with the auction of the borrower's property first. But instead the Adalat published the auction notice for sale of the third-party mortgaged property along with property of the borrower in violation of the provisions to Section 6 (5) of the Ain which under the law the court cannot do. Keeping in mind the provisions of law as contained in the Ist proviso to Section 6 (5) the court ought not to have placed the Schedule "Ka" property owned by the petitioners as third-party mortgage without selling the property of the borrower first. Therefore, the Artha Rin Adalat, Borguna is, hereby, directed to proceed with the execution proceedings by putting the property owned by the borrower in auction first upon compliance of the provisions contained in Section 33(1) of the Ain and in the event of finding no bidder in the auction or any shortfall in the money raised in auction the property of the petitioners third-party mortgagors may be put in auction following the provisions of Section 33(1) of the Ain and other provisions related with the auction process and consequentially dispose of the execution proceedings within the shortest possible time.

14. With the above observations and discussions made above this court is now inclined to dispose of this Rule Nisi. In the result, the Rule Nisi is deposed of in the light of the observations made herein above without any order as to costs.

15. The Order of Stay granted by this Court is, hereby, recalled and vacated.

16. Communicate a copy of the judgment to the court concerned forthwith.

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1 SCOB [2015] HCD 113

HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Civil Revision No. 4430 of 2011

A N M Abdul Halim
... Petitioner.
-versus-

The Bangladesh House Building Finance Corporation
... Opposite- party.

Mr. Md. Golam Mostafa, Advocate
... For the petitioner.

Mr. Harunnor Rashid Khan, Advocate
...For the opposite- party.

Heard on: 12.01.2015 & 27.01.2015.
Date of Judgment: 04.03.2015.

Present:
Mr. Justice A. K. M. Abdul Hakim
with
Mr. Justice Zafar Ahmed

Bangladesh House Building Finance Corporation Loan Regulations, 1977 and 1996:
Under both the repealed Regulations, 1977 and Regulations, 1996 the BHBFC is permitted to charge simple interest on all loans, not the penal interest. ...(Para 26)

Section 115(1) of the Code of Civil Procedure, 1908:
It is now well settled principle of law that in exercise of revisional jurisdiction under section 115(1) of the Code of Civil Procedure, the High Court Division has wide power to do justice in a case and in appropriate case where the order under revision is set aside this Court can pass any consequential order necessitated by the facts of the case. ...(Para 34)

Judgment

Zafar Ahmed, J.

1. In this application under section 115(1) of the Code of Civil Procedure Rule was issued on 23.06.2011 upon the opposite party to show cause as to why the impugned order no. 80 dated 19.08.2010 passed by the learned District Judge, Bogra in Money Execution Case No. 10 of 2000 now pending in the Court of District Judge, Bogra should not be set aside and/ or pass such other or further order or orders as to this Court may seem fit and proper.

2. At the time of issuance of the Rule this Court passed an ad-interim order staying all further proceeding of Money Execution Case subject to payment of a sum of Tk. 2,00,000/- to the decree- holder opposite-party within 6 (six) months. It appears that pursuant to the said order the petitioner on 18.12.2011 paid Tk. 1,00,000/-, on 17.01.2012 Tk. 50,000/-, on 08.02.2012 Tk. 50,000/- and on 08.05.2012 Tk. 50,000/- total Tk. 2,50,000/- in LA/C No. বগ 524, through Sonali Bank, Bogra Branch to the opposite party.

3. Facts, relevant for disposal of the Rule, in brief, are that the opposite party namely Bangladesh House Building Finance Corporation, Regional Office, Bogra (in short the 'BHBFC') as applicant on 30.04.1998 filed Miscellaneous Case No. 30 of 1998 in the Court of District Judge, Bogra under Article 27 of the Bangladesh House Building Finance Corporation Order, 1973 (President's Order No. 7 of 1973, hereinafter referred to as the 'Order, 1973') against the borrower- present petitioner (hereinafter referred to as the 'borrower') praying for amongst others an order for sale of the schedule mentioned property for realization of outstanding dues of Tk. 4,91,142.94 as on 31.01.1998 and for an order to pay interest at the rate of 17.5% with penal interest as per terms and conditions of the mortgage deed till realization of the money.

4. It has been stated in the application of the Miscellaneous Case that on an application of the borrower to construct a building on the scheduled land, the BHBFC opened loan case no. BaGa 524 and after completion of the required formalities granted a loan of Tk. 1,85,000/- in favour of the borrower. Thereafter, as per application of the borrower the BHBFC granted additional loan of Tk. 27,000/-. By accepting the terms and conditions of the loan the borrower on 28.02.1983 and 27.12.1983 respectively executed and registered mortgaged deed in

favour of the BHBFC and the latter vide cheques issued on different dates paid Tk. 1,85,000/- and Tk. 27,000/- total Tk. 2,12,000/- to the borrower, the last cheque being issued on 07.10.1983. With the money given by the BHBFC, the borrower completed the construction of the house.

5. It has further been stated in the said application that as per terms and conditions of the loan the borrower was liable to pay interest at the rate of 13% on both the principal and the additional loan. For the principal loan the payable monthly instalment was Tk. 1,795.59 and for the additional loan the monthly instalment was Tk. 239.44. The borrower obtained the rebate facility and reduction of interest rate given by the Government and the monthly payable instalment was rescheduled at Tk. 3,250.93 which the borrower was liable to pay from 01.07.1994. In spite of repeated reminders by the BHBFC, the borrower failed to pay the principal amount in 43 instalments and the interest in 40 instalments which stood as on 31.01.1998 with penal interest at Tk. 1,32,497.15 and the total amount payable as on 31.01.1998 was Tk. 4,91,142.94.

6. The borrower *i.e.* the present petitioner did not contest the Miscellaneous Case. The BHBFC examined Md. Abdur Rahman as a sole witness and produced sanction letters (exhibit 1, 1(ka)) and mortgage deed (exhibit 2).

7. The Miscellaneous case was heard and disposed of ex-parte and the learned District Judge, Bogra vide order dated 26.11.1998 allowed the same and granted the BHBFC permission to attach the scheduled property and sell the same through auction for realization of Tk. 4,91,142.94 and further to realize interest at the rate of 17.5% till realization of the same.

8. On 24.08.2000 the BHBFC filed Money Execution Case No. 10 of 2000 before the District Judge, Bogra. The borrower entered appearance in the said Execution Case on 14.10.2004.

9. Pending disposal of the Execution case, the borrower on 22.11.2007 filed an application in the Miscellaneous case under section 152 of the Code of Civil Procedure (in short 'CPC') and Article 27(7)(d) of the Order, 1973 for amendment of the operating part of the ex-parte order dated 16.11.1998 passed in the Miscellaneous case thus: মাননীয় আদালতের ২৬.১১.৯৮ তারিখের আদেশের শেষাংশে "প্রার্থকের দাবীকৃত সমুদয় টাকা আদায় কালতক এরপর ১৭½% সুদ পাইবে" তাহা সংশোধিত হইয়া "মর্গেজ দলিলের শর্ত ও কর্পোরেশনের নিয়ম অনুসারে প্রার্থক সুদ পাইবে" লিখিত হইবে। The said application was allowed vide order dated 03.03.2008 passed in the Miscellaneous Case. Thereafter, the BHBFC on 30.07.2009 filed an application in the Execution Case for amendment of the application of the said Execution Case for deleting the words '17.5% interest rate' as mentioned in paragraph nos. 7 and 10 of the said application and inserting the words 'to realize interest as per terms and conditions of the mortgage deed and rules of the Corporation' in its place. The Court below vide order dated 19.01.2010 allowed the application of the BHBFC.

10. It appears from the order dated 19.01.2010 passed in the Money Execution Case that a dispute arose as to actual amount of outstanding money due to the BHBFC by the borrower. The relevant portion of the said order dated 19.01.2010 runs thus:

> "It appears from the record that there is a dispute about the amount of the claim of decree holder. Two separate statements of account as regards claim of the decree holder H.B.F.C. but the amount mentioned in the calculation sheet of that decree holder and that of judgment are quite different. In order to ascertain the actual claim as per prevalent rules of H.B.F.C. both side are directed to seat together to arrive at a consensus amount of claim of decree holder. To 17.2.10 for filing a consensus amount by both sides."

11. However, the consensus amount was not filed in the Court. The Court below vide order dated 25.04.2010 directed the BHBFC to submit the actual claim and the BHBFC submitted the same in the Court on 26.05.2010. On 19.08.2010 the statements of account submitted by the BHBFC was taken up for hearing. The borrower prayed for an adjournment of the hearing which was rejected and the statement of account submitted by the BHBFC claiming Tk. 4,42,871.16 as outstanding dues was accepted by the Court. Challenging this order the borrower moved the instant revisional application, obtained a Rule and order of stay.

12. The Rule has been contested by the BHBFC by filing counter affidavit.

13. During the course of hearing both the borrower-petitioner and the BHBFC-opposite party filed several sets of affidavits annexing various types of documents in support of their respective claims. The contesting parties also filed up to date statements of accounts refuting the accounts submitted by the other side.

14. The learned advocate for the borrower-petitioner vehemently argues that the borrower has repaid the full dues and in fact he has paid more and as such the BHBFC may be directed to return the excess money to the borrower. On the other hand, by filing the counter affidavit dated 08.01.2015 the BHBFC claimed that till November 2014 the borrower has paid Tk. 6,92,743.91 which includes Tk. 2,50,000/- paid after issuance of the Rule and the outstanding amount remains at Tk. 3,42,015.99.

15. As per order of this Court the records of the Money Execution Case No. 10 of 2000 have been transmitted to this Court. We also directed the learned Advocate of the BHBFC to produce the relevant file of the loan case and accordingly, learned Advocate produced the same before us.

16. We have perused the revisional application, several sets of affidavits filed by both the parties and documents annexed thereto. We have also perused the records of the Money Execution Case and the loan case.

17. Upon perusal of the above mentioned records a more fundamental question arose other than the issue centered around the dispute in respect of statements of accounts which is whether the ex-parte order dated 26.11.1998 passed in the Miscellaneous Case and the Money Execution Case arising thereof are maintainable.

18. In the Money Execution Case the borrower on 04.06.2009 filed an application under Order XXI, rules 2 and 69 and section 151 of CPC and Article 27(7)(d) of the Order, 1973 (Annexure-F) for staying the auction proceedings to be held on 15.06.2009. In the said application it has been categorically stated that the borrower did not withdraw the additional loan amount of Tk. 27,000/-. It was alleged in the said application that the BHBFC had committed fraud upon the Court.

19. The BHBFC on 30.07.2009 filed a written objection (Annexure-G) denying the allegations of fraud. However, in the said written objection it admitted that it had granted an additional loan amount of Tk. 27,000/- to the borrower, but the latter only received the cheque of Tk. 14,000/- and did not receive the cheque of Tk. 13,000/-. The borrower repaid Tk. 14,000/- with interest in the financial year 1986-87. It was further stated in the written objection that although in the application of the Miscellaneous Case the BHBFC mentioned about the additional loan but it did not claim the said amount, it only claimed the principal loan amount of Tk. 1,85,000/- and interest accrued thereon.

20. In the application of the Miscellaneous Case (Annexure-A) it has been stated *inter alia:*

> **"প্রার্থক বিভিন্ন তারিখে বিভিন্ন চেকমুলে ১,৮৫,০০০/- টাকা এবং ২৭,০০০/- টাকা একুনে ২,১২,০০০/- টাকা উক্ত ঋণ গ্রহীতাকে প্রদান করেন।** প্রার্থক সর্বশেষ ইং ৭/১০/৮৩ তারিখে চেক প্রদান করে এবং প্রতিপক্ষ উক্ত টাকায় যথাসময়ে গৃহ নির্মাণ সম্পন্ন করেন। উল্লেখ্য যে, প্রতিপক্ষ কর্তৃক বাংলাদেশ সরকারের অর্থ মন্ত্রণালয় প্রদত্ত রেয়াত সুবিধা গ্রহণের পরও সরকার কর্তৃক সুদের হার হ্রাস করার ফলে ৩,২৫০.৯৩ টাকা কিস্তি পুনঃ নির্ধারিত হয়। যাহা ১/৭/৯৪ তারিখ হইতে পরিশোধ যোগ্য বটে।
>
> বন্ধকী দলিলের শর্ত মোতাবেক প্রতিপক্ষ ঋণ গ্রহিতা ঋণের শেষ কিস্তির টাকা যে মাসে গ্রহণ করিবে তাহার পরবর্তী ৩য় মাসের প্রথম দিন হইতে মাসিক কিস্তি পরিশোধ করিতে শুরু করিবে। কিন্তু প্রতিপক্ষ প্রার্থক কর্পোরেশনের তলব তাগাদা সত্বেও ৪র্থ মাসের আসল টাকায় মাসিক কিস্তি এবং ৪০ মাসের সুদের কিস্তির টাকা পরিশোধে ব্যর্থ হয়। ঐরূপভাবে প্রতিপক্ষ ৪৩ মাসের আসল এবং ৪০ মাসের সুদের কিস্তির টাকা পরিশোধে ব্যর্থ হইলে ৩১/১/৯৮ ইং তারিখ পর্যন্ত **দন্ড সুদ সহ** বকেয়ার পরিমাণ ১,৩২,৪৯৭.১৫ টাকা।
>
> উক্ত প্রকারে প্রতিপক্ষ প্রার্থক কর্পোরেশনের মাসিক কিস্তির টাকা ও সুদের টাকা পরিশোধে ব্যর্থ হইয়াও মঞ্জুরীপত্র এবং বন্ধকী দলিলের শর্ত ভংগ করিয়াছে। প্রার্থক কর্পোরেশন প্রতিপক্ষ এর নিকট হইতে ৩১/১/৯৮ তারিখ পর্যন্ত সমস্ত পাওনা একযোগে ৪,৯১,১৪২.৯৭ টাকা আদায়ের হকদার হইতেছে।" (emphasis supplied)

21. Our attention has been drawn to a letter lying with the loan case file which is dated 30.04.1992 issued by the Regional Manager, Bogra of the BHBFC. By this letter the borrower was informed about various matters relating to payment of instalments, rates of interest, rebate facility etc. In the said letter it was mentioned that the borrower has taken a loan of Tk. 2,12,000/- from the BHBFC. The relevant portion of the said letter is quoted below:

> "উপরোক্ত ঋণ কেসের মাধ্যমে **আপনি অত্র কর্পোরেশন হতে মোট =২,১২,০০০/- টাকা ঋণ গ্রহণ করেছেন।** কর্পোরেশনের বকেয়া/ সম্পূর্ণ ঋণ পরিশোধের সুবিধার্থে গত ২১/৩/৯২ ইং তারিখের অম/অবি/উঃ ব্যাংক-৪/গৃনিঋক-১০/৮৭(অংশ)/৮৩ নং পত্রে বাংলাদেশ সরকারের অর্থমন্ত্রণালয় কতিপয় রেয়াত সুবিধা প্রদান করেছেন যা - নিম্নে উদৃত করা হলঃ-" (emphasis supplied)

22. It clearly appears from the above quoted extracts that the BHBFC claimed that the borrower received the additional loan amount of Tk. 27,000/-. In the application of the Miscellaneous Case the BHBFC did not provide any details or break down of accounts. The application simply states that the borrower failed to repay the loan in 43 monthly instalments and the interest in 40 instalments. Therefore, without any details of accounts and in the absence of any statement that the money claimed excludes the additional loan amount of Tk. 27,000/-, it appears that the total claimed amount includes the additional loan amount of Tk. 27,000/- and the interest accrued thereon.

23. There is another aspect of the case which requires judicial scrutiny. It appears from the application of the Miscellaneous Case that the BHBFC claimed that the total outstanding as on 31.01.1998 stood at Tk. 4,91,142.94 which includes penal interest. The prayer portion of the application as contained in paragraph no. 10(ka) states: "আরজী বর্ণিত ৩১/১/৯৮ ইং তারিখ পর্যন্ত ৪,৯১,১৪২.৯৪ টাকা আদায়ের নিমিত্তে নিম্ন তপশীল বর্ণিত সম্পত্তি দেওয়ানী কার্যবিধি আইনের বিধান অনুযায়ী আদালত যোগে নিলাম বিক্রয়ের আদেশ দিতে মর্জি হয়।" The learned District Judge vide order dated 26.11.1998 allowed the Miscellaneous Case and the prayer 10(ka). So, admittedly the BHBFC claimed penal interest which was allowed by the Court below.

24. Now, the question is whether the BHBFC is permitted under the Bangladesh House Building Finance Corporation Order, 1973, Order, 1973 (President's Order No. 7 of 1973) and Regulations made there under to claim penal interest.

25. P.O. 7 of 1973 is silent about the nature and rates of interest. Clause (10) of Article 21 of the Order, 1973 states, "*The rate of interest chargeable on loans made by the Corporation shall be determined by the Government from time to time*." Under clause 2(c) of Article 37 of the Order, 1973 the conditions subject to which the Corporation may grant loan will be regulated by the Regulation made under the Order. Under regulation 11 of the Bangladesh House Building Finance Corporation Loan Regulations, 1977 (in short the BHBFC 'Regulations, 1977') the BHBFC is permitted to charge simple interest on all loan remaining outstanding due to it. Regulations, 1977 has been repealed by the Bangladesh House Building Finance Corporation Regulations, 1996 (in short 'the Regulations, 1996') which was published in Bangladesh Gazette on 25.09.1997. Regulation 11 of Regulations, 1996 contains identical provisions to that of Regulation 11 of the repealed Regulations, 1977 *i.e.* simple interest shall be charged on all loan. For ready reference regulation 11 of Regulations, 1996 is quoted below:

> "Simple interest shall be charged on all loans remaining outstanding due the House Building Finance Corporation established under the House Building Finance Corporation (Act, viii of 1952) and transferred to & vested in the Corporation with effect on and from the 1st April, 1971."

26. So, under both the repealed Regulations, 1977 and Regulations, 1996 the BHBFC is permitted to charge simple interest on all loans, not the penal interest.

27. The most shocking aspect of the case, as it appears from the letter dated 16.11.1994 issued by the Regional Manager, Bogra to the borrower which has been lying with the loan case file, is that the BHBFC used to charge penal interest as matter of custom which has been abolished from 01.10.1993. For ready reference paragraph 5 of the said letter is quoted below:

> **"০১-১০-১৯৯৩ তারিখ হতে দন্ড সুদ এর প্রথা রহিত করা হয়েছে।** তবে, সরকারী নির্দেশ অনুযায়ী ১২টির অধিক কিস্তি খেলাপী হলে বকেয়া আসলের উপর ২% অতিরিক্ত সুদ চার্জ করা হবে। এ চার্জকৃত সুদ পরবর্তী জমা হতে প্রচলিত নিয়মে সমন্বয় করা হবে। ভবিষ্যতে সরকার/ কর্পোরেশন এর পরিচালনা বোর্ড কর্তৃক অতিরিক্ত সুদের হার পরিবর্তন করা হলে অথবা দন্ড সুদ প্রথা পুনঃপ্রবর্তীত হলে পরিবর্তীত হারে সুদ পরিশোধ করতে আপনি/ আপনারা বাধ্য থাকবেন।" (emphasis supplied)

28. The BHBFC, in the first place, was not permitted under the law to charge penal interest. Nevertheless, the custom of charging penal interest has been abolished from 01.10.1993. The case was filed on 30.04.1998 by the Regional Office, Bogra. In the application it has been categorically stated that the outstanding dues include penal interest in spite of the fact that the BHBFC had knowledge that law does not permit it to charge penal interest on loans and the custom of charging the same has been abolished from 01.10.1993.

29. Facts narrated above are summarised thus: **firstly**, the BHBFC claimed in the application of the Miscellaneous Case that it gave the borrower additional loan amount of Tk. 27,000/- and accordingly ex-parte order dated 26.11.1998 was passed. Subsequently, in the Execution Case the BHBFC admitted that the borrower in fact availed additional loan of Tk. 14,000/- which he repaid with interest long before filing the case and he did not avail the additional loan of Tk. 13,000/-. In spite of this admission by the BHBFC, it did not take any step to amend the application of the Miscellaneous Case and the ex-parte order, and **secondly**, the BHBFC had knowledge that it is not permitted under the relevant Regulations to charge penal interest on loans and the custom of charging penal interest has been abolished since 01.10.1993. Nevertheless, in the application of the Miscellaneous Case it claimed penal interest on loans which was allowed vide the ex- parte order. In view of this admitted position we have no hesitation to hold that the case of the BHBFC is based upon falsehood and fraud. The BHBFC committed fraud upon both the borrower and the Court.

30. In ***S.P. Chengalvaraya Naidu v. Jagannath*** (1994) 1 SCC 1 it has been observed,

"The Courts of law are meant for imparting justice between the parties. …We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. … A fraud is an act of deliberate deception with the design of securing something by taking advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. …A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Courts as well as on the opposite party."

31. In the famous case of ***Lazarus Estates Ltd .v. Beasley*** (1956) 1 QB 702 Lord Denning said,

"No judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

32. Bangladesh House Building Finance Corporation is a statutory body created by P.O. 7 of 1973. But unfortunately in the instant case it behaved in an unscrupulous manner like a high street shark loan company. It reminds us of the character 'Shylock' as depicted by William Shakespeare in the drama 'The Merchant of Venice' written in the late 16th century.

33. We are mindful of the fact that in the instant civil revision filed under section 115(1) of CPC, the borrower has challenged the legality of the order dated 19.08.2010 passed in the Money Execution Case. Neither the Execution proceedings nor the ex- parte order dated 26.11.1998 passed in the Miscellaneous Case, from which the Execution Case arose, has been challenged. But, upon scrutiny of facts, circumstances and laws discussed above, in particular when we have found a definite case of fraud on part of the BHBFC, if we confine ourselves to the impugned order, the same would occasion failure of justice. We have to decide now, what should be the appropriate order that we should pass.

34. It is now well settled principle of law that in exercise of revisional jurisdiction under section 115(1) of the Code of Civil Procedure, the High Court Division has wide power to do justice in a case and in appropriate case where the order under revision is set aside this Court can pass any consequential order necessitated by the facts of the case.

35. In ***Jatindra Nath Nandi and ors. v. Krishnadhan Nandi and ors.*** 56 CWN 858 it was held,

"In any event, this Court is perfectly competent to see that proper orders are made when the matter comes up in revision before this Court. The mere fact that the plaintiffs did not move should not stand in the way of this Court making an order in accordance with law, as all the necessary parties are represented before us."

36. In the case of ***Md. Shajahan Khan v. Additional Deputy Commissioner (Revenue), Munshiganj and others*** 11 BLT (AD) 60 it was held by our apex Court that,

"It is well settled that once the conditions in section 115(1) of the Code of Civil Procedure are satisfied and the High Court's jurisdiction to interfere is established, the proceedings as a whole from start to finish can be scrutinized and any order necessary for doing justice may be passed. There is no limit to the area in which the revisional power is to be exercised by the High Court Division in the facts and circumstances of each case."

37. In the facts and circumstances of the instant case and in view of the above mentioned decided cases, we are of the opinion that in order to secure the ends of justice the appropriate order that we should pass is to set aside the ex-parte order dated 26.11.1998 passed in the Miscellaneous Case No. 30 of 1998 and the entire proceedings of the Money Execution Case No. 10 of 2010 arising out of the said Miscellaneous Case. However, the BHBFC is at liberty to amend the application of the Miscellaneous Case, if after settling the accounts of the borrower-petitioner, any outstanding arrear remains due to it. In settling the accounts the BHBFC must adhere to the observations made in this judgment and follow the relevant circulars issued time to time by it and comply with the provisions of the BHBFC Regulations, 1996 in particular, clauses (iv), (v), (vii) and (viii) of regulation 10. Be it mentioned here that clause (vii) of regulation 10 has been amended and replaced by a new clause (vii) in 1999 which has been published in the Gazette on 25.07.1999. For ready reference the relevant clauses of regulation 10 of Regulations, 1996 mentioned above are reproduced below:

10 (iv) The total amount of loan with interest & charges shall be recoverable within such period as shall be stipulated in the mortgage deed or agreement of hypothecation or pledge, as the case may be,

or as may be subsequently extended & rescheduled by the Corporation under intimation to the borrower:

10 (v) The nature and rates of interest & the mode of repayment, adjustment thereof will be determined by the Corporation from time to time:

10 (vii) If the borrower does not pay or is not willing to pay IDCP in the manner prescribed in Regulation 10 (vi) above, it may be added to the principal & be repayable by the borrower concerned at monthly instalments along with the monthly instalments fixed initially and in that event the amount of monthly instalments shall be revised and refixed by the Corporation: (this is the original text prior to amendment)

10 (vii) If the borrower does not pay or is not willing to pay IDCP in the manner prescribed in Regulation 10(vi) above, it shall be added to the normal interest and be repayable by the concerned borrower at monthly instalments together with the monthly instalments of loan fixed initially and in that event the amount of monthly instalments of loan shall be revised or refixed by the Corporation: (the amended text)

10 (viii) In case of regular repayment of dues by monthly instalments the principal & interest will be adjusted as per re-payment schedule fixed by the Corporation. In the event of default, the sum of or sums of money repaid or recovered against the loan account concerned, will be adjusted firstly with the defaulted interest including additional interest (if any) and the residue (if any), will be adjusted with the principal. In case of advance payments the amount paid in advance will be adjusted with the principal subject to being readjusted with subsequent defaulted instalments and the balance (if any) with the principal.

38. The term '**IDCP**' referred to in clause (vii) of regulation 10 above means "the interest during construction period *i.e.* the interest chargeable/charged on each amount of the principal advanced to the borrower concerned from the date of delivery of the first cheque to the date of delivery of the last cheque and such other period as may be determined by the BHBFC from time to time. (clause (c) of regulation 1A(1) of Regulations, 1996).

39. '**Principal':** means and includes the total amount of given by the Corporation to a borrower as Loan, plus the amount chargeable as insurance premium/Risk Guarantee Fund subscription, legal charge, IDCP (if any) and other statutory costs (if any). (clause (a) of regulation 1A(1) of Regulations, 1996).

40. '**Normal interest':** means and includes the interest which is not compound and chargeable/charged on the principal as the rate/rates fixed or refixed by the Corporation from time to time. (clause (b) of regulation 1A(1) of Regulations, 1996).

41. The amended application, if any, must comply with the provisions of clause 2 of Article 27 of the P.O. 7 of 1973 which provides that the application shall state the nature and extent of the liability of the borrower and his surety to the BHBFC, the grounds on which it is made and such other particulars as may be prescribed.

42. In the result, the Rule is made absolute. The ex-parte order dated 26.11.1998 passed in the Miscellaneous Case No. 30 of 1998 by the learned District Judge, Bogra and the entire proceedings of the Money Execution Case No. 10 of 2010 arising out of the said Miscellaneous Case now pending in the Court of District Judge, Bogra are set aside. Since the Money Execution case is set aside the BHBFC-opposite party is directed to return Tk. 2,50,000/- (two lacs fifty thousand) to the borrower-petitioner which has been paid to it by the latter after issuance of the instant Rule within a period of 1 (one) month from the date of receipt of this judgment. The BHBFC is at liberty to amend the application of the Miscellaneous Case within a period of 1 (one) month from the date of receipt of this judgment, if after settling the accounts of the borrower, any outstanding arrear remains due to it. On the other hand, if it transpires that the borrower has paid excess money to the BHBFC, the same would be returned to him within this period.

43. Considering the facts and circumstances of the case the BHBFC-opposite party is directed to pay a cost of Tk. 1,00,000/- (one lac) to the borrower-petitioner within a period of 1 (one) month from the date of receipt of this judgment.

44. Send down the judgment and order along with the LCR of Money Execution Case No. 10 of 2010 at once. The learned Advocate for the BHBFC-opposite party is permitted to take back the original file of the loan case.

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1 SCOB [2015] HCD 119

HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Civil Revision No. 940 of 2013

Farid Hossain
…. Defendant No.6-Petitioner.

-Versus-

Mosammat Jahanara Begum and eight others
…. Plaintiffs-Opposite parties.

The Government of Bangladesh and four others.
… Defendants-Opposite parties.

Mr. Moin Uddin, Advocate
... for the defendant-petitioner.
Mr. Md. Mostafa, Advocate
… for the plaintiff opposite parties.

Heard: on 03.04.2015,19.04.2015, 21.04.2015. Judgment: on 22.04.2015.

Present:
Mr. Justice Muhammad Abdul Hafiz
And
Mr. Justice S.M. Mozibur Rahman

Evidence cannot be corrected in the form of modification under Section 151 of the Code of Civil Procedure, 1908:
Discretionary power of a court as has been inserted in Section 151 of the Code of Civil Procedure, 1908 cannot be exercised where alternative remedies are available. After administering oath in the open court when the evidence of a witness is recorded by a trial court it cannot be discarded or changed or corrected in the form of modification except recalling the witness following the prescribed provision of law enunciated in the Evidence Act, 1872. ...(Para 13)

Judgment

S.M. Mozibur Rahman, J:

1. This Rule was issued, at the instance of petitioner defendant No. 6 calling upon the opposite party plaintiffs Nos. 1-9 to show cause as to why the impugned Order dated 07.03.2013 passed by learned Joint District Judge and Arbitration Adalat, Dhaka in Title Suit No. 4890 of 2008 allowing the application dated 29.07.2012 in part filed by the plaintiff-opposite party Nos. 1-9 under Section 151 of the Code of Civil Procedure for correction of deposition and cross examination of P.W. 1 and discharging the plaintiffs from submitting the Memorandum of Understanding should not be set-aside.

2. Short facts, necessary for disposal of the Rule, is that, the opposite parties No. 1-9 as plaintiffs filed Title Suit No. 4890 of 2008 before the learned District Judge, central filing section, Dhaka against the present petitioner and the opposite parties No. 10-14 impleading them as defendants Nos. 1-6 praying for recovery of khash possession after declaration of title in the suit land shown in the schedule of the plaint. Ultimately the suit was transferred to the Joint District Judge, 7th Court (Arbitration Adalat), Dhaka, for disposal.

3. The defendant Nos. 1-3, 4-5 and 4 and 6 contested the suit by filing three separate written statements and the defendant No. 6 stated in his written statement that the suit is not maintainable in its present form and manner and that the suit has no cause of action. The plaintiffs have not come to the court with clean hand; the plaintiffs filed the suit by suppression of facts; the suit is barred by law of limitation. The suit is bad for defect of parties, the suit is barred by section 42 of the Specific Relief Act; the suit is barred by estoppel, waiver, acquiescence and the plaintiffs have no right, title, interest, owner ship and possession in the suit land. The defendant No. 6 stated that he has been owning and possessing the suit land by way of purchase from its original owner since 1974 to the knowledge of the plaintiffs and other defendants. The defendant No. 6 also mutated the suit land in his name and has been paying the rent and taxes to the Government and City Corporation; that in the city survey the suit land was recorded in the name of the defendant No. 6 vide khatian No. 425, plot No. 3337; that in 1994 the Deputy Commissioner, Dhaka and others tried to evict the defendant No. 6 from the suit land

claiming it as C.S. Plot No. 380; that challenging the said order of eviction the defendant No. 6 as plaintiff filed Title Suit No. 61 of 1994 before the Assistant Judge, 4th Court, Dhaka for declaration of title and permanent injunction against the Deputy Commissioner and others; that on 28.03.1995 the suit was decreed declaring that the suit land is situated at C.S. Plot No. 376 and that also a decree of permanent injunction was given in the said suit against the Deputy Commissioner and others restraining them from the suit land at C.S. Plot No. 376 in the name of C.S. Plot No. 380; that against the said decree for declaration of title and permanent injunction the Deputy Commissioner and others did not take any steps before the competent court.

4. In view of the above plaeadings of the parties to the suit the learned Joint District Judge after framing issues as usual and observing all other legal formalities in this regard made the suit ready for trial. Accordingly, examination in chief of P.W.1 was started on 24.07.2011 and taking long five days it was ended on 08.04.2012. Thereafter P.W. 1 was being cross-examined on and from 27.05.2012 and on 29.07.2012 he stated in cross that a Memorandum of Understanding was executed 15 days before the execution of power attorney Ext.1 between the parties to the suit. On that date i.e. on 29.07.2012 petitioner filed a petition for a direction upon the plaintiff to submit the said Memorandum of Understanding. Learned Joint district Judge after giving both sides an opportunity of being heard allowed the petition directing the plaintiffs to submit the paper as the petitioner prayed for. On the other hand plaintiffs also filed a petition on 27.05.2012 long one year after the conclusion of examination in chief of P.W. 1 praying for correction of deposition made by P.W. 1 and this petition was heard and disposed of on 07.03.2013 allowing the petition for correction of deposition made by P.W. 1 one year ago. At the same time learned trial court exempted the plaintiffs from submitting the Memorandum of Understanding regarding which he passed earlier order to submit it on the basis of the petition of this petitioner defendant no. 6 exercising his inherent power envisaged in section 151 of the Code of Civil Procedure, 1908.

5. After hearing of both the parties, the Joint District Judge and Arbitration Adalat Dhaka, allowed the application of the plaintiffs in part by his impugned judgment and order dated 07.03.2013 correcting the deposition of P.W. 1 which he made one year ago as well as exempting the plaintiffs from submitting the Memorandum of Understanding in contrary to the order he passed earlier on 23.01.2013.

6. Being aggrieved by and dissatisfied with the impugned judgment and order dated 07.03.2013 passed by the learned Joint District Judge and Arbitration Adalat, Dhaka in Title Suit No. 4890 of 2008 petitioner moved the instant civil revisional application and obtained the Rule.

7. Mr. Md. Moin Uddin, the learned Advocate appearing on behalf of the defendant-petitioner, submits that that on 29.07.2012 at the time of cross examination P.W. 1 admitted that সমঝোতা চুক্তিপত্র সম্ভবত ১০/০৩/২০০৮ ইং তারিখে স্বাক্ষরিত হয়, এটা রেজিস্ট্রি হয় নাই। সমঝোতা চুক্তি সম্পর্কে আমি কোন ব্যাখ্যা দিব না। সমঝোতা চুক্তিপত্র দাখিল করিব প্রয়োজনে। As such, he submits that on the same date the petitioner filed an application for direction upon the plaintiffs to submit the said সমঝোতা চুক্তিপত্র for ends of justice. That on 23.01.2013 the Trial Court heard the both sides and allowed the application given by the petitioner for submitting Memorandum of Understanding. He further submits that the deposition of P.W. 1 was started on 24.07.2011 and ended on 08.04.2012 and cross examination was started on 27.05.2012 one year after the plaintiffs filed application for correction of the deposition of P.W. 1 and that P.W. 1 admitted in cross examination that he got Master Degree in Economics from Dhaka University; that subsequently on 07.03.2013 the Trial Court changed his mind and allowed the application of the plaintiffs given for correction of deposition of P.W. 1 and the learned Court below allowed the petition along with a separate order that plaintiffs are exempted from filing the Memorandum of Understanding in contradiction with his earlier order dated 23.01.2013 and as such the Trial Court committed error of law which is liable to be interfered with.

8. In support of his arguments, he cited the following decisions given in the case of Bangladesh Vs. Luxmi Bibi and Ors. Reported in 2BLT (AD) 1994 Page-183, the case of Harun-Or-Rashid and others Vs. Quyum Khan and others reported in 7BLT Page-34, the case of Abdul Noor Vs. Makhan Mia, reported in 60 DLR(AD) 2008, the case of Harun-or-Rashid Vs. Gulaynoor Bibi reported in 19BLC(AD) Page-123. Accordingly, he submits that in pursuance to the decisions given in the cases he referred the present Rule is liable to be made absolute for ends of justice.

9. Mr. Md. Mostofa, the learned Advocate appearing on behalf of the plaintiff opposite parties submits that the record of schedule land was prepared on the basis of settlement. But the plaintiff did not file any settlement case. The plaintiff has filed a photocopy of Khatian no. 14, plot no. 2479 of 2010 Joggasola Mouja. On the perusal of the photocopy of this record it appears that 5.00 acre land has been recorded in the name of plaintiff Nurul Islam. The plaintiff has filed some photocopy of rent receipt. The plaintiff did not file original copy of the

rent receipt. These photocopies are not acceptable as a document. The plaintiff did not adduce any witnesses and produced any original document to prove the case. With regard to the impugned judgment and order he has clearly stated that the learned Court below did not commit any error of law.

10. In support of his arguments, he referred the case of Charandwip Bhumihin Krishi Vs. The Cox's Bazar and others reported in 1988 BLD(AD) page-63. Accordingly, he submits that the Rule issued earlier may be discharged for ends of justice.

11. In view of the above facts and circumstances of the case we have perused the Revisional application, impugned order dated 07.03.2013 and other documents/papers as available in record. It appears from the record that the Trial Court started recording examination in chief of P.W. 1 on 24.07.2011 and ended on 08.04.2012 cross examination of whom was commenced on 27.05.2012 when the plaintiff filed the petition for correction of deposition and cross examination of P.W. 1. After giving both sides an opportunity of being heard he allowed the petition on 07.03.2013 exercising his discretionary power conferred on him under Section 151 of the Code of Civil Procedure, 1908.

12. Now pertinent question in the instant case before us is whether the Trial Court is correct in passing the impugned order dated 07.03.2013 allowing the plaintiffs petition for correction of deposition and cross examination of P.W. 1 as well as discharging the plaintiffs from submitting the Memorandum of Understanding respecting which he earlier allowed an application of the petitioner asking the plaintiffs to submit the said Memorandum of Understanding by his order dated 23.01.2013.

13. We have carefully examined the impugned order dated 07.03.2013 passed by the learned Joint District Judge and found that in exercise of his power conferred on him under Section 151 of the Code of Civil Procedure, 1908 he has arbitrarily allowed the plaintiffs petition submitted for correction of one year old deposition of P.W. 1. Besides, he has exempted the plaintiffs from filing the memorandum of understanding reversing his own order dated 23.01.2013. It is long settled principle of law that where an alternative remedy exists a party cannot have recourse to the inherent jurisdiction of the court under Section 151 of the Code of Civil Procedure, 1908. But in this case it is clearly seen that Trial Court passed the impugned judgment and order whimsically and arbitrarily without applying his judicial mind allowing the petition for correcting the deposition of the P.W. 1 as prayed for by the plaintiffs. Discretionary power of a court as has been inserted in Section 151 of the Code of Civil Procedure, 1908 cannot be exercised where alternative remedies are available. After administering oath in the open court when the evidence of a witness is recorded by a trial court it cannot be discarded or changed or corrected in the form of modification except recalling the witness following the prescribed provision of law enunciated in the Evidence Act, 1872.

14. In the instant case we have observed that Trial Court did not follow the accurate provision of law in course of passing the impugned order dated 07.03.2013. He has manifestly acted at his own whim and caprice which is neither desirable nor acceptable in the eye of law.

15. On perusal of the impugned judgment and order it is further seen that Trial Court passed a *suo-motu* order exempting the plaintiffs from filing the Memorandum of Understanding in contravention of his earlier order dated 23.01.2013 in strength of which he directed the plaintiff to submit the Memorandum of Understanding on the basis of the application filed by the petitioner defendant. This portion of order passed by the Trial Court is also seen to be injudicious and not consistent with the existing provision of law provided to be applied in this regard as we have cited earlier.

16. We have gone through the cases referred by the learned Advocates for both sides as has been stated earlier and found that the facts and circumstances of the case cited by the learned Advocate of the opposite parties are not consistent with that of the instant case before us.

17. In view of the discussion made above we are of the view that the Trial Court committed an error of law in the impugned order resulting in an error in the decision occasioning failure of justice and as such the impugned order dated 07.03.2013 passed by the learned Joint District Judge and Arbitration Adalat, Dhaka in Title Suit No. 4890 of 2008 is set aside.

18. In the result, the Rule is made absolute without any order as to cost.

19. The order of stay granted earlier by this Court stands vacated.

20. Send a copy of this judgment to the court below at once.

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1 SCOB [2015] HCD 122

HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION N0. 3843 of 2004

Noor Mohammad Khan
.... Petitioner
-Versus-

Government of Bangladesh, represented by the Secretary, Ministry of Land, Bangladesh Secretariat, Secretariat Building, Dhaka & others.
.... Respondents

Mr. Md. Zainul Abedin, Advocate
with
Mr. Khaled Mahmud Saifullah, Advocate
..... for the petitioner.

Mr. Mannan Rashid, Advocate
.....for Respondent No. 4

Heard on: 30.04.2015
and Judgment on: 05.05.2015.

Present:
Ms. Justice Zinat Ara
And
Mr. Justice J.N. Deb Choudhury.

Chittagong Hill-Tracts Regulation, 1900:
It is now established that all civil suits will be triable from 1st July, 2008 by the Joint District Judge of the respective 3(three) Hill-Tract Districts and the parties aggrieved thereto may prefer an appeal before the learned District Judge of the respective Hill-Tract Districts and as such, any person aggrieved by the judgment and decree passed by the learned District Judge may prefer civil revisional application before the High Court Division under section 115 of the Code of Civil Procedure 1908. ...(Para 19)

Judgment

J.N. Deb Choudhury, J :

1. On an application under article 102 of the Constitution of the People's Republic of Bangladesh made by the petitioner, this Court on 18.07.2004 was pleased to issue a Rule Nisi in the following terms:

" Let a Rule Nisi issue calling upon the respondents to show cause as to why the judgment and order dated 10.06.2004 passed by the Land Appeal Board, Segunbagicha, Dhaka in Nathi No. 3-58/96(Appeal) in affirming the judgment and order dated 11.05.1996 passed by the Additional Divisional Commissioner, Chittagong in Civil Appeal (Rangamati) No. 88 of 1994 (Annexure-B) in dismissing the appeal and affirming the order dated 02.05.1994 passed by the Deputy Commissioner, Rangamati Hill District in Civil Case No. 29 of 1992 (Annexure-A) should not be declared illegal and to have been passed without any lawful authority and to be of no legal effect or such other or further order or orders passed as to this court may seem fit and proper."

2. Relevant facts necessary for disposal of this Rule as stated in the writ petition, in brief, are that, the father of the writ petitioner filed a Civil Suit No. 29 of 1992 before the Deputy Commissioner, Rangamati Hill District contending, inter alia, that his share of land to the extent of 0.10 acres of land had been acquired vide LA Case No. 85/78-79, but, the acquiring body without paying the compensation money kept the land unused and accordingly, he prayed for payment of compensation money or in the alternative to return the acquired land to the plaintiff. The Deputy Commissioner, Rangamati by his judgment and order dated 02.05.1994 dismissed the suit on the ground that the plaintiff earlier filed Miscellaneous Case No. 60 of 1978 for getting the compensation money and accordingly, the Deputy Commissioner, Rangamati on considering the then market value prepared the award and the Miscellaneous Appeal being No. 49 of 1987, filed against that order was also dismissed. Thereafter, the father of the writ petitioner filed Appeal No. 168/88(appeal) before the Land Appellate Board which was also dismissed. The Deputy Commissioner, Rangamati also held that on 05.05.1990 the possession of the acquired land has been delivered to the requiring body, the respondent No.4. Being aggrieved, the father of the writ petitioner preferred Civil Appeal (Rangamati) No. 88 of 1994 before the Divisional Commissioner, Chittagong which was ultimately heard and disposed of by the Additional Divisional Commissioner,

Chittagong, who by his judgment and order dated 11.05.1996 dismissed the appeal mainly on the reasoning that regarding the selfsame prayer the appellant earlier filed Miscellaneous Case No. 60 of 1978 and lost up to the Land Appeal Board and also held that, there is no illegality in the judgment and order as passed by the Deputy Commissioner, Rangamati. Feeling aggrieved the father of the writ petitioner filed Nathi No. 3-58/96 (Appeal) Rangamati before the Land Appeal Board and the same was heard by the Member No. 1, Land Appeal Board, who by judgment and order dated 10.06.2004, dismissed the appeal on the ground of non-maintainability, observing that the aggrieved person may prefer an appeal to the concern Ministry and under the Land Appeal Board Act, 1999 and there is no scope to entertain any appeal from the order of the Additional Divisional Commissioner passed in any civil appeal.

3. Being aggrieved by and dissatisfied with the judgment and order dated 10.06.2004, passed by the Land Appeal Board, the writ petitioner moved this Court and obtained the instant Rule Nisi.

4. Respondent No. 4, Manager, Janata Bank, Rangamati Branch, Rangamati Hill District contested the Rule by filing an affidavit-in-opposition and supported the judgment and orders as passed by the Deputy Commissioner, Rangamati, Additional Divisional Commissioner, Chittagong and Land Appeal Board.

5. Mr. Mohammad Zainul Abedin, the learned advocate takes us through the writ petition as well as the annexures thereto, along with the materials on record and submits that in view of section 5 of the Land Appeal Board Act, 1989, the Land Appeal Board has the jurisdiction to entertain the appeal filed by the father of the writ petitioner. The learned advocate also places before us an office order dated 23.05.1989 of the Ministry of Land and on referring to clause (1) of the said order submits that the Land Appeal Board has the jurisdiction to entertain the appeal as filed and accordingly, he submits that the dismissal order of the appeal by the Land Appellate Board on the ground of non-maintainability, cannot sustain and that was not in accordance with law. Accordingly, he prays for making the Rule absolute.

6. On the other hand, Mr. Mannan Rashid, the learned advocate appearing on behalf of the respondent No. 4 submits that section 5 of the Land Appeal Board Act, 1989 read with order dated 23.05.1989 of the Ministry of Land do not give any jurisdiction or authority to the Land Appeal Board to entertain any appeal from the judgment and order passed by the Additional Divisional Commissioner, Chittagong in Civil Appeal (Rangamati) No. 88 of 1994 and accordingly, he submits that the Land Appeal Board rightly dismissed the appeal on the ground of non-maintainability.

7. We have heard the learned advocates for both the parties and perused the writ petition, affidavit-in-opposition, along with the annexures thereto.

8. The only question before us to decide in this writ petition is, whether the Land Appeal Board has any jurisdiction to entertain any appeal against the judgment and order passed by Additional Divisional Commissioner, Chittagong in Civil Appeal (Rangamati) No. 88 of 1994 affirming the judgment and order passed by the Deputy Commissioner, Rangamati Hill District in civil suit No. 29 of 1992.

9. For appreciating the points raised by the respective parties, we have to examine firstly, section 5 of the Land Appeal Board Act, 1989 (Act No. 24 of 1989) . For better understanding, we would like to quote the relevant section 5 of the Act as follows:

"বোর্ডের এখতিয়ারঃ- বোর্ড উহার উপর সরকার কর্তৃক অথবা কোন আইনের দ্বারা কিংবা আইনের অধীন অর্পিত ক্ষমতা প্রয়োগ ও দায়িত্ব পালন করিবে।"

And we also consider it necessary to examine clause (1) of the order dated 23.05.1989 of the Ministry of land issued vide Memo No. Bhu:Ma:Sha:-15 (Bhu:Sha:Bho) 231/88/412 which is quoted as under:

"(১) বোর্ড নিম্নলিখিত বিষয়ে নির্ধারিত সময়সীমার মধ্যে জেলা (কালেক্টর)/ অতিরিক্ত জেলা প্রশাসক (রাজস্ব) ও বিভাগীয় কমিশনারগণের রায়/সিদ্ধান্ত এর বিরুদ্ধে আইন ও বিধি মোতাবেক উপযুক্ত ক্ষেত্রে আপীল/পুনঃবিবেচনার আবেদনসমূহের আইনানুগ নিস্পত্তি করিবেনঃ-

(ক) ভুমি সংক্রান্ত মামলা,

(খ) নামজারী ও খরিজ মামলা,
(গ) পরিত্যক্ত, অর্পিত ও বিনিময় সম্পত্তি বিষয়ক মামলা,
(ঘ) সায়রাত ও জলমহাল সংক্রান্ত মামলা,
(ঙ) ভূমি রেকর্ড সম্পর্কিত মামলা,
(চ) ভূমি উন্নয়ন কর, সার্টিফিকেট মামলা,
(ছ) ওয়াকফ/দেবোত্তর সম্পত্তি সংক্রান্ত মামলা,
(জ) খাস জমি বন্দোবস্ত সংক্রান্ত মামলা।"

10. In this connection we like to mention some relevant laws regarding civil and criminal disputes in the three Hill Districts of Chittagong namely, Rangamati, Khagrachori and Bandorbon. In those hill districts the civil and criminal litigations were entertained under sections 7 and 8 of the Chittagong Hill Tracts Regulation, 1900 (herein after referred to as Regulation). For better understanding, we would like to quote sections 7 and 8 of the Regulation, 1900 as follows:

"7. *The Chittagong Hill Tracts shall constitute a district for the purpose of criminal and civil jurisdiction and for revenue and general purposes, the Superintendent shall be the District Magistrate, and subject to any orders passed by the Local Government under section 6, the General Administration of the said Tracts in criminal, civil, revenue and all other matters, shall be vested in the Superintendent.*

8. (1) The Chittagong Hill Tracts shall constitute a sessions division, and the Commissioner shall be the Sessions Judge.

(2) As Session Judge the Commissioner may take cognizance of any offence as a Court of original jurisdiction, without the accused being committed to him by a Magistrate for trial, and when so taking cognizance shall follow the procedure prescribed by the Code of Criminal Procedure, 1898, for the trial of warrante-cases by Magistrates."

11. Next we find from section 17 of the Regulation, the procedure to be followed after completion of the procedure as stated in section 7 concerning civil dispute. For better understanding, section 17 of the said Regulation is quoted as follows:

"17. (1) *All officers in the Chittagong Hill Tracts shall be subordinate to the Superintendent, who may revise any order made by any such officer, including an Assistant Superintendent invested with any of the powers of the Superintendent under section 6.*

(2) The Commissioner may revise any order made under this Regulation by the Superintendent or by any other officer in the Chittagong Hill Tracts.

(3) The Local Government may revise any order made under this Regulation."

(Underlines for giving emphasis)

12. The Chittagong Hill Tracts Regulation, 1900 has been amended by the Chittagong Hill Tracts Regulation (Amendment) Act, 2003 (Act No. XXXVIII of 2003), which was published in the Bangladesh Gazette on 21.09.2003 and by the amendment two new sections 2(c) and 2(d) were inserted, after section 2(b). The relevant amended sections 2(c) and 2(d) as follows:

"*(c) 'District Judge' means the District Judge appointed by the Government in consultation with the Supreme Court of Bangladesh;*
(d) 'Joint District Judge' means the Joint District Judge appointed by the Government in consultation with the Supreme Court of Bangladesh."

13. Three new sub-sections as (3), (4) and (5) were also included in section 8 of the Regulation by way of amendment. For better understanding, we would like to quote the said sub-sections of section 8 of the Regulation as follows:

"*(3) The Rangamati, Khagrachory and Bandarban districts of the Chittagong Hill-Tracts shall constitute three separate civil jurisdictions under three District-Judges.*

(4) The Joint District Judge as a court of original jurisdiction, shall try all civil cases in accordance with the existing laws, customs and usages of the districts concerned, except the cases arising out of the family laws and other customary laws of the tribes of the district of Rangamati, Khagrachory and Bandarban respectively which shall be triable by the Mauza Headmen and Circle Chiefs.

(5) An appeal against the order, judgment and decree of the Joint District Judge shall lie to the District Judge. "

14. It has been stated in the Act of 2003 that, " ১(২) সরকার, সরকারী গেজেট প্রজ্ঞাপন দ্বারা, যে তারিখ নির্ধারণ করিবে সেই তারিখে এই আইন বলবৎ হইবে।"

15. While the Government was making delay for implementation of the said amendment, a Writ Petition No. 606 of 2006 was filed by Bangladesh Legal Aid and Services Trust before the High Court Division and after hearing by the judgment and order dated 24.02.2008 (reported in 61 DLR 109) the High Court Division directed the respondents of that writ petition as follows:

"এমতাবস্থায়, সংশ্লিষ্ট প্রতিবাদীগণ

(১) উপরোক্ত রাঙ্গামাটি, খাগড়াছড়ি ও বান্দরবান জেলাসমূহে Chittagong Hill-Tracts Regulation (Amendment) Act, 2003, এর বিধান অনুসারে দেওয়ানী ও ফৌজদারী আদালত স্থাপন করিবেন

(2) উপরোক্ত ৩জিলায় ৩টি নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল স্থাপন করিবেন।

উপরোক্ত নির্দেশাবলী প্রতিবাদীগণ যতদূর সম্ভব অদ্য হইতে এক বৎসরের মধ্যে বাস্তবায়ন করিবেন।

অতএব, উপরোক্ত মন্তব্য ও নির্দেশনা সহ খরচা ব্যতিরেকে অত্র রুলটি Absolute করা হইল।"

And in the judgment it was also held that, "প্রতীয়মান হয় যে, উপরোক্ত ৩টি জেলায় বাংলাদেশের অপর ৬১ জেলার অনুরুপ দেওয়ানী ও ফৌজদারী উভয় কার্যক্রমই পরিচালিত হইবে বলিয়া সংশোধিত আইন প্রনীত হয়।"

16. Against the said judgment the Government filed Civil Petition for Leave to Appeal No. 1791 of 2009 before the Hon'ble Appellate Division and the same was dismissed on 09.02.2014 as being infructuous. *(information collected from Website of the Supreme Court of Bangladesh)*

17. It appears that by Gazette Notification dated 04.06.2008, the Government has given effect of the said amendment from 1st July, 2008, which was published in the Bangladesh Gazette (Additional edition) on 04.06.2008.

18. In view of the amendments made in the Chittagong Hill-Tracts Regulation, 1900 read with section 3 of the Civil Courts Act, 1887 the District Judge and Joint District Judge are Civil Court. For better understanding we like to quote section 3 of the Civil Courts Act, 1887 as follows:

"*3. There shall be following classes of Civil Courts, namely:-*

(a) The Court of the District Judge;

(b) The Court of the Additional District Judge;

(c) The Court of the Joint District Judge;

(d) The Court of the Senior Assistant Judge; and

(e) The Court of the Assistant Judge."

19. In view of the amendments made in the regulation it is now established that all civil suits will be triable from 1st July, 2008 by the Joint District Judge of the respective 3(three) Hill-Tract Districts and the parties aggrieved thereto may prefer an appeal before the learned District Judge of the respective Hill-Tract Districts and as such, any person aggrieved by the judgment and decree passed by the learned District Judge may prefer civil revisional application before the High Court Division under section 115 of the Code of Civil Procedure 1908.

20. In the present case, it appears that the order of the Deputy Commissioner, Rangamati was passed on 02.05.1994 in Civil Suit No. 29 of 1992 and the appeal therefrom was also dismissed by the Additional Divisional Commissioner, Chittagong on 11.05.1996 in Civil Appeal (Rangamati) No. 88 of 1994 by the Additional Divisional Commissioner, Chittagong and as such, the amendment of the regulation which came into force on 1st July, 2008 has no manner of application in the present case and in view of section 17 of the Regulation which provides that any aggrieved person from any judgment and order passed by the Commissioner may apply for revise of the said order before the local Government under sub-section (3) of section 17.

21. In view of the above, the Land Appeal Board had no jurisdiction to entertain the appeal filed against the judgment and order passed by the Additional Divisional Commissioner, Chittagong in Civil Appeal (Rangamati) No. 88 of 1994 and as such, the Land Appeal Board rightly held that the appeal filed by the father of the writ petitioner being Nathi No. 3-58/96(Appeal) was not maintainable for want of jurisdiction.

22. In view of the above discussions and the provisions of law, we find no substance in the arguments of the learned advocate for the petitioner and we find substance in the arguments of the learned advocate for the respondent No. 4.

23. In the result, the Rule is discharged without any order as to costs.

24. Communicate the judgment to respondent No. 4 at once.

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1 SCOB [2015] HCD 127

HIGH COURT DIVISION
(Criminal Miscellaneous Jurisdiction)

Criminal Miscellaneous Case No.49814 OF 2014

Md. Sajedul Hoque Manik @ Majedul Haque Manik
… Petitioner

-Versus-

The State
... Opposite party

None appears
…… For the petitioner

Mr. Bibhuti Bhuson Biswas, A.A.G.
…….. For the opposite party.

Heard on 28.07.2015, 29.07.2015 and Judgment on 02.08.2015.

Bench:
Mr. Justice Md. Ruhul Quddus
And
Mr. Justice Bhishmadev Chakrabortty

Druto Bichar Tribunal, Ain 2002
Sub-section 4 of section 10:
It appears that the case record was sent to the Druto Bichar Tribunal No.4, Dhaka on 24.12.2012 and the petitioner filed the application for return of the case record to the concerned Court on 07.07.2014, wherefrom the said case was sent to it, which is clearly after the expiry of 135 working days as evident from the order sheet. Sub-section 4 of section 10 of the Druto Bichar Tribunal, Ain 2002 clearly provides that if the trial of a Druto Bichar Tribunal case is not concluded within the time stipulated in sub-section (1), (2) and (3) of section 10, it shall be sent back to the Court wherefrom the case was transferred. ...The Druto Bichar Tribunal No.4, Dhaka has lost its jurisdiction to continue or proceed with the trial of the case after expiry of the statutory period. ...(Para 8&9)

Judgment

Bishmadev Chakrabortty, J.

1. By this Rule the opposite party State was called upon to show cause as to why the order dated 07.07.2014 passed by the learned Judge, Druto Bichar Tribunal No.4, Dhaka in Druto Bichar Tribunal Case No.23 of 2012 arising out of Darus Salam Police Station Case No.44 dated 24.01.2011 corresponding to G.R. No.44 of 2011 under sections 302/201 and 34 of the Penal Code now pending before the Druto Bichar Tribunal No.4, Dhaka should not be set aside.

2. At the time of issuance of the Rule, all further proceedings of the aforesaid case, so far as it relates to the petitioner, was stayed for a period of 3(three). The order of stay still subsists after its extension for a further period of 1(one) year.

3. The petitioner along with others were charge sheeted and made accused in a criminal case under sections 302/201 and 34 of the Penal Code on the allegation of committing murder of one Kamrul Hasan of Chandpur. The record of the said case was transmitted to the Court of Sessions, Dhaka for trial. At one stage the government vide notification dated 21.04.2012 sent the case to the Druto Bichar Tribunal No.4, Dhaka for trial under the provisions of Druto Bichar Tribunal Ain, 2002 (briefly the Ain, 2002) and the same was renumbered as Druto Bichar Tribunal Case No.23 of 2012. During the continuation of trial the petitioner on 07.07.2014 filed an application before it under section 10(4) of the Ain, 2002 for sending back the case to the Court, wherefrom it was transferred on the ground that under the provisions of section 10(1), (2) and (3) of the Ain, 2002, the Tribunal had no authority to hold trial of the case after expiry of the statutory period of (90+30+15=135) 135 days, which is a special limitation provided in the Ain, 2002. The Druto Bichar Tribunal No. 4, Dhaka after hearing by the impugned order dated 07.07.2014 rejected the said application and proceeded with the case.

4. Being aggrieved by the aforesaid order passed by the Druto Bichar Tribunal No.4, Dhaka the petitioner moved this revisional application before this Court under section 439 of the Code of Criminal Procedure (briefly the code) and obtained the present Rule and interim order of stay.

5. At the time of delivery of judgment it come to our knowledge that though the petitioner invoked revisional jurisdiction under section 439 of the Code, but after issuance of the Rule firstly the case was registered as Criminal Revision No. 49814 of 2014 and, thereafter, in each and every order it has been designated as Criminal Miscellaneous Case No. 49814 of 2014. For our anxiety we took information from concerned section and they ascertained that it has been registered as a Miscellaneous Case instead of a Criminal Revision. Since Rule has been issued challenging the legality and propriety of certain order and the matter is fixed today for delivery of judgment, we are disposing the Rule in the designated manner without making unnecessary delay and further complicacy.

6. None appears on behalf of the petitioner to press the Rule, although the matter has been appearing in the list for several days with the name of the learned Advocate for the petitioners.

7. On the other hand, Mr. Bibhuti Bhuson Biswas, the learned Assistant Attorney General, appearing on behalf of the opposite party State has submitted that 12 prosecution witnesses of the case has already been examined and the accused persons have taken adjournments in the case for delaying in disposal of the matter. The adjournments taken by the accused persons should not be treated as working days of the Court, and as the statutory period of limitation as provided under section 10 of the Ain, 2002 has not yet expired and as such the Rule is liable to be discharged.

8. We have heard the learned Assistant Attorney General for the opposite party State and perused the revosional application, annexures and entire order sheet of the Tribunal. It appears that the case record was sent to the Druto Bichar Tribunal No.4, Dhaka on 24.12.2012 and the petitioner filed the application for return of the case record to the concerned Court on 07.07.2014, wherefrom the said case was sent to it, which is clearly after the expiry of 135 working days as evident from the order sheet. Sub-section 4 of section 10 of the Druto Bichar Tribunal, Ain 2002 clearly provides that if the trial of a Druto Bichar Tribunal case is not concluded within the time stipulated in sub-section (1), (2) and (3) of section 10, it shall be sent back to the Court wherefrom the case was transferred.

9. It appears from the order sheet that the prosecution failed to produce any witness since long and for that they took adjournment consecutively, and it is for the prosecution for which the matter has been delayed and hence the submission made by the learned Assistant Attorney General has no leg to stand. The impugned order, therefore, does not appear to have been passed legally. The Druto Bichar Tribunal No.4, Dhaka has lost its jurisdiction to continue or proceed with the trial of the case after expiry of the statutory period.

10. In view of the discussion made above, we find substance in the Rule. The application dated 07.07.14 filed by the accused petitioner for return of the case be allowed.

11. Accordingly, the Rule is made absolute. The order dated 07.07.2014 passed by the Druto Bichar Tribunal No.4, Dhaka in Druto Bichar Tribunal Case No.23 of 2012 arising out of Darus Salam Police Station Case No.44 dated 24.01.2011 corresponding to G.R. No.44 of 2011 rejecting the application for return of the case record is hereby set aside.

12. The learned Judge of the Druto Bichar Tribunal No.4, Dhaka is hereby directed to send the case record of Druto Bichar Tribunal Case No.23 of 2012 to the Court wherefrom it was transferred and after receiving of the said case record the concerned Court shall proceed with the case in accordance with law.

13. Communicate copy of the judgment to the concerned Court at once.

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1 SCOB [2015] HCD 129

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 13689 OF 2012

Md. Moniruddin Ahmed
....Petitioner
-Versus-
Rajdhani Unnayan Katripakkhya represented by its Chairman, RAJUK Bhaban, RAJUK Avenue, Motijheel, Dhaka-1000 and others
.... Respondents

Mr. Mohammad Mahedi Hasan Chowdhury with
Mr. A. K. M. Rabiul Hassan, Advocates
.....For the petitioner.

Mr. Delowar Hossain Somadder, Advocate
…..For the respondent no. 1.

Mr. Sk. Md. Morshed, Advocate
….For the respondent no. 4.

Heard on 18.11.2014, 09.02.2015 & 15.02.2015.
Judgment on 19.02.2015.

Present:
Mr. Justice Moyeenul Islam Chowdhury
And
Mr. Justice Md. Ashraful Kamal

The principles of natural justice are applied to administrative process to ensure procedural fairness and to free it from arbitrariness. Violation of these principles results in jurisdictional errors. Thus in a sense, violation of these principles constitutes procedural ultra vires. ...(Para 17)

In all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned. ...(Para 18)

From promise or from established practice, a duty to act fairly and thus to comply with natural justice may arise. Thus the concepts of 'fairness' and 'legitimate expectation' have expanded the applicability of natural justice beyond the sphere of right. ...(Para 20)

Judgment

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioner, a Rule Nisi was issued calling upon the respondents to show cause as to why the Memo No. রাজউক/নঃপঃ/অ-২/৩৬৩/১২-২০৫ স্থাঃ dated 08.10.2012 issued under the signature of the respondent no. 2 cancelling the Land Use Clearance Certificate (Annexure-'E' to the writ petition) should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The case of the petitioner, as set out in the Writ Petition, in short, is as follows:

The petitioner and others purchased a piece of land situated at Mouza Joar Sahara, that is to say, C. S. and S. A. Dag No. 750, R. S. Dag No. 1355, Dhaka City Survey Dag No. 55279 by 3(three) registered deed being nos. 2814 dated 23.03.2011, 2815 dated 23.03.2011 and 7380 dated 02.08.2011. Accordingly, they mutated their names in the concerned record of the Government vide Mutation Case No. 1081 of 2011-2012 and have been enjoying the same by paying regular rent to the Government. Anyway, on 26.02.2012, they filed an application to the office of the respondent no. 1 for a Land Use Clearance Certificate and after scrutinizing all the relevant documents submitted along with the application, the respondent no. 2 being satisfied granted a Land Use Clearance Certificate in favour of them vide Memo No. রাজউক/নঃপঃ/সঃ-২/৩৬৩/১২-৪১৭ স্থাঃ dated 12.03.2012. While the petitioner and other co-owners of the case land were taking necessary steps for developing the same, the respondent no. 4 filed an application to the office of the respondent no. 1 on 23.09.2012; but without holding any inquiry into the allegation referred to in the said application, the respondent no. 2 issued the impugned Memo No. রাজউক/নঃপঃ/অ-২/৩৬৩/১২-২০৫ স্থাঃ dated 08.10.2012 cancelling the Land Use Clearance Certificate dated 12.03.2012. In the impugned Memo dated 08.10.2012, no specific mention was made about the suppression of any facts in obtaining the Land Use Clearance Certificate from the Rajdhani Unnayan Kartipakkya (RAJUK). As the impugned Memo dated 08.10.2012 was issued behind the back of the petitioner, it is malafide. The

petitioner did not violate any terms and conditions of the Land Use Clearance Certificate dated 12.03.2012. In colourable exercise of power, the RAJUK authority revoked the Land Use Clearance Certificate dated 12.03.2012 by the impugned Memo dated 08.10.2012 which is without lawful authority and of no legal effect.

3. In the Supplementary Affidavit dated 11.11.2012 filed on behalf of the petitioner, it has been stated that the petitioner made a representation to the Chairman of the RAJUK on 18.10.2012 requesting him to allow them to continue with the development of the case land; but the Chairman did not pay any heed thereto.

4. Both the respondent no. 1 and the respondent no. 4 have contested the Rule by filing 2(two) separate Affidavits-in-Opposition. Their case as set out in their respective Affidavits-in-Opposition, in short, runs as follows:

The petitioner and others filed an application dated 26.02.2012 before the respondent no. 1 (RAJUK) for issuance of a Land Use Clearance Certificate with reference to the case land by providing the respondent no. 1 with wrong, misleading and fraudulent information and without letting the respondent no. 1 know about the actual position of the case land, the petitioner obtained the Land Use Clearance Certificate from the RAJUK on 12.03.2012. Thereafter they obtained a building permit for construction of a building in the case land from the RAJUK by its Memo No. রাজউক/উঃ নিঃ/৩সি-৩বি-৪৬০/১২/৭৬১ স্থাঃ dated 10.05.2012. They had been raising a building on the case land by occupying the public road and the land of the respondent no. 4. Against this backdrop, the respondent no. 4 lodged a written complaint with the RAJUK against the petitioner on 23.09.2012 and prayed for revocation of the Land Use Clearance Certificate granted in favour of the petitioner. On receipt of the complaint dated 23.09.2012, the RAJUK authority inspected the City Survey Map and an inquiry was held on the basis of the said complaint. On inquiry, the RAJUK authority found the petitioner and others guilty of providing misleading information and suppression of facts in obtaining the Land Use Clearance Certificate and also found the petitioner's encroachment on the public road and land of the respondent no. 4. By that reason, the RAJUK authority by its Memo No. রাজউক/নঃপঃ/অ-২/৩৬৩/১২-২০৫ স্থাঃ dated 08.10.2012 cancelled the Land Use Clearance Certificate granted in favour of the petitioner invoking Clause 5 of the said Certificate. As the land in question was undivided and undemarcated, the petitioner and others were not authorized in obtaining the Land Use Clearance Certificate from the RAJUK on the basis of their application dated 26.02.2012. Since there was suppression of material facts, the RAJUK authority rightly revoked the Land Use Clearance Certificate by the impugned Memo dated 08.10.2012.

5. At the outset, Mr. Mohammad Mahedi Hasan Chowdhury, learned Advocate appearing on behalf of the petitioner, submits that the petitioner was not afforded an opportunity of being heard prior to revocation of the Land Use Clearance Certificate by issuing the impugned Annexure-'E' dated 08.10.2012 and that being so, he was condemned unheard and in this view of the matter, the impugned Annexure-'E' dated 08.10.2012 is without lawful authority and of no legal effect. In this connection, Mr. Mohammad Mahedi Hasan Chowdhury has drawn our attention to the decision in the case of HFDM De Silva Gunesekere…Vs…Bangladesh represented by the Secretary, Ministry of Home Affairs and others reported in 2 BLC (HCD) 179.

6. Mr. Mohammad Mahedi Hasan Chowdhury further submits that according to the Affidavits-in-Opposition filed by the respondent nos. 1 and 4, an inquiry was held into the written complaint dated 23.09.2012 lodged by the respondent no. 4 with the RAJUK authority; but curiously enough, no paper or document relating to the alleged inquiry has been filed or produced in the Court and in the absence of any such paper or document, a man of ordinary prudence will be loath to place his reliance upon the alleged story of holding an inquiry into the written complaint dated 23.09.2012 and consequently the alleged inquiry is a myth.

7. Mr. Mohammad Mahedi Hasan Chowdhury also submits that it is the definite assertion on behalf of the respondent nos. 1 and 4 that the petitioner provided wrong and misleading information to the RAJUK authority in obtaining the Land Use Clearance Certificate; but astoundingly enough, the nature of the alleged wrong or misleading information was not disclosed in the impugned Memo dated 08.10.2012 and as such the impugned order contained in Annexure-'E' dated 08.10.2012 is necessarily a cryptic and nebulous order which can not be sustained in law.

8. Mr. Mohammad Mahedi Hasan Chowdhury next submits that the RAJUK authority did not rescind the Land Use Clearance Certificate suo motu invoking Clause 5 of the Land Use Clearance Certificate, but admittedly it was rescinded on the basis of the written complaint dated 23.09.2012 lodged by the respondent no. 4 and this rescission of the Land Use Clearance Certificate being not suo motu by the RAJUK authority is not tenable in the eye of law.

9. Mr. Mohammad Mahedi Hasan Chowdhury also submits that on receipt of the impugned Memo dated 08.10.2012 (Annexure-'E' to the writ petition), the petitioner made a representation to the RAJUK authority on

18.10.2012 for revival of the Land Use Clearance Certificate on the ground that it was not understandable as to why the Land Use Clearance Certificate was revoked; but surprisingly enough, the RAJUK authority did not respond to the representation of the petitioner dated 18.10.2012 (Annexure-'F' to the supplementary affidavit) and as the RAJUK authority did not respond thereto, the petitioner was necessarily deprived of an effective representation in that regard and that is why, the petitioner felt constrained to come up with the instant writ petition under Article 102 of the Constitution.

10. Per contra, Mr. Sk. Md. Morshed, learned Advocate appearing on behalf of the respondent no. 4, submits that the petitioner and others obtained the Land Use Clearance Certificate from the respondent no. 1 by suppressing the fact that the case land is undivided and undemarcated and under joint possession of the petitioner and others with the respondent no. 4 and as the petitioner and others committed fraud upon the respondent no. 1, the petitioner cannot get any relief in the writ petition having come up before this Court with unclean hands.

11. Mr. Sk. Md. Morshed also submits that it is a settled proposition of law that fraud vitiates everything and since the petitioner and others resorted to fraud in obtaining the Land Use Clearance Certificate from the RAJUK authority, the principles of natural justice were not required to be complied with and in this perspective, it cannot be said at all that the impugned Memo dated 08.10.2012 is without lawful authority and of no legal effect. In this connection, Mr. Sk. Md. Morshed adverts to the decision in the case of The State of Chhattisgarh and others…Vs…Dhirjo Kumar Sengar reported in (2009) 13 SCC 600.

12. Mr. Sk. Md. Morshed further submits that in this writ petition, the Rule was issued on 12.11.2012 whereas the building permit of the petitioner was revoked by Annexure-'12' dated 05.11.2012 and since no relief has been sought with regard to the revocation of the building permit of the petitioner by Annexure-'12' dated 05.11.2012, the writ petition is not maintainable.

13. Mr. Sk. Md. Morshed next submits that Clause 2 of the Land Use Clearance Certificate (Annexure-'D' to the writ petition) does not create any right of commencement of any construction work in favour of the petitioner; rather it is a pre-condition to the obtaining of any building permit from the RAJUK by the petitioner and as the Annexure-'D' does not create any right of commencement of any construction work in favour of the petitioner, the writ petition is not maintainable on this count as well.

14. Mr. Delowar Hossain Somadder, learned Advocate appearing for the respondent no. 1, virtually adopts the submissions made by the learned Advocate Mr. Sk. Md. Morshed.

15. We have heard the submissions of the learned Advocate Mr. Mohammad Mahedi Hasan Chowdhury and the counter-submissions of the learned Advocate Mr. Sk. Md. Morshed and perused the Writ Petition, Supplementary Affidavit, Affidavits-in-Opposition and relevant Annexures annexed thereto.

16. Indisputably the principle of "Audi Alteram Partem" was not adhered to prior to revocation of the Land Use Clearance Certificate by issuing the impugned Annexure-'E' dated 08.10.2012. Now a pertinent question arises: what legal consequences will ensue for not following the principle of "Audi Alteram Partem" in this regard? This question must be answered for proper and effectual adjudication of the Rule.

17. The principles of natural justice are applied to administrative process to ensure procedural fairness and to free it from arbitrariness. Violation of these principles results in jurisdictional errors. Thus in a sense, violation of these principles constitutes procedural ultra vires. It is, however, impossible to give an exact connotation of these principles as its contents are flexible and variable depending on the circumstances of each case, i.e., the nature of the function of the public functionary, the rules under which he has to act and the subject-matter he has to deal with. These principles are classified into two categories-(i) a man can not be condemned unheard (audi alteram partem) and (ii) a man can not be the judge in his own cause (nemo debet esse judex in propria causa). The contents of these principles vary with the varying circumstances and those cannot be petrified or fitted into rigid moulds. They are flexible and turn on the facts and circumstances of each case. In applying these principles, there is a need to balance the competing interests of administrative justice and the exigencies of efficient administration. These principles were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have legitimate expectation that the decision-making process would be subject to some rules of fair procedure. These rules apply, even though there may be no positive words in the statute requiring their application.

18. Lord Atkin in R. Vs. Electricity Commissioners ([1924] 1 KB 171) observed that the rules of natural justice applied to 'any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially'. The expression 'having the duty to act judicially' was used in England to limit the application of the rules to decision-making bodies similar in nature to a court of law. Lord

Reid, however, freed these rules from the bondage in the landmark case of Ridge…Vs... Baldwin ([1964] AC 40). But even before this decision, the rules of natural justice were being applied in our country to administrative proceedings which might affect the person, property or other rights of the parties concerned in the dispute. In all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned. In this context, reliance may be placed on the cases of The University of Dacca and another…Vs…Zakir Ahmed, 16 DLR (SC) 722; Sk. Ali Ahmed…Vs…The Secretary, Ministry of Home Affairs and others, 40 DLR (AD) 170; Habibullah Khan…Vs…Shah Azharuddin Ahmed and others, 35 DLR (AD) 72; Hamidul Huq Chowdhury and others…Vs…Bangladesh and others, 33 DLR 381 and Farzana Haque….Vs…The University of Dhaka and others, 42 DLR 262.

19. In England, the application of the principles of natural justice has been expanded by introducing the concept of 'fairness'. In Re Infant H (K) ([1967] 1 All E.R. 226), it was held that whether the function discharged is quasi-judicial or administrative, the authority must act fairly. It is sometimes thought that the concept of 'acting fairly' and 'natural justice' are different things, but this is wrong as Lord Scarman correctly observes that the Courts have extended the requirement of natural justice, namely, the duty to act fairly, so that it is required of a purely administrative act (Council of Civil Service Union…Vs...Minister for the Civil Service [1984] 3 All E.R. 935). Speaking about the concept, the 'acting fairly' doctrine has at least proved useful as a device for evading some of the previous confusions. The Courts now have two strings to their bow. An administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests and therefore involves a duty to act judicially, in accordance with the classic authorities and Ridge…V... Baldwin; or it may simply be held that in our modern approach, it automatically involves a duty to act fairly and in accordance with natural justice. The Indian Supreme Court has adopted this principle holding "….this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands" (Swadeshi Cotton Mills…V... India, AIR 1981 SC 818).

20. The English Courts have further expanded the horizon of natural justice by importing the concept of 'legitimate expectation' and holding that from promise or from established practice, a duty to act fairly and thus to comply with natural justice may arise. Thus the concepts of 'fairness' and 'legitimate expectation' have expanded the applicability of natural justice beyond the sphere of right. To cite a few examples, not only in the case of cancellation of licence which involves denial of a right, but also in the case of first-time grant of licence and renewal of licence, the principle of natural justice is attracted in a limited way in consideration of legitimate expectation. An applicant for registration as a citizen, though devoid of any legal right, is entitled to a fair hearing and an opportunity to controvert any allegation levelled against him. An alien seeking a visa has no entitlement to one, but once he has the necessary documents, he does have the type of entitlement that should now be protected by due process, and the Government should not have the power to exclude him summarily.

21. In the case of Chingleput Bottlers…Vs...Majestic Bottlers reported in AIR 1984 SC 1030, the Indian Supreme Court has made certain observations which create an impression that the rules of natural justice are not applicable where it is a matter of privilege and no right or legitimate expectation is involved. But the application of the rules of natural justice is no longer tied to the dichotomy of right-privilege. It has been stated in "Administrative Law" by H.W.R. Wade, 5th edition at page-465: "For the purpose of natural justice, the question which matters is not whether the claimant has some legal right, but whether the legal power is being exercised over him to his disadvantage. It is not a matter of property or of vested interests, but simply of the exercise of Governmental power in a manner which is fair …" In the American jurisdiction, the right-privilege dichotomy was used to deny due process hearing where no right was involved. But starting with Gonzalez…Vs...Freeman (334 F. 2d 570), the Courts gradually shifted in favour of the privilege cases and in the words of Professor Schwartz, "The privilege-right dichotomy is in the process of being completely eroded" ("Administrative Law", 1976, Page-230). Article 31 of our Constitution incorporating the concept of procedural due process, the English decisions expanding the frontiers of natural justice are fully applicable in Bangladesh.

22. In English law, the rules of natural justice perform a function, within a limited field, similar to the concept of procedural due process as it exists in the American jurisdiction. Following the English decisions, the Courts of this sub-continent have held that the principle of natural justice should be deemed incorporated in every statute unless it is excluded expressly or by necessary implication by any statute.

23. The basic principle of fair procedure is that before taking any action against a man, the authority should give him notice of the case and afford him a fair opportunity to answer the case against him and to put his own case. The person sought to be affected must know the allegation and the materials to be used against him and he must be given a fair opportunity to correct or contradict them. The right to a fair hearing is now of universal application whenever a decision affecting the rights or interest of a man is made. But such a notice is not required where the action does not affect the complaining party.

24. It is often said that malafides or bad faith vitiates everything and a malafide act is a nullity. What is malafides? Relying on some observations of the Indian Supreme Court in some decisions, Durgadas Basu J held, "It is commonplace to state that malafides does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes: (i) that the authority making the impugned order did not apply its mind at all to the matter in question; or (ii) that the impugned order was made for a purpose or upon a ground other than what is mentioned in the order." (Ram Chandra…Vs…Secretary to the Government of W.B, AIR 1964 Cal 265)

25. To render an action malafide, "There must be existing definite evidence of bias and action which cannot be attributed to be otherwise bona fide; actions not otherwise bona fide, however, by themselves would not amount to be malafide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act" (Punjab…Vs… Khanna, AIR 2001 SC 343).

26. The principle of reasonableness is used in testing the validity of all administrative actions and an unreasonable action is taken to have never been authorized by the Legislature and is treated as ultra vires. According to Lord Greene, an action of an authority is unreasonable when it is so unreasonable that no man acting reasonably could have taken it. This has now come to be known as Wednesbury unreasonableness. (Associated Provincial Picture…Vs… Wednesbury Corporation [1948]1 KB 223)

27. Reverting to the case in hand, it is an indubitable fact that the principle of "Audi Alteram Partem" was not adhered to prior to rescission of the Land Use Clearance Certificate by issuing the impugned Annexure-'E' dated 08.10.2012. From our above discussions, it is manifestly clear that the petitioner was entitled to a fair hearing before cancellation of the Land Use Clearance Certificate by the RAJUK authority. In other words, the RAJUK authority did not act fairly by not affording the petitioner an opportunity of being heard before issuance of the impugned Annexure-'E' dated 08.10.2012.

28. In the decision in the case of HFDM De Silva Gunesekere…Vs…Bangladesh represented by the Secretary, Ministry of Home Affairs and others reported in 2 BLC (HCD) 179 relied upon by Mr. Mohammad Mahedi Hasan Chowdhury, it was held in paragraph 7 that the black-listing of the petitioner without an opportunity of being heard was illegal and for the same reason, the impugned order deporting him from the country by 27.07.1995 without giving him an opportunity of being heard was violative of natural justice, and must be held to have been made illegally and without lawful authority. So it is seen that in this decision, the black-listing of the petitioner by the authority and the consequent deportation order of the authority were found to be without lawful authority for violation of the principle of natural justice.

29. In the decision in the case of The State of Chhattisgarh and others…Vs…Dhirjo Kumar Sengar reported in (2009) 13 SCC 600 referred to by Mr. Sk. Md. Morshed, it was held in paragraphs 19, 20 and 21:

> "19. The respondent keeping in view the constitutional scheme has not only committed a fraud on the Department, but also committed a fraud on the Constitution. As commission of fraud by him has categorically been proved, in our opinion, the principles of natural justice were not required to be complied with.
>
> 20. Mr. Gupta has relied upon a large number of decisions of this Court viz. Inderpreet Singh Kahlon…Vs…State of Punjab, ((2006) 11 SCC 356); Mohd. Sartaj…Vs…State of U. P., ((2006) 2 SCC 315); Jaswant Singh…Vs…State of M. P., ((2002) 9 SCC 700) and State of M. P.…Vs…Shyama Pardhi, ((1996) 7 SCC 118) to contend that audi alteram partem doctrine should have been complied with.
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> 21. In these cases, requirement to comply with the principles of natural justice has been emphasised. The legal principles carved out therein are unexceptional. But, in this case, we are concerned with a case of fraud. Fraud, as is well known, vitiates all solemn acts. (Ram Chandra Singh…Vs…Savitri Devi reported in ((2003) 8 SCC 319), Tanna & Modi…Vs…CIT reported in ((2007) 7 SCC 434) and Rani Aloka Dudhoria…Vs…Goutam Dudhoria reported in ((2009) 13 SCC 569). The High Court, therefore, must be held to have committed a serious error in passing the impugned judgment."

30. Coming back to the case before us, we must say that the facts and circumstances of the case are quite distinguishable from those of the case reported in (2009) 13 SCC 600. Besides, in our opinion, in the instant case, the alleged perpetration of fraud by the petitioner upon the RAJUK authority was not proved at all in view of the fact that the petitioner and others jointly obtained the Land Use Clearance Certificate from the RAJUK and a reference to Annexure-'D' clearly indicates that the Land Use Clearance Certificate sought for was in respect of a part of the case land, though it was not specifically mentioned that the land is undivided and undemarcated. Over and above, by invoking Clause 5 of Annexure-'D', that is to say, "কোন তথ্য গোপন করিলে বা ভুল তথ্য প্রদান করিলে প্রদানকৃত ছাড়পত্র বাতিল বলিয়া গণ্য হইবে," the RAJUK authority did not revoke the Land Use Clearance Certificate suo motu; rather on the basis of the written complaint dated 23.09.2012 lodged by the respondent no.

4, the Land Use Clearance Certificate granted in favour of the petitioner and others was rescinded behind their back in an arbitrary fashion.

31. Precisely speaking, it was all the more necessary to hear the petitioner before cancellation of the Land Use Clearance Certificate by the impugned Annexure-'E' dated 08.10.2012 when there was a specific complaint dated 23.09.2012 against the petitioner and others lodged by the respondent no. 4 in black and white. It does not stand to reason and logic as to why and how the RAJUK authority could shut its eyes and act blindfold at the instance of the respondent no. 4 alone. On this point, we are at one with Mr. Mohammad Mahedi Hasan Chowdhury that had the RAJUK authority revoked the Land Use Clearance Certificate of the petitioner suo *motu* invoking Clause 5 of the said Certificate, then the question of *malafides* or bad faith on their part would not have arisen. We have already observed that the failure to adhere to the principle of *"Audi Alteram Partem"* results in a jurisdictional error. As the RAJUK authority committed a jurisdictional error by not giving any hearing to the petitioner prior to cancellation of the Land Use Clearance Certificate, the impugned Annexure-'E' dated 08.10.2012 must be held to be without lawful authority and of no legal effect.

32. It is true that in the Affidavits-in-Opposition filed by the respondent nos. 1 and 4, it has been specifically, unambiguously, clearly and unmistakably stated that the RAJUK authority held an inquiry into the written complaint dated 23.09.2012 lodged by the respondent no. 4 relating to the suppression of some material facts in obtaining the Land Use Clearance Certificate from the RAJUK authority by the petitioner and others; but funnily enough, no paper or document relating to the alleged inquiry has been filed or produced in the Court. In the absence of any such paper or document, we are inclined to hold that the RAJUK authority did not make any inquiry into the written complaint dated 23.09.2012 at all. What is strikingly noticeable is that the RAJUK authority acted at its sweet will at the instance of the respondent no. 4 without caring a fig for the principle of *"Audi Alteram Partem."* This exercise of the RAJUK authority is, no doubt, unconscionable and as such it is deprecated.

33. Mr. Mohammad Mahedi Hasan Chowdhury has rightly contended that the impugned Annexure-'E' dated 08.10.2012 does not specifically refer to any materials on the basis of which the Land Use Clearance Certificate was rescinded by the RAJUK authority. From Annexure-'E' dated 08.10.2012, it transpires that the RAJUK authority revoked the Land Use Clearance Certificate granted in favour of the petitioner and others on the ground— "সঠিক তথ্য উপস্থাপন না করায়". What we are driving at boils down to this: the RAJUK authority did not apply its mind to the matter in question and as a natural corollary, it issued the impugned Annexure-'E' dated 08.10.2012 which is a classic case of bad faith.

34. There is another dimension of the case. It is an admitted fact that on receipt of the impugned Annexure-'E' dated 08.10.2012, the petitioner made a representation to the RAJUK authority on 18.10.2012 (Annexure-'F' to the supplementary affidavit) and the prayer incorporated in Annexure-'F' ran like this: "কি কারণে উক্ত ছাড়পত্র বাতিল করা হলো তা আমাদের বোধগম্য নয়। বিষয়টি উদ্ধর্তন কর্তৃপক্ষের মাধ্যমে দলিল দস্তাবেজ সহ সরজমিনে তদন্ত সাপেক্ষে আমাদের ভূমি ব্যবহারের ছাড়পত্র পুর্নবহালের জন্য বিনীত অনুরোধ জানাচ্ছি।" So it appears that by this Annexure-'F' dated 18.10.2012, the petitioner urged the RAJUK authority to hold an on-the-spot inquiry into the matter and he was not aware as to why the Land Use Clearance Certificate was revoked and also requested the RAJUK authority for restoration of the Land Use Clearance Certificate subject to the on-the-spot inquiry. But the RAJUK authority did not respond to this Annexure-'F' dated 18.10.2012 and this was left unanswered to the grave prejudice of the petitioner. The upshot of the above discussion is that the petitioner was in the dark about the cause of revocation of the Land Use Clearance Certificate by the RAJUK authority and that is why, he could not file any effective representation thereagainst. As found earlier, no inquiry was held into the matter prior to cancellation of the Land Use Clearance Certificate. Having failed to get his grievances remedied, the petitioner eventually came up with the instant writ petition under Article 102 of the Constitution.

35. It is true that the Land Use Clearance Certificate (Annexure-'D' to the writ petition) does not create any right of commencement of any construction work by the petitioner; rather it is a pre-condition to the obtaining of any building permit from the RAJUK authority. It goes without saying that the petitioner was adversely affected by the cancellation of the Land Use Clearance Certificate. He was not given any chance of countering the complaint dated 23.09.2012 made by the respondent no. 4. The principle of fair play, or for that matter, fair procedure was made a casualty in the present instance. Anyway, undeniably after obtaining the Land Use Clearance Certificate, the petitioner and others obtained a building permit from the RAJUK authority and thereafter they started erecting a building on the case land. It is undisputed that by issuing Annexure-'12' dated 05.11.2012, the building permit was cancelled consequent upon the cancellation of the Land Use Clearance Certificate and that was specifically referred to in Annexure-'12'. In other words, in consequence of the revocation of the Land Use Clearance Certificate, the building permit was rescinded and that is why probably the petitioner did not challenge the Annexure-'12' dated 05.11.2012 in this writ petition. As the Annexure-'12' dated 05.11.2012 was issued by the RAJUK authority on the basis of the revocation of the Land Use Clearance Certificate, the petitioner, as we see it, is not required to challenge the same specifically in the writ petition.

36. In view of what have been discussed above and regard being had to the facts and circumstances of the case, we are led to hold that the writ petition is maintainable and the impugned Annexure-'E' dated 08.10.2012 revoking the Land Use Clearance Certificate dated 12.03.2012 issued in favour of the petitioner and others cannot be sustained in law. So we find merit in the Rule. The Rule, therefore, succeeds.

37. Accordingly, the Rule is made absolute without any order as to costs. The impugned Annexure-'E' dated 08.10.2012 is declared to be without lawful authority and of no legal effect. However, the RAJUK authority is at liberty to dispose of the complaint dated 23.09.2012 lodged by the respondent no. 4 in accordance with law after affording the petitioner an opportunity of being heard.

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1 SCOB [2015] HCD 136

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 2640 of 2011

Md. Ibrahim

.....Petitioner

-Versus-

The Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Finance, Internal Resource Division, Segunbagicha, P.S. Ramna, Dhaka and others

.....Respondents

Mr. A.F. Hassan Ariff, Advocate with
Mr. Md. Bahadur Shah, Advocate

.....For the petitioner

Mr. Imranul Kabir, Advocate with
Ms. Farzana Ahmed, Advocate

.....For the Respondent No.4

Mr. Md. Ramzan Ali Sikder, Advocate
with
Mr. Tanim Hossain, Advocate

.....For the Respondent No.6.

Ms. Israt Jahan, A.A.G. with
Ms. Kashefa Hossain, A.A.G.

.....For the Respondent Nos. 1-3

Heard on: 24.01.2012, 25.01.2012, 02.02.2012, 07.02.2012, 09.02.2012, 20.02.2012, 26.02.2012, 27.02.2012, 29.02.2012, 01.03.2012, 15.03.2012, 18.03.2012, and judgment on: 16.10.2012.

Present:
Mr. Justice Syed Refaat Ahmed
And
Mr. Justice Md. Ashraful Kamal

Ocean Bill of Lading:
In order to get delivery order from the carrier as well as for getting payment under the L/C, it was mandatorily required to present "Ocean Bill of Lading" and none else. But in this case, admittedly, the petitioner produced House Bill of Lading-against which petitioner is not entitle to get any delivery of goods. ...(Para 27)

Article 1(a) of schedule of the Carriage of Goods by Sea Act, 1925:
In the present case petitioner submitted an ocean bill of lading issued by EXCALIVOR LOGISTICS who is a freight forwarder and agent. Therefore, as per Article 1(a) of schedule of the Carriage of Goods Sea Act, 1925, EXCALIVOR LOGISTICS is neither an owner nor a chatterer of the vessel and had no authority to issue any bill of lading. So, the bill of lading placed by the petitioner was not a bill of lading as per Article-1 (a) of schedule of "The carriage of goods by Sea Act, 1925." ...(Para 35)

Sale of Goods Act, 1930
Section 47
Unpaid Seller's Lien:
Therefore, from the reading of the aforesaid sections it appears that a unpaid seller has lien on the goods for the price while he is in position of them and in case insolvency in transit and a right of the sale a right of withholding delivery and stoppage in transit. So the unpaid seller may exercise his right of lien notwithstanding that he is possession on the goods. ...(Para 44)

Judgment

Md. Ashraful Kamal, J:

1. This Rule Nisi was issued at the instance of the petitioner Md. Ibrahim on an application under Article 102(1) & (2) of the Constitution of the People's Republic of Bangladesh calling upon the respondents to show cause as to why the holding of the imported duty paid goods covered under Latter of Credit No. 209610010034 dated 18.03.2010 and B/E No. C137775 dated 19.10.2010 and B/E No. C63728 dated 23.05.2010, Bill of

Lading No. S00005349 dated 11.04.2010 and Bill of Lading No. S00005402 dated 15.04.2010 should not be declared to have been done without lawful authority and is of no legal effect and as to why the respondents should not be directed to release the said imported duty paid goods.

2. Brief facts, necessary for the disposal of this Rule, are as follows:-

The petitioner opened a Letter of Credit (LC) being No. 209610010034 dated 18.03.2010 for import of 4000 Metric Tons of APH WHEAT (New Crops) covered under H.S. Code No. 1001.90.19 @ US$ 268 per Metric Tons, as per proforma invoice No. 1023/2010 dated 15.03.2010 and total value of the goods at about US$ 10,72,000.00 (including freight). Thereafter, consignment arrived at the Chittagong Port under 1 set of Invoice and 1 set of house Bill of Lading against two shipments. Then, the petitioner paid the entire L.C value (including the freight) to the concerned Bank. Accordingly, the Bank delivered the duly endorsed shipping documents to the petitioner. Thereafter, petitioner submitted House Bill of Lading alongwith all others relevant documents before the Custom Authority for assessment, and on the basis of those documents Custom Authority assessed the petitioner duty and tariff. Then, the petitioner on 09.02.2011 paid entire custom duty, VAT and other charges of the goods in question. But, the respondent No. 4 did not deliver the aforesaid goods to the petitioner.

3. Mr. A.F. Hasan Ariff along with Mr. Md. Bahadur Shah, appearing for the petitioner submits that the petitioner submitted bill of entries on 14.10.2010 and as per the provisions of Section 82A of the Customs Act the respondents are under a statutory obligation to release the consignment within 3 (three) days, but the respondents failed to release the said duty-paid-goods. He further submits that the Custom Authority and Port Authorities are under statutory obligation to release goods once assessed, but in spite of submission of all the relevant documents such as B/E, Bank Slip, Atomic Energy Certificate, Clearance of Agriculture Directorate, Packing List, Commercial Invoice, Certificate of Origin, Radioactivity Statement, Proforma Invoice, L/C and Custom Assessment Papers including freight pre-paid bill of lading duly endorsed by the bank, the respondents did not deliver the goods to the petitioner. It is asserted that the respondents, in particular respondent Nos. 6 and 7, cannot operate and function without interaction amongst each other and that the respondent Nos. 6 and 7 being instrumentalities of respondent Nos. 2, 3 and 4 the respondents are jointly and severally withholding release of the consignment on the mala fide motivated pretext (based on respondent No. 6 pretext) that there is a freight dispute pending before the Australian Court amongst the supplier/ shipper, Australian Commodity Management (pvt.) Limited and Gilgandra Marketing Cooperative Limited and during pendency of the said proceeding of the Australian Court the goods cannot be delivered.

4. Mr. Ariff further submits that the petitioner earlier released goods covered under house bill of lading No.S00005367 dated 29.04.2010 under the very same L/C No.209610010034 dated 18.03.2010 from same shipping Co. i.e, respondent No. 6 on 05.07.2010 against the shipping document endorsed by the L.C opining bank. The shipping documents contained house Bill of lading No. S00005367 dated 29.04.2010 (ANNEXIRE-F).

5. Mr. Ariff argues that in the instant shipment the freight stands prepaid. Given that there is no dispute that, the beneficiary bank duly received payment against freight along with consideration for wheat, the bank on receipt of full payment released shipping documents including House Bill of Lading. It is submitted that the petitioner having cleared L/C amount inclusive of freight and customs duty, taxes and other charges has complete ownership over the goods and the respondent No. 7 as an instrumentality of the Customs Authority and Port Authority resultantly has no legal competency to withhold delivery under any plea. He also submits that respondent No. 5 (bank) already certified that money has been transferred from the said bank to the negotiating bank (National Australia Bank Limited) on several dates. The suppliers declared that they have received the payments through National Australia Bank Limited and the documents established that the petitioner's importer had discharged his pecuniary liability and the supplier exporter has duly acknowledged the same.

6. The respondents have entertained discharge of the cargo and assessed custom duties and taxes treating the goods belonging to the importer within the territory of Bangladesh, thereby, Mr. Ariff submits the imported goods fall outside the scope of any extra- territorial claim. Accordingly, it is submitted that the goods cannot be withheld from delivery on the plea of extra-territorial claim against third parties.

7. Mr. Ariff also argues that Section 3 of the Territorial Water and Maritime Zone Act, 1974 enables the Govt. of Bangladesh to declare limit/extent of territorial waters of Bangladesh. The sovereignty of Bangladesh extends to its territorial waters as per provision of Section 3 (3) of the said Act, Section 3 (3) is quoted below;

"*The sovereignty of the republic extends to the territorial waters as well as to the air space over and the bed and subsoil of such waters"*.

8. Notwithstanding that a vessel may fly flag of any other country, when it enters the territorial waters of Bangladesh the vessel and cargo becomes subject to the municipal laws of Bangladesh. In the event that the vessel thereafter seeks entry into the Chittagong Port Area, it is to be noted that the Port area is delineated under Section 4 and 5 of the Ports Act, 1908 as well as Section 3 of CPA Ordinance 1976. The process that thereafter ensures is that the shipping agent submits import manifest under Section 43 and 44 of Customs Act to the Customs authority furnishing information about Bangladesh bound cargo to be unloaded under the custody of the Post Authority. The Cargo unloaded is subject to the elaborate legal regime established under the Import and Export (Control) Act, 1953, Import Policy Order, Export Policy order adopted from time to time. The Chittagong Port is at the same time subject to fiscal and legal regime governed in particular and specifically by the Customs Act 1969. The Chittagong Port is a customs station [sec 2(k)] and Customs Port [sec 2 (j)] read with section 9 (a) of Customs Act. Section 9 (a) stipulates;

"The ports and airports which alone shall be customs ports or loading of goods for export or any class of such goods"

Section 2 (i) read with section 10 defines the limit of the Customs Station. Section 10 stipulates;

"The Board may, by notification in the official Gazette- (a) specify the limits of any customs –station; and (b) approve proper places in any customs –station for the loading and unloading of goods or any class of goods."

Section 2 (iii) read with section 9 (b) of the Customs Act define Customs Inland Container Deport. Section 9 (b) stipulates;

"The places which alone shall be land customs-stations [or customs-inland container deport] for the clearance of goods of any class of goods imported or to be exported by land or inland waterways."

9. The cargo is unloaded in the Port area which is simultaneously a Customs area. The Port Authority, a statutory public authority exercises control over the cargo. The Port Authority as a statutory public authority is included within the definition of State, as per definition clause contained in Article 152 (1) of the Constitution. The Customs authority having control over the cargo as an agency of the sovereign State, exercises its authority to levy customs duties and taxes. The cargo, therefore, is not subject to jurisdiction of foreign legal regimes and foreign judgment. The assessment by the Customs Authority established as the revenue agency of the Government, reflects treatment of the cargo as being under sovereign control of the State and that the cargo is owned by the importer who has surrendered to the revenue legal regime of the state.

10. The above legal analysis submitted on by Mr. Ariff is further extended in his submission that the foreign judgments have no binding force in territories of Bangladesh as there is no reciprocal treaty under section 44A of the Code of Civil Procedure. Section 44A stipulates;

"(1) Where a certified copy of a decree of any of the superior Court of any reciprocating territory has been filed in a District Court, the decree may be executed in Bangladesh as if it had been passed by the District Court.

(2)Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3)The provision of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 130.

Explanation II- " reciprocating territory" means country or territory as the Government may, from time to time, by notification in the official Gazette, declare to be reciprocating territory for the purposes of this section and "Superior Courts", with reference to any such territory, means such courts as may be specified in the said notification.

Explanation III- "Decree" with reference to a superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other charges of a like nature or in respect of a fine or other penalty, and (b) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment.

11. It is accordingly explained on behalf of the petitioners that the cargo carried into the sovereign territory of Bangladesh and discharged therein (section 73 of the Customs Act) is subject to fiscal liability for entry into Bangladesh for home consumption or warehousing (section 79 of Customs Act). The cargo is discharged from the vessel free from any encumbrance whatsoever. The New South Wales Court's jurisdiction and litigants legal control (if any) do not, therefore, extend into the sovereign territory of Bangladesh in general and/or in particular to the Chittagong Port. The Chittagong Port Authority Ordinance 1976 does not recognize the notion of a ship owner's lien for freight under the provision of Section 22 of the Ordinance. Section 22 is quoted below;

"(1) If the master or owner of any vessel, at or before the time of landing from such vessel of any goods at any dock or pier, gives to the Authority notice in writing that such goods are to remain subject to a lien for freight, prim age or average of any amount to be mentioned in such notice, such goods shall continue to be liable, after the landing thereof, to such lien.

(2) Such goods shall be retained either in the warehouses or sheds of the Authority or, with the consent of the Collector of Customs, in a public warehouse, at the risk and expense of the owner of the said goods, until the lien is discharged as hereinafter mentioned."

12. He also submits that the Master or owner of the vessel has not at or before the time of landing of cargo at the Port notified the Chittagong Port Authority in writing as mandated under section 22 exercising any lien over the cargo. The cargo therefore landed free from any encumbrance whatsoever including any lien. The facts as emerged from the foreign judgment (Annexure-3 to the Affidavit-in-opposition by respondent No.6), establish that the litigation is amongst Australian litigants and that plaintiff has undertaken to pay into court on account of freight and other charges. It is submitted that the said foreign judgment evidences that the petitioner-importer was not a party to the proceedings suffering any claim, the petitioner-importer had no liability including liability to pay freight, and that the petitioner's imported cargo therefore is free from encumbrance and he is entitled to delivery of the same.

13. Mr. Ariff also argues that the respondent No.7, the ICD is a licensee under the Customs Act as well as of the Port Authority. As licensee of the Customs/Port Authority, the ICD discharged delegated functions of the Port Authority. The Port Authority in performing its statutory function delegated/licensed the ICD to perform the function of the Port Authority in providing storage facility. It is noted that the Customs Authority declares places as warehouse stations under Section 2(u) read with Section 11 of the Customs Act. The respondent No 7, ICD simultaneously performs the function of a State agency both under Chittagong Port Authority Ordinance as well as the Customs Act. The ICD cannot entertain vessels cargo in private capacity. The ICD cannot deliver cargo to any importer without any assessment and payment of the customs duties and taxes. The respondent No. 7 is an instrumentality of the Port Authority discharging the functions of the Port.

14. Furthermore, Mr. Ariff submits that after proper assessment of the Bill of Entry the importer's C&F Agent deposit duties, taxes, VAT etc. to the authorized bank. On the basis of such payment the concerned Principal Appraiser affixes the seal "The goods are out of Customs Control" which is known as "Out passing" of B/E. It is noted that Annexure-C to the Writ petition is the relevant printed release order but without the necessary endorsement that the goods are out of Customs control. The said document further reveals that the Chittagong Port Authority has not filled up and endorsed the release order. The respondents are, therefore, collectively responsible to ensure delivery of the cargo without any impediment. No lien has been exercised upon the cargo under section 22 of the Chittagong Port Authority Ordinance, 1976. The respondents collectively, including respondent No. 7, are under an obligation to deliver the cargo to the Writ Petitioner.

15. His further contention is that admittedly and evidently the petitioner did not suffer any lien on his cargo for freight. The retired bank documents and the beneficiary bank establish that the freight was duly received by the beneficiary bank discharging the petitioner importer from any financial liability in respect of the cargo. The foreign judgment demonstrates litigation among the suppliers, wherein the petitioner is neither a party nor any claim against the petitioner has been laid.

16. Mr. Ariff submits that the shipping company as defendant No. 2 has laid claim against the suppliers in the suit before the New South Wales Court. However, the shipper in Australia failed to pay freight to MSC for the cargo, and therefore no Bill of Lading was released by MSC in respect of the cargo.

17. He finally submits that according to Annexure-G. The petitioner's liability towards freight was discharged during the period 6 May-1 June 2010 when the payments were received by the negotiating bank, i.e. National Australia Bank Ltd. The delay in delivering the cargo to the petitioner is patently and evidently due to unlawful withholding on the plea of non-payment of freight. The respondents collectively have exercised their statutory control over the cargo under the Port Act, 1908, Chittagong Port Authority Ordinance, 1976 and the Customs Act, 1969 and, therefore, are under a legal obligation to deliver the cargo free from any encumbrance including container/ICD charges after the petitioner-importer has discharged his obligations towards payment of custom duties, taxes and port dues.

18. The respondent No.4 Chittagong Port Authority (CPA) entered appearance and contested the writ petition by filing an affidavit-in-opposition. Mr. Imrul Kabir along with Farzana Ahmed appearing for the Respondent No. 4 submits that the payment of customs duty and other charges to the customs authority does not create any right to have an automatic delivery of any goods. Rather, obtaining a clearance certificate from the Customs Authority, which is a mandatory requirement to qualify to have the goods from the Chittagong Port Authority. In the present case the petitioner failed to provide any clearance certificate to the CPA. Therefore, it is the petitioner's inability that the goods are still laying at the private depot.

19. Mr. Imrul's next contention is that the petitioner never ever came to the respondent No.4 along with the necessary documents, especially 'out passed' Bill of Entry from the Customs Authority.

20. Finally, Mr. Imrul asserted that the note sheet in respect of the petitioner's file keept in its office shows that the petitioner never approved the respondent No.4 to take delivery of the goods in question.

21. The respondent No.6 entered appearance and contested the writ petition by filing an affidavit-in-opposition. Mr. Md. Ramzan Ali Sikder appearing for the Respondent No. 6 submits that Mediterranean Shipping Company or MSC, carried two consignments consisting of 80 containers of APH Wheat ("the cargo") from Sydney Australia to Chittagong Port, of which the petitioner was the importer, but the respective shippers at Australia failed to pay freight to MSC for the cargo, and therefore, no Bills of Lading were issued or released by MSC in respect of the cargo. Next, he submits that the original owner and supplier of the consignment in question 'Gilgandra Marketing Co-Operative Limited' as plaintiff filed legal proceeding in the Supreme Court, New South Vales, Australia against Australian Commodity & Merchandise Pty Ltd, MSC Mediterranean Shipping Company SA. NYK Line and MISC Berhad. The Australian Court by judgment and order dated 22.3.2011 issued an order directing the MSC, the principal of the Respondent No. 6, to do all things that are necessary to deliver the wheat to or according to the direction of the plaintiff (Gilgandra Marketing Co-Operative Limited) and also permanently restrained Australian Commodity & Merchandise Pty Ltd from dealing with selling, encumbering, endorsing and Bill of Lading, issuing delivery order for delivering the cargo, containers and Bill of Lading of the wheat in question. Mr. Ramzan further submits that MSC still retains the original Ocean Bill of Lading and that MSC has nothing to do with the House Bill of Lading issued by the freight forwarder (Excalibur Logistics). With regard to the petitioner's payment against the House Bill of Lading, it is submitted that the petitioner and its bank, Bank Asia Limited, have done the same at their risk and responsibility and that this Respondent is not liable to deliver the cargo to the petitioner in this regard.

22. Mr. Ramzan finally submits that on the basis of the freight forwarder's House Bill of Lading, petitioner cannot claim the goods in question, as per L/C terms and conditions. Therefore, payment of Customs duty, VAT and other charges for the goods on 9.02.2011 to the Customs Authority cannot qualify the petitioner to have the release of the goods in question.

23. The kernel question in this Rule Nisi is whether the respondents individually or jointly holding the petitioner's goods in questions without lawful authority.

24. From the record it appears that the petitioner opened a Letter of Credit being No. 209610010034 dated 18.03.2010. The said Letter of Credit stipulates, inter alia, as under;

> 46A: (C) *"FULL SETS OF SHIPPED ON BOARD CLEAN NEGOTIABLE OCEAN BILL OF LADING MARKED FREIGHT PREPAID EVIDENCING SHIPMENT MADE TO THE ORDER OF BANK ASIA LTD. ANDERKILLA BRANCH, CHITTAGONG, BANGLADESH"*.

47A :(1) DOCUMENT WITH DISCREPANCY MUST NOT BE NEGOTIATED WITHOUT PRIOR APPROVAL OR L/C OPENING BANK.

47A: (6) *"STALE, CLAUSED, THROUGH, SHORT FORM B/L. BLANK BACK B/L FREIGHT FORWARDER B/L AND DOCUMENTS ARE NOT ACCEPTABLE."*

47A: (13) *"BENEFICIARY'S CIRTIFICATE CONFIRMING THAT ONE SET OF NON NEGOTIABLE DOCUMENTS HAS BEEN SENT TO DIRECTLY TO THE APPLICANT BY COURIER SERVICE WITHIN 7 WORKING DAYS AFTER SHIPMENT."*

25. But, the bill of lading dated 15.04.2010 submitted by the petitioner appears that the said bill of lading issued one Excalibur Logistics Sydney, Australia, as carrier, who is the freight forwarder engaged by the shipper. Clause 46 A: (C) of the Letter of Credit (LC) clearly state that the Bill of Lading would be 'OCEAN BILL OF LADING' and as per 47 A (6) of the Letter of Credit state that the Bill of Lading issued by the Freight Forwarders are not acceptable. So, the Bill of Lading produced by the petitioner in the case in hand is not a bill of lading as per L/C terms and condition.

26. Apart from that, Bill of lading issued by a forwarding agent which is neither the owner nor the charterer of the vessel. For this purpose it cannot matter whether the bill is issued in its own name or under an assumed or business name which conceals it identity.

27. In view of the above it is abundantly clear that in order to get delivery order from the carrier as well as for getting payment under the above L/C, it was mandatorily required to present "Ocean Bill of Lading" and none else. But in this case, admittedly, the petitioner produced House Bill of Lading-against which petitioner is not entitle to get any delivery of goods.

28. Scrutton, Charterparties, 19th ed (1984) at 2 describes a bill of lading as follows;

"After the goods are shipped, a document called a bill of lading is issued, which serves as a receipt by the shipowner, acknowledging that the goods have been delivered to him for carriage..... the bill of lading serves also as;

1. Evidence of the contract of affreightment between the shipper and the carrier.

2. A document of title, by the endorsement of which the property in the goods for which it is a receipt may be transferred, or the goods pledged or mortgaged as security for an advance.

By statute, the rights and liabilities of the shipper under the contract of affreightment as set out in the bill of lading may be transferred with the full property in the goods to the consignee of the goods or the indorsee of the bill of lading."

29. Therefore, a document is not a bill of lading merely because that is what the purpose called it.

30. From the statement by the editors of the 19th edition of Scrutton (at 384);

"*A house bill of lading issued by a forwarding agent acting solely in the capacity in the agent to arrange carriage is not a bill of lading at all, but at most a receipt for the goods coupled with an authority to enter into a contract of carriage on behalf of the shipper. It is not a document of title, nor within the Bills of Lading Act, 1855 and it is unlikely that it would ever be regarded as a good tender under a cif-contract."*

[Emphasis added]

31. In view of the above statement, a forwarding agent issuing to its customer a house bill masquerading as an ocean bill which did not protect the petitioner on the terms of bill of lading.

32. Under the UCP 600-Article 24 relates to bill of lading. A bill of lading, however named, must appeared to;

"a. A Road, rail or inland waterway transport document, however named must appear to

i. indicate the name of the carrier and;

-be signed by the carrier or a named agent for or on behalf of the carrier, or

-indicate receipt of the goods by signature, stamp or notation by the carrier or a named agent for or on behalf of the carrier.

Any signature, stamp or notation of receipt of the goods by the carrier or agent must be identified as that of the carrier or agent.

Any signature, stamp or notation of receipt of the goods by the agent must indicate that the agent has signed or acted for or on behalf of the carrier.

If a rail transport document does not identify the carrier, any signature or stamp of the railway company will be accepted as evidence of the document being signed by the carrier.

ii. indicate the date of shipment or the date the goods have been received for shipment, dispatch or carriage at the place stated in the credit. Unless the transport document contains a dated reception stamp, an indication of the date of receipt or a date of shipment, the date of issuance of the transport document will be deemed to be the date of shipment.

iii. indicate the place of shipment and the place of destination stated in the credit.

b. i. A road transport document must appear to be the original for consignor or shipper or bear no making indicating for whom the document has been prepared.

ii. A rail transport document marked " duplicate" will be accepted as an original.

(iii) A rail or inland waterway transport document will be accepted as an original whether marked as an original or not.

c. In the absence of an indication on the transport document as to the number of originals issued, the number presented will be deemed to constitute a full set.

d. For the purpose of this article, transhipment means unloading from one means of conveyance and reloading to another means of conveyance, within the same mode of transport, during the carriage from the place of shipment, dispatch or carriage to the place of destination stated in the credit.

e.i. A road, rail or inland waterway transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document.

ii. A road, rail or inland waterway transport document indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment.

33. In the present case transport document (petitioner submitted house bill of lading) neither signed by the carrier nor a named agent for or on behalf of the carrier. Rather, it was signed by the freight forwarder. Therefore, as per a (i) of the Article 24 of UCP 600, house bill of lading submitted by the present petitioner is not a bill of lading.

34. The definition of "Carrier" in Article 1 (a) of schedule of "The Carriage of Goods by Sea Act, 1925 merits reference here and read thus:-

Schedule
Rules relating to bills of lading
Article- I
Definitions

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say-

(a) "Carrier" includes the owner or the chatterer who enters into a contract of carriage with a shipper.

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea including any bill of lading or any similar document as aforesaid issued under or pursuant to a charger party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

35. In the present case petitioner submitted an ocean bill of lading issued by EXCALIVOR LOGISTICS who is a freight forwarder and agent. Therefore, as per Article 1(a) of schedule of the Carriage of Goods Sea Act, 1925, EXCALIVOR LOGISTICS is neither an owner nor a chatterer of the vessel and had no authority to

issue any bill of lading. So, the bill of lading placed by the petitioner was not a bill of lading as per Article-1 (a) of schedule of "The carriage of goods by Sea Act, 1925."

36. On the other hand Chittagong Port is the bailee of Import containers since receiving of those containers from vessel till the delivery/disposal of such container. While the containers are stored in the port protected area Chittaong Port takes all types of safety and security measures to protect the containers till the delivery. There are different types of import containers arrive in Chittagong Port such as (1) Import FCL containers which are received in intact seal and stored in port protected area and port is liable to deliver it with intact seal, (2) Import LCL containers which are received in intact seal and unstuffed and the cargo stored in the Container Freight Station (CFS) or sheds inside port protected area, (3) Dhaka ICD bound containers which are received in intact seal and dispatched through Bangladesh railway to Dhaka Kamalapur ICD and (4) another type of containers carrying rice, wheat, mustard, animal feed, scrap, raw cotton, waste paper etc. which are not stored in port protected area and allowed to carry those container from vessel's hook point or port premises to Private Container Depot. The containers or containerized cargo subsequently delivered to the importer or to the Clearing & Forwarding agent (representative of importer) on the basis of customs clearance and Agent's delivery order after realizing the port charges.

37. The writ petitioner's containers carried wheat and that is why those containers did not store inside the port-protected area and allowed to transfer directly from vessel's hook point to private container depot (M/S Esack Brothers Industries Limited Container yard), respondent No.7 as per manifest submitted by the respective Main Line Operator (MLO).

38. In this regard, Regulations For Working Of Chittagong Port (CARGO AND CONTAINER), 2001 runs as follows:

2. The documentary formalities involved during the stages from the arrival of the containers till the delivery.

The documentary formalities for the containers which are discharged at vessel hook points on to the private depot operator's trailer and transferred those trailers from Chittagong port to private depot yard are as follows'

2.1 Shipping agent declares in Import General manifest (IGM) the container number, seal number, name of cargo, importer's name, Private depot's name where the containers will be stored etc. and submits it to Chittagong Customs Authority and Chittagong Port.

2.2 . Chittagong Port provided the container discharging permission to the nominated Berth Operator within 24 hours of vessel arrival at berth where the name of private depot as preadvised by shipping agent.

2.3 Equipment Interchange Receipt (EIR) is generated for containers to be transferred from vessel's hook point or from port premises to private depot premises.

2.4 The importers nominated C&F agents observe the customs formalities to get out pass the delivery document for taking cargo delivery from private depot premises and after obtaining customs clearance C&F agent submits customs out passed document to CPA with agent delivery order which is verified at one stop service centre of CPA and related port charges are realised accordingly which makes the delivery document as ready to take cargo delivery. Importer's agent takes the delivery of cargo from private depot premises on submission of all related documents on payment of charges a/c off Dock. It should be noted here that unless and until the import documents are not out passed or released by the customs authority. Chittagong port and private depot operators do not hold the position to deliver the cargo to the concern importer.

[Emphasis added]

39. From the aforesaid provision it appear that the duty of the C&F agent of the importer is after completion of custom formalities to get out pass the delivery document and submits it before the CPA with related port charges.

40. But, in the present case no such 'out pass' produced before the CPA along with port charges. Therefore, how the petitioner wanted to get the delivery of his goods in question. Moreover, as per provision 2.4. of the regulations for working of Chittagong Port (CARGO AND CONTAINER), 2001 unless and until the import documents are not 'out pass' or released by the customs authority CPA and private depot operators do not hold

the position to deliver the cargo to the concerned importers without customs clearance certificate, which CPA has no authority to allow delivery of the said goods.

41. From the records, we do not find any single scrap of papers whether the petitioner filed any application to get the cargo from CPA, so, how the petitioner said that the CPA refused the delivery of his goods.

42. It is also appears from the law and guiding principle of Chittagong port authority that depositing the customs duty and other charges to the custom authority does not itself mean automatic delivery the said goods. But, the petitioner is required to obtain a clearance certificate from the custom authority. In the present case, petitioner proved to fail to provide the clearance certificate to CPA and thereby, it is the petitioner's responsibility and liability that the goods are still lying at the private depot.

43. In addressing, the question raised by Mr. Hasan Ariff whether any Australian court or whether seller can stop the order, directed the local agent not to hand over the goods to the petitioner reference is had of Chapter 5 of the Sale of Goods Act, 1930 relates to "Rights of unpaid seller against the goods." In this context we quote Sections 45 to 49;

45. (1) The seller of goods is deemed to be an "Unpaid seller" within the meaning of this Act-

(a)when the whole of the price has not been paid or tendered;

(b)when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Unpaid seller's rights

46. (1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law-

(a) a lien on the goods for the price while he is in possession of them;

(b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them;

(c) a right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. [Emphasis added]

Unpaid Seller's Lien

Seller's Lien

47.(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:-

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Part delivery

48. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

Termination of lien

49(1) The unpaid seller of goods loses his lien thereon-

(a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.

(b) when the buyer or his agent lawfully obtains possession of the goods;

(c) by waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

44. Therefore, from the reading of the aforesaid sections it appears that a unpaid seller has lien on the goods for the price while he is in position of them and in case insolvency in transit and a right of the sale a right of withholding delivery and stoppage in transit. So the unpaid seller may exercise his right of lien notwithstanding that he is possession on the goods.

45. In the present case the goods in question are being held by the respondents as agent or bailee for buyer. Section 51 of the Sale of Goods Act which runs as follows;

51.(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, untill the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further desitnation for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

46. Therefore, it is evident from the record that as per Section 51 of the Sale of Goods Act the goods in question in transit. And as per Section 50 of the Sale of Goods Act, the unpaid seller has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

47. The petitioner's lawyer Mr. Ariff submits before the court that the petitioner has incurred huge loss and accordingly prays for compensation. In this regard Sales of Goods Act provides specifically in Chapter VI thus:

THE SALE OF GOODS ACT,1930

CHAPTER VI

SUITS FOR BREACH OF THE CONTRACT

55. (1) where under a contract of sale the property in the goods has passed to the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

(2) where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

56. Where the buyer wrongfully neglects or refuses to accept and pay for the buyer, the buyer may sue the seller for damages for non-delivery.

57. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

58. Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to delier specific or ascertained goods, the Court may, if it thinks fit, on the application of plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

59. (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject other goods; but he may-

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

60. Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and use for damages for the breach.

61. (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price-

(a) to the seller in a suit by him for the amount of the price –from the date of the tender of the goods or from the date on which the price was payable.

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller-from the date on which the payment was made.

48. Therefore, if the seller wrongfully neglects or refuses to deliver the goods to the buyer i.e. someone in the position of the present petitioner, then the petitioner, if he deems it necessary, can indeed take recourse of the law as referred to above. The findings above of this Court are necessarily confined to the facts unique to this case and predicated on documents as found on record.

49. In light of the above facts and circumstances, the relevant provisions of law and the observations and findings, we do not find any excellence in this Rule.

50. In the result, the Rule is discharged. There is no order as to cost.

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1 SCOB [2015] HCD 147

HIGH COURT DIVISION
(Criminal Miscellaneous Jurisdiction)

Criminal Miscellaneous Case No.17553 OF 2006

Md. Mahbubar Rahman @ Babu and others
... Petitioners
-Versus-

The State
... Opposite party

None appears
…… For the petitioners
Mr. Biswojit Roy, D.A.G. with
Mr. Bibhuti Bhuson Biswas, A. A.G.
….. for the opposite party

Heard on 26.07.2015, 02.08.2015 and
Judgment on 03.08.2015

Bench:
Mr. Justice Md. Ruhul Quddus
And
Mr. Justice Bhishmadev Chakrabortty

Children Act, 1974
Section 4 and section 3:
Considering the above provisions of section 4 and section 3 of the Act, 1974 is has been held in the case of Bimal Das –Vs- The State, reported in 46 DLR 460, that the Sessions Judge may also, where the situation demands it, exercise the power of a Juvenile Court. ...(Para 10)

Children Act, 1974
Sub-section 2 of section 7
and
Rule 4 of the Children Rules 1976:

Although Druto Bichar Tribunal No.1, Dhaka has the jurisdiction to try and proceed with Juvenile Druto Bichar Case No.01 of 2006 simultaneously with Druto Bichar Sessions Case No. 12 of 2006, but in dealing with the Juvenile Case it is bound to follow the provisions of law as laid down in sub-section 2 of section 7 of the Act, 1974 and Rule 4 of the Rules 1976, i.e., either it has to sit in a building or room different from that in which the ordinary sittings of the Court are held, or on different days or at different times from those at which the ordinary sittings of the Court are held. It means that at least the case should be tried at different times even on the same day than that of other cases of ordinary jurisdiction. ...(Para 13)

Judgment

Bishmadev Chakrabortty, J.

1. This Rule at the instance of seven accused persons of a criminal case was issued calling upon the Deputy Commissioner, Dhaka to show cause as to why the impugned proceedings of Druto Bichar Tribunal Juvenile Case No.01 of 2006 arising out of Kotwali (Faridpur) Police Station Case No.54 dated 28.03.2005 now pending in the Court of Druto Bichar Tribunal No. 1, Dhaka should not be quashed.

2. At the time of issuance of the Rule, the proceedings of Druto Bichar Tribunal Juvenile Case No.1 of 2006 was stayed till disposal of the Rule.

3. The facts for disposal of the Rule, in short, are that the informant, Md. Milon Mia, lodged a First Information Report (briefly the FIR) with the Kotwali Police Station implicating the petitioners and others bringing allegation of killing his younger brother Jewel by them. The said FIR was registered as Kotwali Police Station Case No.54 dated 28.03.2005 corresponding to G.R. No.147 of 2005 under sections 143/147/302 and 114 of the Penal Code.

4. The police after investigation submitted charge sheet on 29.04.2005 bearing No.162 (Ka) against 9 persons including these petitioners under sections 143/149/302 and 114 of the Penal Code. Another charge sheet

bearing No.162 dated 29.06.2005 out of the same FIR was also submitted against other 3(three) persons namely Masud, Parvez and Pappu as they were major at that time.

5. In course of time the record of Kotwali Police Station Case No.54 dated 28.03.2005 corresponding to G.R. No.147 of 2005 was sent to the Sessions Judge, Faridpur for trial. Subsequently the Government in the Ministry of Home Affairs vide gazette notification dated 01.12.2005 sent the said Case to the Court of Druto Bichar Tribunal No.1, Dhaka for speedy trial. The case against the present petitioners was renumbered as Druto Bichar Tribunal Juvenile Case No.1 of 2006 and the case against other co-accused who were major was renumbered as Druto Bichar Tribunal Sessions Case No.12 of 2006. The Druto Bichar Tribunal No. 1, Dhaka took up both the cases for trial simultaneously. In course of trial the present petitioners on 04.07.2006 filed an application before the Druto Bichar Tribunal under Sections 6, 7(2) and 7(4) of the Children Act, 1974 (briefly the Act, 1974) on the ground that the provisions of law as laid down in sections 6, 7(2) and 7(4) of the Act, 1974, both the cases should not be tried together, and as such they prayed for stay of further proceeding of Druto Bichar Juvenile Case No.1 of 2006 till disposal of Druto Bichar Tribunal Sessions Case No.12 of 2006. The Druto Bichar Tribunal No.1, Dhaka by its order No.16 dated 29.08.2006 rejected the said application holding that the trial of both the cases are going on simultaneously, and as such the contents of the application are not tenable in the eye of law.

6. Being aggrieved by the proceedings of Druto Bichar Tribunal Juvenile Case No. 1 of 2006 now pending in the Court of Druto Bichar Tribunal No.1, Dhaka the above accused petitioners moved this application before this Court under Section 561A of the Code of Criminal Procedure and obtained the present Rule and interim order of stay.

7. None appears on behalf of the petitioners to press the Rule, although the matter has been appearing in the list for several days with the name of the learned Advocate for the petitioners.

8. On the other hand, Mr. Biswojit Roy, the learned Deputy Attorney General, appearing on behalf of the State has submitted that the Druto Bichar Tribunal No.1, Dhaka having the power of Sessions Judge has been conducting the case as Juvenile Court and there is no bar to hold trial of both the cases simultaneously, and as such the Rule should be discharged.

9. We have heard the learned Deputy Attorney General and perused the FIR, charge sheet, connecting orders and provisions of law of Sections 4, 5 and 7 of the Children Act, 1974.

Section 4 of the Children Act, 1974 reads as follows:

The powers conferred on a Juvenile Court by this Act shall also be exercisable by-

(a) The High Court Division,
(b) a Court of Session,
(c) a Court of an Additional Sessions Judge and of an Assistant Sessions Judge,
(d) a Sub-Division Magistrate, and
(e) *a Magistrate of the First Class, whether trying any case originally or on appeal or in revision.*

10. Considering the above provisions of section 4 and section 3 of the Act, 1974 is has been held in the case of Bimal Das –Vs- The State, reported in 46 DLR 460, that the Sessions Judge may also, where the situation demands it, exercise the power of a Juvenile Court.

11. Section 5 of the Act, 1974 has given certain power to the Court for conducting the cases of Juveniles. Section 6 of the Act, also prohibits joint trial of child and adult. Sub-Section 2 of section 7 of the Act, 1974 also provides:

In the trial of a case in which a child is charged with an offence a Court shall, as far as may be practicable, sit in a building or room different from that in which the ordinary sittings of the Court are held, or on different days or at different times from those at which the ordinary sittings of the Court are held.

Rule 4 of the Children Rules 1976 (briefly the Rule, 1976) prescribes:

(1) The heading of all cases and proceeding shall be conducted in as simple a manner as possible without observing any formality and care shall be taken to ensure that the child against whom the case or proceeding has been instituted feels home-like atmosphere, during the hearing.
(2) The Court shall see that the child brought before it is not kept under the close guard of a police officer but sits or stands by himself or in the company of a relative or friend or a Probation Officer at some convenient place.

12. In the instant case, initially the case record was sent to the Sessions Judge, Faridpur for trial which was subsequently sent to the Court of Druto Bichar Tribunal No.1, Dhaka by gazette notification dated 01.12.2005 for speedy trial. The Druto Bichar Tribunal constituted under the provisions of Druto Bichar Tribunal Ain, 2002 holds similar jurisdiction as of Sessions Judge. In the petition nowhere it has been stated or alleged that the Druto Bichar Tribunal No. 1, Dhaka has got no authority to proceed with the above Juvenile case. So considering the facts and provisions of law we are of the view that the Druto Bichar Tribunal No.1, Dhaka is empowered to proceed with the cases of Juveniles, i.e., it is empowered to hold the trial of Druto Bichar Tribunal Juvenile Case No.01 of 2006. Since Sessions Case No.166 of 2005, subsequently renumbered as Druto Bichar Sessions Case No.12 of 2006, and Sessions Juvenile Case No.01 of 2005, which was subsequently renumbered as Druto Bichar Tribunal Juvenile Case No.01 of 2006 arises out of the selfsame Kotwali Police Station Case No.54 dated 28.03.2005 corresponding to G.R. No.147 of 2005, the Druto Bichar Tribunal No.1, Dhaka proceeded with the hearing of both the cases simultaneously legally without violating any provisions of law.

13. Although Druto Bichar Tribunal No.1, Dhaka has the jurisdiction to try and proceed with Juvenile Druto Bichar Case No.01 of 2006 simultaneously with Druto Bichar Sessions Case No. 12 of 2006, but in dealing with the Juvenile Case it is bound to follow the provisions of law as laid down in sub-section 2 of section 7 of the Act, 1974 and Rule 4 of the Rules 1976, i.e., either it has to sit in a building or room different from that in which the ordinary sittings of the Court are held, or on different days or at different times from those at which the ordinary sittings of the Court are held. It means that at least the case should be tried at different times even on the same day than that of other cases of ordinary jurisdiction.

14. We are unable to ascertain whether in conducting the juvenile case the Druto Bichar Tribunal No.1, Dhaka as Juvenile Court has followed the procedure as laid down in sub-section 2 of section 7 of the Act, 1974. We are also unable to ascertain whether in conducting aforesaid case the procedure as laid down in Rule 4 of the Rules, 1976 was at all followed, i.e., whether trial commenced in home-like atmosphere.

15. In view of the above we find no bar for the Druto Bichar Tribunal No. 1, Dhaka to proceed with the Juvenile Case and the Druto Bichar Tribunal Case arising out of same case and selfsame offence simultaneously, but in holding trial of the case of Juveniles, the Court in exercising the jurisdiction of the Juvenile Court is bound to follow the provisions of sub-section 2 of section 7 of the Act, 1974 and Rule 4 of the Rules, 1976.

16. In the above facts and circumstances, we find no illegality or infirmity by the Druto Bichar Tribunal No. 1 Dhaka in proceeding with the trial of those two cases simultaneously, but the Tribunal in conducting trial of the Druto Bichar Tribunal Juvenile Case No. 1 of 2006 shall follow the provisions of law of sub-section 2 of Section 7 of the Act, 1974 and Rule 4 of the Rules, 1976.

17. In the above facts and circumstances of the case, we find no ground to quash the proceedings of Druto Bichar Tribunal Juvenile Case No.01 of 2006 pending before the Druto Bichar Tribunal No.1, Dhaka.

18. In the result, the Rule is discharged. The order of stay granted earlier stands vacated. The Druto Bichar Tribunal No.1, Dhaka is directed to proceed with the juvenile case in accordance with law and during the trial of the case it shall follow the provisions of sub-section 2 of section 7 of the Act, 1974 and Rule 4 of the Rules, 1976, in the light of observation made in the body of the judgment.

19. Send a copy of the judgment to the concerned Court at once.

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