Supreme Court Online Bulletin

(Law Report)

January, 2016

Editors
Justice Moyeenul Islam Chowdhury
Justice Sheikh Hassan Arif

Citation
6 SCOB [2016] AD
6 SCOB [2016] HCD

Supreme Court of Bangladesh

Published by
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Supreme Court of Bangladesh

Judges of the Appellate Division

1. Mr. Justice Surendra Kumar Sinha,
   Chief Justice
2. Mr. Justice Md. Abdul Wahhab Miah
3. Madam Justice Nazmun Ara Sultana
4. Mr. Justice Syed Mahmud Hossain
5. Mr. Justice Muhammad Imman Ali
6. Mr. Justice Hasan Foez Siddique

Judges of the High Court Division

1. Mr. Justice Syed Muhammad Dastagir Husain
2. Mr. Justice Mirza Hussain Haider
3. Mr. Justice Sharif Uddin Chaklader
4. Mr. Justice Md. Mizanur Rahman Bhuiyan
5. Mr. Justice Syed A.B. Mahmudul Huq
6. Mr. Justice Tariq ul Hakim
7. Madam Justice Salma Masud Chowdhury
8. Mr. Justice Farid Ahmed

9. Mr. Justice Shamim Hasnain

10. Mr. Justice A.F.M Abdur Rahman

11. Mr. Justice Md. Abu Tariq

12. Madam Justice Zinat Ara

13. Mr. Justice Muhammad Abdul Hafiz

14. Mr. Justice Syed Refaat Ahmed

15. Mr. Justice Md. Miftah Uddin Choudhury

16. Mr. Justice A.K.M. Asaduzzaman

17. Mr. Justice Md. Ashfaqul Islam

18. Mr. Justice Zubayer Rahman Chowdhury

19. Mr. Justice Md. Abdul Hye

20. Mr. Justice Quamrul Islam Siddique

21. Mr. Justice Md. Fazlur Rahman

22. Mr. Justice Moyeenul Islam Chowdhury

23. Mr. Justice Md. Emdadul Huq

24. Mr. Justice Md. Rais Uddin

25. Mr. Justice Md. Emdadul Haque Azad

26. Mr. Justice Md. Ataur Rahman Khan

27. Mr. Justice Syed Md. Ziaul Karim

28. Mr. Justice Md. Rezaul Haque

29. Mr. Justice Sheikh Abdul Awal

30. Mr. Justice S.M. Emdadul Hoque

31. Mr. Justice Mamnoon Rahman

32. Madam Justice Farah Mahbub

33. Mr. Justice Md. Nizamul Huq

34. Mr. Justice Mohammad Bazlur Rahman

35. Mr. Justice A.K.M. Abdul Hakim

36. Mr. Justice Borhanuddin

37. Mr. Justice M. Moazzam Husain

38. Mr. Justice Soumendra Sarker

39. Mr. Justice Abu Bakar Siddiquee

40. Mr. Justice Md. Nuruzzaman

41. Mr. Justice Md. Moinul Islam Chowdhury

42. Mr. Justice Obaidul Hassan

43. Mr. Justice M. Enayetur Rahim

44. Madam Justice Naima Haider

45. Mr. Justice Md. Rezaul Hasan (M.R. Hasan)

46. Mr. Justice Md. Faruque (M. Faruque)

47. Mr. Justice Md. Shawkat Hossain

48. Mr. Justice F.R.M. Nazmul Ahasan

49. Madam Justice Krishna Debnath

50. Mr. Justice A.N.M. Bashir Ullah

51. Mr. Justice Abdur Rob

52. Mr. Justice Quazi Reza-ul Hoque

53. Mr. Justice Md. Abu Zafor Siddique

54. Mr. Justice A.K.M. Zahirul Hoque

55. Mr. Justice Jahangir Hossain

56. Mr. Justice Sheikh Md. Zakir Hossain

57. Mr. Justice Md. Habibul Gani

58. Mr. Justice Gobinda Chandra Tagore

59. Mr. Justice Sheikh Hassan Arif

60. Mr. Justice J.B.M. Hassan

61. Mr. Justice Md. Ruhul Quddus

62. Mr. Justice Md. Khasruzzaman

63. Mr. Justice Farid Ahmed

64. Mr. Justice Md. Nazrul Islam Talukder

65. Mr. Justice Bhabani Prasad Singha

66. Mr. Justice Anwarul Haque

67. Mr. Justice Md. Akram Hossain Chowdhury

68. Mr. Justice Md. Ashraful Kamal

69. Mr. Justice S.H. Md. Nurul Huda Jaigirdar

70. Mr. Justice K.M. Kamrul Kader

71. Mr. Justice Md. Mozibur Rahman Miah

72. Mr. Justice Mustafa Zaman Islam

73. Mr. Justice Mohammad Ullah

74. Mr. Justice Muhammad Khurshid Alam Sarkar

75. Mr. Justice A.K.M. Shahidul Huq

76. Mr. Justice Shahidul Karim

77. Mr. Justice Md. Jahangir Hossain

78. Mr. Justice Abu Taher Md. Saifur Rahman

79. Mr. Justice Ashish Ranjan Das

80. Mr. Justice Mahmudul Hoque

81. Mr. Justice Md. Badruzzaman

82. Mr. Justice Zafar Ahmed

83. Mr. Justice Kazi Md. Ejarul Haque Akondo

84. Mr. Justice Md. Shahinur Islam

85. Madam Justice Kashefa Hussain

86. Mr. Justice S.M. Mozibur Rahman

87. Mr. Justice Md. Farid Ahmed Shibli

88. Mr. Justice Amir Hossain

89. Mr. Justice Khizir Ahmed Choudhury

90. Mr. Justice Razik-Al-Jalil

91. Mr. Justice J. N. Deb Choudhury

92. Mr. Justice Bhishmadev Chakrabortty

93. Mr. Justice Md. Iqbal Kabir

94. Mr. Justice Md. Salim

95. Mr. Justice Md. Shohrowardi

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Cases of the Appellate Division

Sl. No	Name of the Parties and Citation	Key Word	Short Ratio
1.	Bangladesh & ors Vs Sontosh Kumar Shaha & ors 6 SCOB [2016] AD 1	Article 102 and 44 of the Constitution; Clause (5) of article 102 read with article 117(2) of the Constitution; The power of Administrative Tribunal to pass interim order;	Despite the absence of any provision empowering the Tribunal to pass any interim order, the Tribunal is not powerless since it has all the powers of a civil court and in proper cases, it may invoke its inherent power and pass interim order with a view to preventing abuse of the process of court or the mischief being caused to the applicant affecting his right to promotion or other benefit. But the Tribunal shall not pass any such interim order without affording the opposite party affected by the order an opportunity of being heard. However, in cases of emergency, which requires an interim order in order to prevent the abuse of the process and in the event of not passing such order preventing such loss, which cannot be compensated by money, the Tribunal can pass interim order as an exceptional measure for a limited period not exceeding fifteen days from the date of the order unless the said requirements have been complied with before the expiry of the period, and the Tribunal shall pass any further order upon hearing the parties.
2.	Md. Nurul Abser Vs Alhaj Golam Rabbani & ors 6 SCOB [2016] AD 54	Arbitration Act, 2001: Sections 39, 42, 43 and 44:	A combined reading of the provisions of sections 42, 43 and 39 of the Act, 2001 clearly shows that the only remedy open to a person who wants to set aside an arbitral award is to file an application under section 42 of the Act, 2001 within sixty days from the date of receipt of the award and after the expiry of the period of sixty days as envisaged in the section, the award becomes enforceable within the meaning of section 44 thereof and thus, jurisdiction of the civil Court has impliedly been barred if not expressly. In the context, we may also refer to section 9 of the Code which has clearly provided that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred and therefore, in view of the provision of section 42 of the Act, 2001, clause (d) of rule 11, Order VII of the Code is attracted.

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Sl. No	Name of the Parties and Citation	Key Word	Short Ratio
3.	Mrs. Ruksana Huq & ors Vs A. K. Fayazul Huq & ors 6 SCOB [2016] AD 61	Code of Civil Procedure, 1908 Order I rule 10(2)	Though there is no clear provision mentioning the word 'transposition' but order I rule 10(2) of the Code of Civil Procedure enables the courts to make such transposition, Order I rule 10(2) has empowered the courts to strike out name of any party, either plaintiff or defendant, improperly joined and also to add any persons-either as plaintiff or defendant-who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary for effectual and complete adjudication of the matter. Exercising this very power the courts can make transposition also of either of the parties of a suit or other proceeding to the other category of the parties and the courts also are doing so, and it has become a long practice now. Of course, generally, the courts will not allow transposition of defendants as plaintiffs after striking the names of the original plaintiffs or after transposing them as defendants. But in appropriate facts and circumstances-as these are in the present case-the courts should not be reluctant to make such transposition of the parties for the ends of justice or to prevent abuse of the process of the court.
4.	Bangladesh & anr Vs Md. Bellal Hossain Mollik & anr 6 SCOB [2016] AD 65	Police Officers (Special Provisions) Ordinance, 1976 Section 3 read with Bangladesh Public Service Commission (Consultation) Regulation, 1979 Regulation 6:	On consideration of section 3 of the Ordinance vis-a-vis regulation 6 of the Regulations, it is obvious that consultation with Public Service Commission is mandatory before passing the order of dismissal in respect of each of the respondent as section 3 of the Ordinance has not ousted the operation of other laws, rules and regulations.
5.	Sohel Dewan & ors Vs State 6 SCOB [2016] AD 70	Penal Code, 1860 Section 302/34:	In the facts of the case before us, where there is some inkling of a doubt as to which of the shots from the firearms of the accused caused the death, or conversely which one of the three accused who fired the shots missed his target, the application of sections 302/34 of the Penal Code was correct, but the question remains as to whether the death sentence would be appropriate. We are inclined towards the view that where the conviction is not under section 302 of the Penal Code simpliciter, and where the

Cases of the Appellate Division

Sl. No	Name of the Parties and Citation	Key Word	Short Ratio
			complicity of the accused is proved by the aid of section 34 of the Penal Code, then the sentence of death would not be appropriate.
6.	Anti Corruption Commission Vs Md. Shahidul Islam & ors 6 SCOB [2016] AD 74	Public Servants; Members of Parliament; Anti-Corruption Commission	The oath that they took referred to their obligation to "faithfully discharge the duty" upon which they were about to enter. They are public servants since they held office by virtue of which they were authorized or required to perform public duty. The word "office" has been used in Articles 3 and 3D of P.O.28 of 1973 meaningfully.

Cases of the High Court Division

SL No.	Name of the parties and Citation	Key Words	Ratio
1.	Anowar Ahmed & anr Vs State 6 SCOB [2016] HCD 1	Code of Criminal Procedure, 1898 Section 561A:	The customs authority being satisfied about the import documents, released the imported cloths from customs station and the petitioners handed over the imported cloths to the importer as C and F Agent from the Custom Area and place of business of the petitioners is the Customs House or Custom Area as per section 2(i) and 207 of the Customs Act, 1969 and Rule 2(b) of the Rules 1986 and consequently petitioners are in no way responsible for the alleged offence. The petitioners as agent cannot be held liable for the work of the Principal and thus the petitioners committed no offence within the meaning of sections 420/468/469/471/34 of the Penal Code.
2.	Bright Textile Ind. (Pvt.) Ltd Vs Commissioner of Taxes 6 SCOB [2016] HCD 5	Income Tax Ordinance, 1984 Section 35, 83	The DCT concern, prior to discarding the book versions of the accounts has to raise dissatisfaction as to the method of accounting as to its cumbersomeness that the true and correct income of the Assessee-applicant cannot be deduced therefrom or to pin point the defect in the accounts; else the DCT concern has to accept the book version of the accounts as submitted by the Assessee-applicant and audited and certified by the chartered accountant.
3.	Md. Saidur Rahman Sarker Vs Bangladesh & ors 6 SCOB [2016] HCD 13	Election Commission independent decision	It does not appear that the Election Commission, after admitted declaration of schedule for holding election of Botlagari Union, has taken independent decision of its own considering the facts and circumstances of the case. Rather, it passed the impugned order at the proposal/direction of the Ministry of Local Government, Rural Development and Co-operatives. Therefore, it cannot be said that the impugned order passed by the Election Commission is lawful.
4.	M. A. Hashem Vs. Artha Rin Adalat, Dhaka & ors 6 SCOB [2016] HCD 19	Statutory privilege; The right of redemption of the mortgagor; Artah Rin Adalat Ain, 2003, Section 33, 38,	A statutory privilege is a nascent right reserved to an individual person but this privilege is lost once he/she himself infringes it or abandons it voluntarily. The Writ Petitioner in fact has abandoned the statutory privilege by willfully and

Cases of the High Court Division

SL No.	Name of the parties and Citation	Key Words	Ratio
		45	deliberately refraining from depositing the balance amount of bid money within the prescribed period of limitation. By filing the application seeking permission to deposit the balance 75% bid money instead of depositing the amount directly, the auction purchaser relinquished his known statutory right as auction purchaser and waived all his rights to the property in question as well as the earnest money deposited by him.
5.	Dr. Moazzem Hossain Vs Bangladesh & ors 6 SCOB [2016] HCD 34	Writ Court; Court of equity	Will the petitioner continue to suffer loss of his seniority through no fault of his own? Is the Writ Court powerless in this regard? In this connection, it may be pointed out that the Writ Court is also a Court of equity. The principles of natural justice, equity and good conscience demand that the seniority of the petitioner be restored at least from the date of promotion of his colleague Dr. Md. Jubair Bin Alam to the post of Personal Professor on 06.11.2004 who admittedly made his application therefor on 28.12.2003 which was subsequent to the date of making of the application by the petitioner on 21.12.2003. In this way, the injustice done to the petitioner, according to us, can be remedied.
6.	State Vs Kalam alias Abul Kalam 6 SCOB [2016] HCD 43	Dying declaration; Motive; Abscondence	A dying declaration, whether written or oral, if accepted by the Court unhesitatingly, can itself provide a strong basis for convicting an accused.
7.	Barakatuallah Electro Dynamics Ltd Vs BPDB & ors 6 SCOB [2016] HCD 56	Bangladesh Power Development Board Order, 1972, Article 2; Doctrine of estopple	It appears from Clause-(d) of Article-2 of P.O. 59 of 1972 that the term "Government" has been specifically defined therein. According to the said provision, "Government" means the Government of the People's of Bangladesh. Clause-(h) of Article-2 further provides that "Power Board" means Bangladesh Power Development Board as constituted by the said PO 59 of 1972. The very definition of these two terms clearly indicates the intention of the Legislature in that the Legislature wanted to keep these two terms separately with separate definitions.

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SL No.	Name of the parties and Citation	Key Words	Ratio
8.	Md. Yousuf Ali Akon & ors Vs. BIWTA & ors. 6 SCOB [2016] HCD 66	Legitimate expectation	In the advertisement dated 19.01.2004, the authority has given an express promise to that effect that the appointee shall be on a probation period of 1 (one) year and after satisfactory completion of the said probationary period, the appointee shall be absorbed and therefore, the petitioners' legitimate expectation arises. The petitioners successfully made out a case of legitimate expectation. The petitioners had a legitimate expectation to be absorbed against the permanent posts on the basis of the advertisement published in the "Daily Observer" on 19.01.2004. In the background of the advertisement dated 19.01.2004, there was reasonable expectation of their being permanently absorbed in the post of Master Pilots.
9.	Abdus Salam & ors. Vs. State 6 SCOB [2016] HCD 82	partisan witness; ocular evidence; medical evidence; Value of evidence by child witness	The ocular evidence of prosecution witnesses supported by post mortem report with regard to the injury no. 1 and 2 cannot be disbelieved. Further, the medical evidence is only corroborative in nature, in that view, the ocular evidence of the eye-witnesses, which substantially corroborates the injuries on the person of the deceased Rokshana, must be accepted.
10.	Mahbub Ali Vs. Judge, Artha Rin Adalat & ors 6 SCOB[2016]HCD 102	Necessary parties in an Artha Rin Suit; Artha Rin Adalat Ain, 2003, Section 6;	It appears that, admittedly, defendant no. 3-petitioner was neither a borrower nor guarantor and even nor a mortgagor relating to the loan liability and, therefore, he is not liable for repayment of the loan inasmuch as the petitioner does not come within the purview of sub-section (5) of section 6 of the Ain, 2003, wherein who will be the necessary party in the Artha Rin suit has been provided, and hence the suit ought to have been dismissed as against this defendant no. 3- petitioner.
11.	Rashid & ors Vs. State & ors 6 SCOB[2016]HCD 108	Code of Criminal Procedure, 1898, Section 436;	The learned Sessions Judge, Sunamgonj appears to have fallen in error in law in directing the learned Judicial Magistrate to take cognizance directly inasmuch as from a mere reading of Section 436 of the CrPC, it appears that the learned Sessions Judge is not empowered to directly ask any Judicial Magistrate to take cognizance.

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SL No.	Name of the parties and Citation	Key Words	Ratio
12.	Md. Sadek Hossain & ors Vs. Most. Azmeri Begum and ors. 6 SCOB[2016]HCD 112	Evidence Act, 1872, Section 115	From a close reading of Section 115 of the Evidence Act ..., it is quite clear that the legislature does not allow a person from retracting or denying anything that which he might intentionally have said or done either verbally or by action or by omission and the consequence of which might have led some other person to rely on such as true or act upon such belief. This is as we find is clearly barred under the law. It is also significant to note that the bar is not confined to a particular type or class of suits but it applies to 'any' suit or proceeding be it Civil or Criminal whatever may be the nature, class or category of the suit or proceeding. It is evident from perusal of the same that Section 115 in no way distinguishes or otherwise makes any distinction between Civil and Criminal Proceedings. From the language of Section 115 itself it is evident that it applies to all proceedings.
13.	Musa Kalimullah Vs Secretary, WR, MoWD & ors 6SCOB[2016] HCD 124	Promotion; time scale	It transpires that for a Steno-Typist of the Board the post of Stenographer is a promotion post and the decision of promotion is to be made on the basis of merit through open competition in which serving Steno-Typists and outsiders may take part. It is true that the Petitioner had earlier drawn the benefits of 3 time-scales as a Steno-Typist. So, on being promoted as Stenographer he has become entitled again to get the benefits of a new-slot of time-scales subject to fulfilling essential conditions like- satisfactory service of 8, 12 or 15 years.

6 SCOB [2016] AD 1

APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha,
Chief Justice
Mr. Justice Md. Abdul Wahhab Miah
Mrs. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.159 OF 2010
(From the Judgment and order dated 05.02.2009 passed by the High Court Division in Writ Petition No.2438 of 2004)

WITH

CIVIL APPEAL NO.131 OF 2012
(From the Judgment and order dated 24.8.2010 passed by the High Court Division in Writ Petition No.6967 of 2009)

WITH

CIVIL APPEAL NO.132 OF 2012
(From the Judgment and order dated 15.5.2011 passed by the High Court Division in Writ Petition No.1929 of 2010)

WITH

CIVIL APPEAL NO.133 OF 2012
(From the Judgment and order dated 13.12.2011 passed by the High Court Division in Writ Petition No.7717 of 2010)

WITH

CIVIL APPEAL NO.134 OF 2012
(From the Judgment and order dated 10.6.2010 passed by the High Court Division in Writ Petition No.1309 of 2010)

WITH

CIVIL APPEAL NO.128 OF 2015.
(From the Judgment and order dated 08.09.2014 passed by the High Court Division in Writ Petition No. 2327 of 2014)

WITH

CIVIL APPEAL NO.119 OF 2008.
(From the Judgment and order dated 27.07.2005 passed by the High Court Division in Writ Petition No. 4935 of 2000)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.703 OF 2014
(From the Judgment and order dated 10.06.2012 passed by the High Court Division in Writ Petition No. 7483 of 2009)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.2026 OF 2015
(From the Judgment and order dated 09.09.2014 passed by the High Court Division in Writ Petition No.12321 of 2013)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.2295 OF 2010
(From the Judgment and order dated 04.08.2010 passed by the High Court Division in Writ Petition No. 454 of 2010)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.955 OF 2011
(From the Judgment and order dated 09.12.2010 passed by the High Court Division in Writ Petition No. 5670 of 2010)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.1854 OF 2011
(From the Judgment and order dated 09.12.2010 passed by the High Court Division in Writ Petition No.5670 of 2010)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.2539 OF 2012

(From the Judgment and order dated 24.11.2011 passed by the High Court Division in Writ Petition No.1118 of 2011)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.1782 OF 2015

(From the Judgment and order dated 16.4.2014 passed by the High Court Division in Writ Petition No.7657 of 2011)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NOS.1415, 1416, 1417, 1418, 1419, 1420 and 1421 OF 2015

(From the Judgment and order dated 05.02.2015 passed by the High Court Division in Writ Petition Nos. 1220, 1221, 1222, 1986, 1987, 2151, 7591 of 2011)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NOS.644-645 OF 2015

(From the Judgment and order dated 23.7.2014 passed by the High Court Division in Writ Petition Nos.6263 and 6264 of 2014.)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NOS.1445, 1768, 2133-34 and 2320 OF 2015

(From the Judgment and order dated 10.4.2014 passed by the High Court Division in Writ Petition Nos.7272, 8706, 8707, 1385 of 2009 and 4544 of 2010)

Government of Bangladesh and others	:	Appellants. (In C.A.No.159 of 2010 & C.A.Nos.131, 132, 133 of 2012, C.A. Nos.128 of 2015, 119 of 2008)
Bangladesh, represented by the Secretary, Ministry : of Home Affairs, Bangladesh Secretariat, Ramna, Dhaka-1000 and others		Appellants. (In C.A.No.134 of 2012)
The Board of Intermediate and : Secondary Education, Barisal, represented by the Chairman, Barisal and another		Petitioners. (In C.P.No.703 of 2014)
Government of Bangladesh and others	:	Petitioners. (In C.P.Nos.2026 of 2015, 2295 of 2010, 955, 1854 of 2011, 2539 of 2012, 1782 of 2015, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 644 and 645 of 2015)
Md. Humayun Kabir	:	Petitioner (In C.P.No.1445 of 2015)
Md. Fariduzzaman	:	Petitioner (In C.P.No.2133 of 2015)
Md. Farid Mia	:	Petitioner (In C.P.No.2134 of 2015)
Mosammat Selina Begum	:	Petitioner (In C.P.No.2320 of 2015)

Mohammad Asgar Ali	:	Petitioner (In C.P.No.1768 of 2015)
=Versus=		
Sontosh Kumar Shaha and others	:	Respondents. (In C.A.No.159 of 10)
Bangladesh Stenographer Association(BSA):		Respondent. (In C.A.No.131 of 2012)
Md. Mofazzal Hossain and another	:	Respondents. (In C.A.No.132 of 2012)
Md. Sohraowarddi and others	:	Respondents. (In C.A.No.133 of 2012)
Khalilur Rahman and others	:	Respondents. (In C.A.No.134 of 2012)
Syed Shah Alam and others	:	Respondents. (In C.A.No.128 of 2015)
Ms. Sabiha Ahmed	:	Respondent. (In C.A.No.119 of 2008)
Kazi Abdul Jalil	:	Respondent. (In C.P.No.703 of 2004)
Khan Md. Abdul Bari and others	:	Respondents. (In C.P.No.2026 of 2015)
Md. Zahir Raihan Siddique	:	Respondent. (In C.P.No.2295 of 2010)
Md. Osman Ghani and others	:	Respondents. (In C.P.No.955 of 2011)
Md. Osman Ghani and others	:	Respondents. (In C.P.No.1854 of 2011)
Md. Hafizur Rahman and others	:	Respondents. (In C.P.No.2539 of 2012)
Md. Ratan Hossain Talukder and others	:	Respondents. (In C.P.No.1782 of 2015)
Tilok Chandra Dev and others	:	Respondents. (In C.P.No.1415 of 2015)
Kazi Harun-or-Rashid and others	:	Respondents. (In C.P.No.1416 of 2015)

S.M. Hafizur Rahman and others : Respondents.
(In C.P.No.1417 of 2015)

Md. Abdul Mannan and others : Respondents.
(In C.P.No.1418 of 2015)

Muhammad Jafor Ahmed Siddique and others: Respondents.
(In C.P.No.1419 of 2015)

Bimal Chandra Sharkar and others : Respondents.
(In C.P.No.1420 of 2015)

A.B.M. Sekendeer Kabir : Respondents.
(In C.P.No.1421 of 2015)

Government of Bangladesh, : represented by the Secretary, Ministry of Local Government, Rural Development and Co- operative, Bangladesh Secretariat, Ramna, Dhaka and others Respondents.
(In C.P. No.1445 of 2015)

Government of the People's : Republic of Bangladesh, represented by the Secretary, Ministry of Education, Bangladesh Secretariat, Ramna, Dhaka and others Respondents.
(In C.P.Nos.2133, 2134 of 2015)

Government of the People's : Republic of Bangladesh, represented by the Secretary Ministry of Establishment, Bangladesh Secretariat, Ramna, Dhaka and others Respondents.
(In C.P.Nos.2330, 1768 of 2015)

Md. Jahangir Hossen and others : Respondents.
(In C.P.No.644 of 2015)

Saima Akter and others : Respondents.
(In C.P.No.645 of 15)

For the Appellant : Mr. Mahbubey Alam, Attorney General, instructed
(In C.A.No.159 of 2010) by Mr. Haridas Paul, Advocate-on-Record.

For the Appellant : Mr. Mahbubey Alam, Attorney General, instructed
(In C.A.Nos.131 & 133 of 2012) by Mr. Haridas Paul, Advocate-on-Record.

For the Appellant : Mr. Mahbubey Alam, Attorney General, instructed
(In C.A.No.132 of 2012) by Mr. Md. Zahirul Islam, Advocate-on-Record.

For the Appellant : (In C.A.No.134 of 2012)	Mr. Mahbubey Alam, Attorney General, instructed by Mrs. Sufia Khatun, Advocate-on-Record.
For the Appellant : (In C.A.No.128 of 2015)	Mr. Haridas Paul, Advocate-on-Record.
For the Appellant : (In C.A.No.119/08)	Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For the Petitioner : (In C.P.No.2295 of 2010)	Mrs. Sufia Khatun, Advocate-on-Record.
For the Petitioner : (In C.P.No.955 of 2011)	Mr. Md. Zahirul Islam, Advocate-on-Record.
For the Petitioner : (In C.P.Nos.1854 of 2011 & 2539 of 2012)	Mr. Md. Shamsul Alam, Advocate-on-Record.
For the Petitioner : (In C.P.No.1872 of 2015)	Mr. Haridas Paul, Advocate-on-Record.
For the Petitioner : (In C.P.Nos.1415-1421 of 2015)	Mr. Haridas Paul, Advocate-on-Record.
For the Petitioner : (In C.P.No.1445 of 2015)	Mrs. Sufia Khatun, Advocate-on-Record.
For the Petitioner : (In C.P.Nos.1768 & 2320 of 2015)	Mrs. Sufia Khatun, Advocate-on-Record.
For the Petitioner : (In C.P.Nos.2133-34 of 2015)	Mr. Taufique Ahmed, Advocate-on-Record.
For the Petitioner : (In C.P.Nos.644-645 of 2015)	Mrs. Mahmuda Begum, Advocate-on-Record.
For the Petitioner : (In C.P.No.2026 of 2015)	Mr. Haridas Paul, Advocate-on-Record.
For the Petitioner : (In C.P.No.703 of 2014)	Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For the Respondent : (In C.A.No.159 of 2010)	Mr. Moinul Hosien, Senior Advocate, instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.
For the Respondent : (In C.A.No.131 of 2012)	Mr. Mahmudul Islam, Senior Advocate, (with Mr. Abdur Rob Chowdhury, Senior Advocate, Mr. Probir Neogi, Senior Advocate and Mr. Mahbub Ali, Advocate) instructed by Mr. Md. Ferozur Rahman, Advocate-on-Record.
For the Respondent : (In C.A.No.132 of 2012)	Mr. Mahmudul Islam, Senior Advocate, (with Mr. Abdur Rob Chowdhury, Senior Advocate, Mr. Probir Neogi, Senior Advocate and Mr. Mahbub Ali, Advocate) instructed by Mr. Md. Taufique Ahmed, Advocate-on-Record.

For the Respondent : (In C.A.No.133 of 2012)	Mr. Mahmudul Islam, Senior Advocate, (with Mr. Abdur Rob Chowdhury, Senior Advocate, Mr. Probir Neogi, Senior Advocate and Mr. Mahbub Ali, Advocate) instructed by Mrs. Madhumaloti Chy Barua, Advocate-on-Record.
For the Respondent : (In C.A. No.134 of 2012)	Mr. Mahmudul Islam, Senior Advocate, (with Mr. Abdur Rob Chowdhury, Senior Advocate, Mr. Probir Neogi, Senior Advocate and Mr. Mahbub Ali, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.
For the Respondent : (In C.P. No.2295 of 2010)	Mr. Md. Zahirul Islam, Advocate-on-Record.
For the Respondent : (In C.P. No.955 of 2011)	Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
Respondent : (In C.P. No.1854 of 2011)	N.R.
Respondent : (In C.P. Nos.2539 of 2012 and 1782 of 2015)	Mr. Md. Zahirul Islam, Advocate-on-Record.
Respondent : (In C.P. Nos.1415-1417 of 2015)	N.R.
For the Respondent : (In C.P. No.1418 of 2015)	Mr. Zainul Abedin, Advocate-on-Record.
For the Respondent : (In C.P. Nos.1419-1421 of 2015)	N.R.
For the Respondent : (In C.P. Nos.1445, 1768 and 2320/15)	Mrs. Madhumaloti Chy Barua, Advocate-on-Record.
Respondent : (In C.P.Nos.2133 & 2134/15)	N.R.
For the Respondent : (In C.P.Nos.644-645 of 2015)	Mr. Probir Neogi, Advocate (with Mr. Sk. Md. Morshed, Advocate), instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the Respondent : (In C.P. No.2026 of 2015)	Mrs. Shirin Afroz, Advocate-on-Record.
For the Respondent : (In C.A. Nos.128 of 2015 & C.A. No.119 of 2008)	Mr. Md. Zahirul Islam, Advocate-on-Record.

For the Respondent : Mr. Zainul Abedin, Advocate-on-Record.
(In C.P. No.703 of 2014)

Date of hearing : 18th, 19th, 25th August,2015, 1st September, 2015 and Judgment on 15th December, 2015.

To invoke the fundamental rights conferred by Part III of the constitution, any person aggrieved by the order, action or direction of any person performing the functions in connection with the affairs of the Republic, the forum is preserved to the High Court Division. The conferment of this power cannot be curtailed by any subordinate legislation - it being the inalienable right of a citizen. This power cannot be conferred upon any Tribunal by the Parliament in exercise of legislative power or by the High Court Division or the Appellate Division in exercise of its power of judicial review.
...(Para 42)

It is the Supreme Court alone which is empowered to examine whether or not any law is inconsistent with the constitution. The Parliament has given the legislative power under article 65 to promulgate law but this power is circumscribed by limitations and if it exercises any power which is inconsistent with the constitution, it is the Supreme Court which being the custodian of the constitution and is manned by the Judges who are oath bound to protect the law to examine in this regards. The Supreme Court is the only organ of the State to see that any law is in consonance with the constitution. So, where the constitution confers the power upon the Supreme Court to strike down laws, if found inconsistent, such power cannot be delegated to a Tribunal created under subordinate legislation. In the alternative, the Supreme Court cannot delegate its power of judicial review of legislative action to a Tribunal. ...(Para 55)

Article 102 and 44 of the Constitution:
In Mujibur Rahman, it is observed that "the right of judicial review under Article 102(1) is neither a fundamental right nor a guaranteed one. And the right of judicial review is neither an all-remedy nor a remedy falls or wrongs. It is available only when "no other equally efficacious remedy is provided by law". With due respect, these observations have been made unconsciously and therefore, we are unable to approve the same. The right of judicial review under article 102(1) is a guaranteed one which is embodied in the constitution itself, but if that right is not guaranteed, even if a citizen's fundamental right is infringed, he will be left with no remedy at all. True, article 102(1) has not been retained in the fundamental rights chapter as has been kept in India but in view of article 44(1), it is akin to fundamental right. Similarly the observation that the enforcement of fundamental right is available only when 'no other equally efficacious remedy is provided by law' is also not a correct view, inasmuch as, whenever there is infringement of fundamental rights, any person can move the High Court Division for judicial review of the administrative action under Article 102(1). The question of equally efficacious remedy arises only when it will exercise power under article 102(2) i.e. writ of certiorari and other writs mentioned in sub-clauses (a) and (b) of clause (2). If there is an alternative remedy, the High Court Division's power is debarred. It is only in exceptional cases, it can exercise this power. ...(Para 65)

Clause (5) of article 102 read with article 117(2) of the Constitution:
Except on the limited scope challenging the vires of law or if there is violation of fundamental rights, the power of the High Court Division is totally ousted under clause (5) of article 102 read with article 117(2). If a public servant or an employee of statutory corporation wants to invoke his fundamental rights in connection with his terms and conditions of service, he must lay foundation in the petition of the violation of the fundamental rights by sufficient pleadings in support of the claim. It will not suffice if he makes evasive statement of violation of his fundamental rights or that by making stray statements that the order is discriminatory or malafide. ...(Para 78)

If an order is said to be without jurisdiction or is contrary to law, the appropriate course open to the applicant is to plead to the Tribunal with such plea and ask for vacating the order or action. It is altogether within the tenor of the Tribunal. ...(Para 79)

The observations made in Shaheda Khatun (supra) that if the action complained as is found to be *coram non judice,* without jurisdiction or malafide, the judicial review is available are based on the decisions on different premises and the said views cannot be applicable in service matters in presence of an alternative forum, and this forum is created as per provisions of the constitution. It is to be borne in mind that no case can be an authority on facts. The Tribunal is created as an 'alternative' forum of the High Court Division in respect of specific purposes. If any administrative action is found without jurisdiction or *coram non judice* or malafide, the Tribunal is competent to deal with the same and adjudicate these issues satisfactorily. These issues are within its constituents of the Administrative Tribunal. ...(Para 80)

The power of Tribunal to pass interim order:
Despite the absence of any provision empowering the Tribunal to pass any interim order, the Tribunal is not powerless since it has all the powers of a civil court and in proper cases, it may invoke its inherent power and pass interim order with a view to preventing abuse of the process of court or the mischief being caused to the applicant affecting his right to promotion or other benefit. But the Tribunal shall not pass any such interim order without affording the opposite party affected by the order an opportunity of being heard. However, in cases of emergency, which requires an interim order in order to prevent the abuse of the process and in the event of not passing such order preventing such loss, which cannot be compensated by money, the Tribunal can pass interim order as an exceptional measure for a limited period not exceeding fifteen days from the date of the order unless the said requirements have been complied with before the expiry of the period, and the Tribunal shall pass any further order upon hearing the parties. ...(Para 100)

The High Court Division observed that a departmental proceedings was initiated against the respondent which has been taken without approval of the G.A. committee, and the same was a mandatory provision of law and that the Chief Justice without taking the matter to the G.A. Committee had accorded the approval. On perusal of the record the High Court Division noticed that there was an endorsement at the bottom of the note-sheet with a note of the Chief Justice 'yes' and this proved that the Chief Justice accorded the approval violating rule 3(d) of the High Court Division Rules. This

court perused the record and found that this observation was correct but that itself is not a ground for interference. It should be borne in mind that in urgent matters, sometimes the Chief Justice gives approval in respect of some proposals without placing the matter before the G.A. committee, because the calling such meeting takes time and in urgent matters the Chief Justice accords permission subject to the approval of the committee later on. In this case inadvertently the matter has not been placed before the G.A. Committee.

In order to avoid more harm to the judiciary, the Chief Justice takes such decision. The Chief Justice being the head of the judiciary is respected by the Judges and his opinion with regard to the superintendence and control over the lower judiciary has primacy and is being honoured by the Judges of the committee. This is a practice being followed by this Court and non-approval of the decision of the Chief Justice was merely an irregularity and not an illegality and this will not vitiate the decision.

...(Para 111 &112)

J U D G M E N T

Surendra Kumar Sinha, CJ:

1. These appeals and the leave petitions are disposed of by this judgment although they arise from different judgments of the High Court Division and the parties are also distinct. They raise common questions of law and therefore, they are grouped together for analogous disposal in order to avoid conflicting decisions. All of them involve the consideration of the following points:

(i) whether a disciplinary action taken against an officer of the Judicial Service of the Republic can seek judicial review against such action.

(ii) whether the General Administration Committee (G. A. Committee) can ignore a recommendation of the Executive Government to exonerate an officer of the lower judiciary and direct the concerned Ministry to take penal action.

(iii) whether an employee in the service of the Republic can claim higher status and grade without challenging his service Rules in comparison with his counterpart serving at different departments under the similar nomenclature i.e. post.

(iv) whether the Administrative Tribunal established under article 117(2) of the constitution can strike down an administrative order for infringement of fundamental rights guaranteed by the constitution.

(v) whether judicial review in the High Court Division is available in respect of the terms and conditions of service of an employee in the service of the Republic.

(vi) whether the Administrative Tribunal is competent to examine the constitutional validity of a statutory provision.

(vii) whether the Administrative Tribunal can pass interim order so as not to frustrating the proceedings pending before it.

2. For our convenience we would like to narrate short facts in Civil Appeal No.159 of 2010. The respondent Sontosh Kumar Shaha was a Senior Assistant Judge, Chuadanga and while he was serving as such two departmental proceedings under the provisions of the Government Servants (Discipline and Appeals) Rules, 1985 were initiated against him on the

allegation of corruption. He was placed under suspension and departmental inquiries were held. The inquiry officers found no evidence of corruption against him in respect of one proceeding but in respect of the other, the report was somehow misplaced from the records maintained with the Ministry and the Supreme Court, the concerned Ministry reported that the allegations could not be established against him. Pursuant thereto, Law and Justice Division of the Ministry of Law, Justice and Parliamentary Affairs by letter under memo dated 17th January, 2002, recommended to the Supreme Court for its approval to exonerate him from the charges and also to withdraw his suspension order. The Supreme Court did not approve the proposal and accordingly, the Ministry thereafter sent letters to drop the proceedings. This time the Supreme Court on perusal of the inquiry report directed the Ministry to issue second show cause notice upon him on 20th November, 2003. The respondent challenged the said order in Writ Petition No.7316 of 2003. The writ petition was summarily rejected on the ground that the recommendation of the Ministry was disapproved by the Full Court. Subsequently, it was detected that the proposal for suspension was neither placed before the G.A. Committee nor the Full Court in accordance with rule 3(d) of the High Court Division Rules. The respondent thereupon moved the High Court Division in another writ petition. The High Court Division upon hearing the parties made the rule absolute observing that the proposal for suspension and the initiation of the disciplinary proceedings were not placed before the G.A. Committee and also the Full Court and therefore, the direction given by the Supreme Court was without jurisdiction.

3. The Rules of 1985, was a piece of legislation which was promulgated by the President with the consultation of the Public Service Commission with the object to regulate the conditions of service, pay, allowances, pensions, discipline and conduct of Public Servants and statutory corporations. This Court in Masdar Hossain (52 DLR (AD) 82) declared that judicial service is not a service of the Republic within the meaning of article 152(1) of the constitution, and it is functionally and structurally distinct and separate service from the administrative service of the government and that the judicial service should not be placed at par on any account and should not be mixed up with the administrative services. This Court further declared that Bangladesh Judicial Service Recruitment Rules, 1981 are applicable to the officers of judicial service and directed the government to frame Rules separately for the purpose of posting, promotion, grant of leave, discipline, pay, allowances, pension and other terms and conditions of service in accordance with articles 116 and 116A for the judicial service and Magistrates exercising judicial works.

4. Neither the President nor the Parliament framed law or Rules in respect of the conditions of service, pensions, benefits, discipline and conduct for the judicial service and Magistrates exercising judicial works. Therefore, as per direction and guidelines in Masder Hossain, the Rules of 1985 are made applicable to the judicial officers until such law or Rules are framed by the government. It was also declared that the judicial review against any disciplinary action taken against the members of judicial service is available in the Administrative Tribunal.

5. Learned Attorney General argues that in presence of alternative remedy in the Administrative Tribunal, the judicial review against the decision of the disciplinary action for taking penal action against Sontosh Kumar Shaha is not maintainable and the High Court Division is not justified in interfering with the direction. Mr. Mahmudul Islam, Learned Counsel argues that since the proposal for suspension of the respondent No.1 and the initiation of the proceedings had not been placed before the G.A. Committee and the Full Court, the decision taken for taking disciplinary action against him was violative to article

116 of the constitution, and therefore, judicial review of the said decision in the High Court Division is maintainable. Mr. Mahmudul Islam has submitted that the views taken by this court in Mujibur Rahman V. Bangladesh, 44 DLR(AD)111, is required to be reconsidered, inasmuch as, the said views are inconsistent with Part III of the constitution. On this point, the Attorney General also agrees with opinion of the learned Counsel Mr. Mahmudul Islam and adds that there are inconsistent opinions of this Court and the High Court Division on the question of maintainability of a writ petition against any disciplinary action taken against a public servant and therefore, there is need for revisiting Masder Hossain's case afresh. Since a constitutional point has been raised at the Bar, the Chief Justice reconstituted a larger Bench to decide the questions of law.

6. In Part III of the constitution there are hosts of fundamental rights - some of them are conditional and some of them are unconditional. Fundamental rights are conferred primarily for the benefit of individuals and can, therefore, be waived, and can form the subject of a lawful compromise. The fundamental rights are succinctly narrated below. Those laws which are inconsistent with the fundamental rights to be void. If any law is inconsistent with any provisions of Part III of the constitution the same shall to the extent of such inconsistency be void; all citizens are equal before law and they are entitled to equal protection of law; the State shall not discriminate against any citizen on the ground of religion, race, caste, sex etc.; there shall be equality of opportunity for all citizens in respect of appointment or in the service of the Republic; there shall be protection of law to all the citizens and no action detrimental to his life, liberty, body or reputation or property shall be taken except in accordance with law; no citizen shall be deprived of life and personal liberty except in accordance with law; no citizen shall be arrested without being informed the grounds of his detention etc.; there shall not be any forced labour in contravention of the provisions of law; no person shall be convicted of any offence except for violations of law; every citizen shall have the right to move freely within the country subject to such restrictions imposed by law; every person shall have the right to assemble and participate in public meetings and processions peacefully; a citizen has the right to form associations or unions, subject to such restrictions imposed by law in the interest of security of the State; every citizen has freedom of speech and expression; every citizen has right to hold profession, his trade or occupation, business subject to public order and morality; every citizen has the right to profess, practice or propagate any religion; every citizen shall have the right to acquire, hold and transfer any property subject to law; and finally, the right to move the High Court Division in accordance with clause (1) of article 102 for the enforcement of rights conferred by Part III of the Constitution is guaranteed.

7. Mr. Mahmudul Islam submits that there is no doubt that the right of a citizen to seek redress to the High Court Division for enforcement of fundamental rights is guaranteed; and therefore, the views taken by this Court in Mujibur Rahman V. Bangladesh, 44 DLR (AD) 111 are required to be reviewed since some of the findings are inconsistent with article 44 of the Constitution. In support of his contention he has relied on some decisions of this Court and of Indian jurisdiction. He has also referred some provisions of the High Court Division Rules and submits that since the decision taken against Sontosh Kumar Shaha was in violation of High Court Division Rules, the High Court Division was justified in making the rule absolute.

8. In Mujibur Rahman, the latter was compulsorily retired from his service as Collector of Customs. The Administrative Tribunal set aside the order of retirement. On appeal from the said judgment, the Administrative Appellate Tribunal interfered with the Tribunal's judgment

on the ground that as the order of compulsory retirement was passed by the Chief Martial Law Administrator, the judicial review of the said order was barred. A writ petition was filed by Mujibur Rahman but the High Court Division summarily rejected the petition on the ground that the petition was not maintainable under clause (5) of article 102. This Court considered article 117 of the constitution and some decisions from home and aboard and held that the Tribunals created under article 117 are not meant to be like the High Court Division or subordinate courts over which the High Court Division can exercise judicial review and superintendence. The Tribunal has been set up in exercise of its legislative power by the Parliament. The Tribunal was construed as a forum substitute, alternate or co-equal to the High Court Division. The judicial review by the High Court Division in respect of terms and conditions of service of the Republic has been deliberately excluded by clause (2) of Article 117.

9. We have meticulously perused the judgment in Mujibur Rahman and noticed some inconsistency in the conclusion arrived at therein. What disturbed us is that keeping the findings in paragraph 36, the majority opinion that "The tribunals are not meant to be like High Court Division or the subordinate court over which the High Court Division of the Supreme Court exercising both judicial review and superintendence. The tribunals are not in addition to the courts described in Chapters I and III.' and the observations that "Within its jurisdiction the Tribunal can strike down an order for violation of principle of natural justice as well as for infringement of fundamental rights, guaranteed by the Constitution, or of any other law, in respect of matters relating to or arising out of sub-clause (a), but such tribunals cannot, like the Indian Administrative Tribunals in exercise of a more comprehensive jurisdiction under Article 323A strike down any law or rule on the ground of its constitutionality,' We find no elaborate discussion in drawing such inference. Again it has been observed, 'in the service of the Republic who intends to invoke fundamental right for challenging the vires of a law will seek his remedy under Article 102(1), but in other cases he will be required to seek remedy under Article 117(2).' The above findings and conclusions are required to be reconsidered with a view to avoiding confusion in the minds of the litigants.

10. The observations particularly in the first portion is correct - there is no doubt about it, but the conclusion reached at by it is not sound one over which I will discuss later on. In arriving at the conclusion this Court has assigned no reasons and secondly, a citizen's right to move the High Court Division under article 102(1) for enforcement of the rights conferred by Part III is guaranteed. Clause (2) of article 44 provides that the Parliament may empower any other court to exercise 'all or any of those powers, that is, for enforcement of the rights conferred by Part III, but this power cannot be so conferred affecting the powers of the High Court Division. The power of judicial review given to the High Court Division is a constitutional power, which can be exercised by it on the basis of an application moved by a citizen and this power has been specifically preserved for a citizen to invoke such right/privilege in the High Court Division under article 102(1). Judicial review vested in the High Court Division under article 102(1) is one of the basic structures of the constitution and it cannot be taken away by the Parliament. The Parliament in exercise of its legislative power cannot curtail the constitutional jurisdiction conferred on the High Court Division. The Parliament can confer upon the Administrative Tribunal in exercise of its legislative power the power of judicial review of administrative actions and nothing more. This has been settled in Kesavananda Bharati case (AIR 1997 S.C. 1461) and this court has accepted the said view.

11. In Mujibur Rahman case, this Court noticed article 44(1) in paragraph 47, but it has totally ignored the tenor of article 44(1). By creation of Tribunals the Parliament cannot curtail the powers of the High Court Division given under article 102(1) to issue writs, directions and orders. The High Court Division's power is extensive. It is a court of record and it has the power of contempt. It has the control and superintendence over the courts and tribunals subordinate to it. The High Court Division's power is constitutional while the power of the Tribunal is legislative and the Tribunal has been created by a subordinate legislation.

12. The constitution guaranteed the High Court Division not to become mere appendages to the administration. The basic human freedoms, including freedom of religion and the rights of all minorities – religious, cultural, linguistic will not cease to exist because these are guaranteed rights and will be enforceable on the application of a citizen in the High Court Division. These powers cannot be exercised by a Tribunal created under article 117(2). After the creation of Administrative Tribunal, the jurisdictions of the High Court Division in service matters and its propriety which it had exercised have to be exercised by the Tribunal established under article 117(2). If this provision is taken into consideration with article 44(2), there will be no confusion in coming to the conclusion that an effective alternative institutional mechanism for judicial review in respect of service matters has been created by the Parliament. In Minerva Mills Ltd. V. Union of India, AIR 1980 S.C.1789, the Supreme Court of India observed that the power of judicial review is an integral part of the constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. If there is one feature of the constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionable, which is, part of the basic structure of the constitution. It was concluded:

> "Of course, when I say this I should not be taken to suggest that, however, effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasize is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the Legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the Legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review....."

13. Under our constitutional dispensation particularly articles 44(2) and 117(2), it is possible to set up an alternative mechanism in place of the High Court Division for providing judicial review in respect of the terms and conditions of service of the Republic and other public organisations. Over a span of time after the creation of Administrative Tribunal, there is no doubt that a service jurisprudence has been developed in this country to the satisfaction of the litigants. Initially there was confusion in the minds of some as to whether the Tribunal will be able to address and adjudicate upon the problems properly since the Tribunal is manned by the District Judge who has no expertise in those field. We find no serious infirmity on the question of judicial review of administrative actions by the Tribunal. The public servants and other litigants have accepted the system.

14. In S.P. Sampath Kumar V. Union of India, AIR 1987 S.C. 386, Bhagwati, C.J. while concurring with the majority opinion observed:

> "Thus it is possible to set up an alternative institution in place of the High Court for providing judicial review. The debates and deliberations spread over almost two decades for exploring ways and means for relieving the High Courts of the load of backlog of cases and for assuring quick settlement of service disputes in the interest of the public servants as also the country cannot be lost sight of while considering this aspect. It has not been disputed before us- and perhaps could not have been – that the Tribunal under the scheme of the Act would take over a part of the existing backlog and a share of the normal load of the High Courts. The Tribunal has been contemplated as a substitute and not as supplemental to the High Court in the scheme of administration of justice. To provide the Tribunal as an additional forum from where parties could go to the High Court would certainly have been a retrograde step considering the situation and circumstances to meet which the innovation has been brought about. Thus barring of the jurisdiction of the High Court can indeed not be a valid ground of attack."

15. This Court in Mujibur Rahman held that "There is no command nor any necessary intendment in the constitution that the Tribunals or the Appellate Tribunal is to be construed as a forum substitute, alternate or co-equal to the High Court Division'. The views expressed above are not sound. It ought to have explained the powers of the Tribunal with a view to removing any confusion. The opinion that it is not a forum substitute is true but it is not correct to assume that it is not a forum 'alternate' inasmuch as, the court made the above observation ignoring the language used in article 44(2). In this connection it is necessary to expound the constitutional back up of the creation of the Tribunal. Articles 44(2) provides:

> "(2) without prejudice to the powers of the High Court Division under Article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise <u>all or any of those powers</u>." (emphasis supplied)

16. There cannot be any doubt in holding the view that the jurisdiction and powers conferred upon an Administrative Tribunal is an 'alternative' forum with the object to relieve the High Court Division from the huge backlog and the Parliament has been given the power to establish such Tribunal subject to certain limitations without affecting the fundamental rights of a citizen. We have discussed above, all the fundamental rights enshrined in Part III are not inalienable - some of them are conditional and this clause (2) contains in Part III. It is a forum created by the Parliament providing for judicial review with an object to relieve the High Court Division of the burden of huge backlog of cases and ensuring quick disposal of service related matters in an alternative dispute resolution mechanism. The constitution has empowered the Parliament to give such power of judicial review upon a Tribunal under article 117 in respect of –

(a) the terms and conditions of persons in the service of the Republic, including the matters provided for in Part IX and the award of penalties or punishments;

(b) .....

17. Keeping the High Court Division's limited power of judicial review under Article 102(1) only in respect of violation of fundamental rights and legislative actions, we have reason to believe that unless the High Court Division is not determined to allow the Tribunal to perform the power of judicial review in its respective field and if it does not usurp its

powers, one day it will be seen that a service jurisprudence in the Tribunal level has been developed. By this time, we may legitimately say that the Tribunals have been functioning to the satisfaction of the litigants, in general. This will augment the High Court Division's control and supervision over other courts subordinate to it and the peoples confidence over the judiciary will be strengthened.

18. If the Judges of the High Court Division are over burdened with cases, how can they supervise and control its subordinate courts and Tribunals? Apart from the above, the High Court Division has the power to transfer a case pending in a subordinate court to it which involves a substantial question of law as to the interpretation of constitution or on a point of general public importance, the determination of which is necessary for the disposal of the case under Article 110. Therefore, while the power of judicial review of legislative action is vested in the High Court Division along with violation of fundamental rights, it should ensure that frivolous claims are filtered out through the process of adjudication of the Tribunal. It is hoped that the High Court Division shall be guard in exercising its power of judicial review and avoid to interfere with those matters which are cognizable under Article 117(1) of the constitution. This is necessary for the interest of justice and in that case, it can properly supervise and administer justice.

19. The High Court Division has over the years accumulated case load almost four hundred thousand. As the population is increasing, the backlog problem is becoming acute. The bar of jurisdiction to entertain a writ petition on any of the above matters is a measure for effective, expeditious and satisfactory disposal relating to service disputes of public servants and the power of judicial review in respect of those matters by the High Court Division has been debarred by clause (5) of article 102 read with clause (2) of article 117. There is thus a forum where matters of importance and grave injustice over service matters can be brought for determination. One may pose a question as to what nature of jurisdiction a Tribunal has barring the judicial review of the High Court Division. This Tribunal has all the powers and jurisdiction relating to the terms and conditions of persons in the service of the Republic that were being exercised by the High Court Division. This is a new alternative dispute resolution mechanism. There are courts under the prevailing laws in the country by which both the High Court Division and the District Courts exercise such powers. The Parliament in exercise of its legislative power has also given concurrent jurisdictions to the High Court Division and the Sessions Judges say, section 498 of the Code of Criminal Procedure. This power has been given upon a court subordinate to the High Court Division with a view to enabling the litigants to avail of prompt and less expensive criminal justice from the lower tier of the judiciary. The difference between these two enactments is that under the Code of Criminal Procedure the power of judicial review has been given to the High Court Division from the judgment of the sessions Judges, but in respect of service matters, the appellate power of judicial review has been given upon the Administrative Appellate Tribunal and then to this Court. The object is to afford the service holders to get prompt and less expensive relief in a lower tier of the judiciary. And the final power of judicial review has been given upon this Court on limited matters only on the question of law.

20. Article 44(1) says that the right to move the High Court Division under clause (1) of article 102 itself is a fundamental right, that is to say, this right is guaranteed. Under the Indian provision, though there is an enabling provision in clause (3) of article 32 of the constitution empowering the Parliament to any other court to exercise all or any of the powers exercisable by the Supreme Court, no such legislation was made in India till 1985, when Part XIV containing articles 323A and 323B have been inserted. This article 323A is

almost in *pari materia* to article 117(1) of our constitution. By Article 323A the Parliament has been given power to constitute Central Administrative Tribunal and by article 323B, the State Legislature has been given the power to constitute Administrate Tribunals in the State level.

21. The object of establishing such Tribunals in India by constitutional amendment was to take out the adjudication of disputes relating to the recruitment and conditions of public services of the Union and of the States from the hands of the civil courts and the High Courts and to place it before the Administrative Tribunals for the Union or the States. This departure was made with the object that the traditional civil courts gripped with rules of pleadings and strict rules of evidence and traditional four tier appeals, and endless revision and reviews under the Code of Civil Procedure, were not treated to be needed expeditious dispensation of litigation relating to the service matters. Reference in this connection is the case of Vatchirikuru Village Panchayat V. Deekshi Thulu Nori Venkatarama, 1991(2)SCR 531.

22. Under the Indian Central Administrative Tribunals Act, 1985, the Tribunal would adjudicate upon disputes and complaints with respect to the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union and Corporations and other authorities under control of the Union Government excepting (a) members of the defence services, (b) officers and servants of the Supreme Court or of any High Court, (c) members of the Secretarial staff of Parliament or of any legislature of any States or Union territorial etc.

23. In India there was no separate provision like articles 44 and 101 of our constitution, but similar provisions have been incorporated in clauses (1) and (3) of article 32 but no such provision is included in article 226 with the result that in case of violation of fundamental rights, its citizens can move the Supreme Court only under article 32. Whatever other remedy may be open to a person aggrieved, he has no right to complain under article 32, if there is no infringement of fundamental rights. Article 32 is included in Part III in the Chapter of 'fundamental rights' but Article 102 of our constitution is included in Part VI under the heading 'The Judiciary'.

24. The Constitutional Bench in L. Chandra Kumar (AIR 1997 SC 1125) held that if the power under Article 32 of the constitution, which has been described as the "heart" and "soul" of the constitution, can be additionally conferred upon "any other Court" there is no reason why the same situation cannot subsist in respect of jurisdiction conferred upon the High Courts under Article 226 of the constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of Supreme Court's power under Article 32 is retained, it is observed, there is no reason why the power to test the validity of legislations against the provisions of the constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323B of the Constitution. It is observed that, apart from the authorization that flows from Articles 323A and 323B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power, it is further observed, is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose.

25. The Supreme Court of India summarized its opinion in L. Chandra Kumar that the Tribunals function in this respect is only supplementary and all such decisions of the

Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also be left with the power to test the vires of subordinate legislations and rules.

26. As regards the powers of Central Administrative Tribunal of India section 14 provides:

> "14. Jurisdiction, powers and authority of the Central Administrative Tribunal-
> (1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court [xx]) in relation to-
>
> (a) recruitment, and matters concerning recruitment, to any All India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filed by a civilian;
> (b) all service matters concerning-
> (i) a member of any All-India Service; or
> (ii) a person [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any civil service of the union or any civil post under the union; or
> (iii) a civilian [not being a member of an All-India Service or a persons referred to in clause (c)] appointed to any defence services or a post connected with defence.
> and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or, of any corporation [or society] owned or controlled by the Government.
> (c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) of sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation [or society] or other body, at the disposal of the Central Government for such appointment.
> (3) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall also exercise, on and from the date with the effect from which the provisions of this sub-section apply to any local or other authority or corporation [or society], all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court [xx] in relation to-
>
> (a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation [or society]; and
>
> (b) all service matters concerning a person [other than a person referred to in clause (a) or clause (b) of sub-section (1)] appointed to any service or post in connection with the affairs of such local or other authority or corporation [or society] and pertaining to the service of such person in connection with such affairs."

27. We noticed from the above that the Parliament did not empower the Tribunals to declare legislative actions ultra vires the constitution but by judicial pronouncement the Supreme Court in L. Chandra Kumar has given such power. Reasons assigned by the Supreme Court are that the 'constitution confers the power to strike down laws upon the High Courts and Supreme Court it also contains elaborate provisions dealing with..... though the tribunals created by ordinary legislations cannot exercise the power of judicial review of legislative actions to the exclusion of the High Courts, there is no constitutional prohibition against their performing a supplemental as opposed to a substitutional role....' "so long as the jurisdiction of the High Courts under Articles 226/227 and that of this court under Article 32 is retained, there is no reason why the power to test the validity of legislation against the provisions of the Constitution cannot be conferred upon the Administrative Tribunals created under the Act or upon Tribunals created under Article 323B of the Constitution "This power is available to Parliament under Entries 77, 78, 79 and 95 of List LI and to the state legislature under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose".

28. As per the jurisdiction given to Indian Central Administrative Tribunal, in relation to all service matters covering All-India service or a person not being a member of All-India service or a person appointed to any civil service of the Union or a post connected with the defence service. Thereafter, by an amendment, the Central Administrative Tribunal has been given power to have the jurisdiction of the officers of all the civil courts other than Supreme Court. The Administrative Tribunals in India are competent to exercise all powers which the respective courts could have exercised. Our Administrative Tribunal is not invested with the power of judicial review of legislative actions even if there is violation of any of the provisions of the fundamental rights. It is because of Article 44(1). Indian Tribunals have been given the power of judicial review in respect of legislative action by judicial pronouncement in Minerva Mills case, AIR 1980 SC 1789. Bhagwati, J. observed:

> "The judiciary is the interpreter of the constitution and to the judiciary is assigned the delicate task to determine what is the conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which inter alia requires that the exercise of powers by the Government whether it be the legislature or the executive or any other authority be conditioned by the constitution and the law."

29. This enlargement of power may be termed as judicial legislation signifies new legal rules made by Judges. In 'Introduction of jurisprudence' by Mr. Lloyd, it is pointed out that how there remains a consensus of opinion that, within certain narrow and clearly defined limits, new law is created by the judiciary. On reading great deal in theoretical text-books on Politics and Government about that Trinity, which exists in all free governments, the Executive, the Legislative and the Judiciary, as to how these departments should be entirely distinct and each adhere strictly to its own duties and limits. These duties are so internally connected, so closely interwoven, so act and re-act upon each other, that it is often difficult, sometimes impossible to decide where the jurisdiction of one department ends and that of another begins.

30. As regards Acts passed by the legislature, judicial legislation comes in to modify and to re-enforce principally in four ways: (1) by applying to them the rules of statutory construction. Much law is created in this way; or (2) the judiciary may decide that a certain

statute is unconstitutional or is not unconstitutional as the case may be, and thus, either destroy it altogether, or in order to save it, may greatly modify its effect and in a large measure thwart the interest of the legislature; (3) or in construing any statute, the Judges may impute a narrow meaning to certain words used or a liberal meaning as the case may be and thus modify and mould the law to their own notions of justice and the public good; (4) A statute may be ignored altogether in some important particulars and new law created by the judiciary. (Judicial Legislation, Frank Bowman).

31. With due respect, we are unable to endorse the said view of Bhagwati,J. 'Judiciary' includes all tiers of judiciary including the Supreme Court, High Courts, Tribunals and the District Courts. In both countries, say, India and Bangladesh the power of judicial review in respect of legislative actions has been assigned to the Supreme Courts by the constitution but it has not given to the District Courts and the Tribunals created by Subordinate legislations. It is, therefore, not fair and permissible to equate the Judges of the Supreme Court with the Judges of the District Courts or Tribunals although all of them are part of judiciary. More so, the power of judicial review is given to the Supreme Court of Bangladesh by the constitution but the said power to the lower judiciary is given by subordinate legislation.

32. There are three organs of the State, of them, the judiciary' is one but if the higher judiciary is equated with the lower judiciary, there will create chaos and confusion. There is no doubt that the Indian High Courts and Supreme Court have been assigned a delicate task to determine what is the power conferred on each branch of the government but this power has not been assigned to the lower judiciary which is also a part of 'judiciary'. This anomaly has been reflected in a later decision in L. Chandra Kumar V. Union of India, AIR 1997 S.C. 1125. In this case, the Supreme Court citing the dictum in Marbury V. Madison, Crauch 137 (1803) observed that Henry, J. Abraham's definition of judicial review in the American context is subject to a few modification equally applicable to the concept as it is understood in Indian constitutional law. Broadly speaking, it is observed, judicial review in India comprises three aspect: Judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. So far this view is correct but the question is whether the judicial review of legislative action is permissible by the lower judiciary or a Tribunal.

33. It has been observed in L.Chandra Kumar (supra) that 'Indeed, when the Framers of our constitution set about their monumental task, they were well aware that the principle that courts possess the power to invalidate duly enacted legislations had already acquired a history of nearly a century and a half;' (emphasis supplied). Here also the powers of the Supreme Court have been equated with those of the Subordinate Courts and Tribunals. It has concluded its arguments in Para 93 observing that 'The Tribunals are competent to hear matters where the vires of statutory provisions are questioned.' This conclusion is in direct conflict with its observation in paragraph 80 wherein it has been observed that 'However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no Constitutional Prohibition against their performing a supplemental as apposed to a substitutional role in this respect.'

34. In R.K. Jain V. Union of India, AIR 1993 SC 1769, the Supreme Court of India analyzed the theory of alternative institutional mechanisms which have been functioning in practice and recommended that the Law Commission of India or a similar expert body to conduct a survey of the functioning of Tribunals and that such study conducted after gauging

the working of the Tribunals over a sizeable period provides an answer to the questions critics of the theory. It was observed as under:

> "The over all picture regarding the tribunalisation of justice in our country is not satisfactory and encouraging. There is a need for a fresh look and review and a serious consideration before the experiment is extended to new areas of fields, especially if the constitutional jurisdiction of the High Courts is to be simultaneously ousted. Not many tribunals satisfying the aforesaid tests can possibly be established."

35. The constitutional court did not approve all the recommendations submitted by the Malimath Committee constituted for the purpose and it was of the opinion that the Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, it was observed, they should not act as substitutes of the High Courts and Supreme Court which have under constitutional set up, been specifically entrusted with such obligations. It was observed 'Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to security before a Division Bench of the respective High Courts. The Tribunals will consequently have the power to test the vires of subordinate legislations and rules'.

36. Let us consider some provisions of law relating to the phrase 'judicial review' other than Bangladesh and India. In the early 1980's Canada experienced a fundamental change in its political and legal structures. A new Constitution Act, 1982 came into effect declaring itself to be 'the Supreme law of Canada." The new Constitution Act further decreed that 'any law that is inconsistent with (its) provisions... is, to the extent of the inconsistency, of no force or effect. (Constitution Act, 1982, Schedule B, Part I, Canadian Charter of Rights and Freedoms, section 52(1)'. Judicial review under the Canadian system 'refer to any form of judicial assessment of legal validity of government action (typically legislation) under a constitutional Charter of Bill of Rights'. It has been observed by W.J. Waluchow, in his 'A common Law Theory of Judicial Review', this judicial assessment is such as one finds in Canada and United States, or under sections of nation's constitution that outline basic civil rights like equality and freedom of association.

37. In Edwards V. A.G. of Canada, (1930) A.C. 124, it is observed that a constitution is a 'living tree' trends, and reliefs and whose current and continued authority rests on its justice or on factors like the consent, commitment, or sovereignty of the people-now, not the framers or the people - now particularly relevant. In viewing a constitution as a living tree, malleable in the hands of contemporary interpreters, consistent with its status as foundational law, and with the entrenchment and stability that may see essentials aspects of the very idea of constitutionalism?

38. All judicial review - all manner of adjudication by courts – is itself an exercise of judicial accountability – accountability to the people who are affected by a judicial pronouncement. That accountability gets evidenced in critical comments, by Fali S. Nariman, on judicial decision when Judges behave as they should as moral custodian of the constitution; the function they perform enhances the spirit of constitutionalism. He observed, 'My only regret some times is that some of our modern-day Judges – whether in India or elsewhere – do not always realise the solemnity and importance of the functions they are expected to perform. The ideal judge of today, if he is to be a constitutional mentor, must move around, in and outside court, with the constitution in his pocket, like the priest who is never without the Bible (or the Bhagavad Gita). Because, the more you read the provisions of

our Constitution, the more you get to know of how to apply its provisions to present-day problems.' (Before Memory Fades...)

39. The main impact of judicial review of legislation, based upon a combination of eighteenth-century natural law principles with the constitution, did not come until the second half of the nineteenth century. The American Constitution regulates the relations between executive, legislature, and judiciary differently from the British. It gives to a law court a supervisory function which, cannot hold having deep political implications and it isolates legislative and executive from each other, instead of the British method of constituting government as an executive committee of the majority in Parliament.

40. Modern democracies also differ widely in the organisation of the administration of justice. In continental democracies, a Ministry of justice is in administrative control of the entire judicial machinery, and also the central agency for the drafting of legislation. In Britain, these functions are divided between the Lord Chancellor's Secretariate, the Parliamentary draftsman and ad-hoc law revision committees. In 1965, the process of law revision was given institutional continuity, through the creation of Law Commissions for England and Scotland. In the United States, the Attorney General's Department exercises some of the functions of a Ministry of justice, together with numerous congressional committees and *ad-hoc* commissions. Each of these national institutions has certain merits and deficiencies.

41. There is no doubt that the constitution is the supreme law of the country and therefore, any Court or Tribunal can exercise any of the provisions of the constitution but with regard to judicial review in respect of legislative actions, this power has been restricted to the High Court Division in our constitution. When the constitution itself has preserved the right of a citizen to move the High Court Division for infringement of fundamental rights against any administrative action, such power cannot be exercised by any Tribunal other than the one established by the constitution i.e. the High Court Division. This power has been assigned to the High Court Division as will be evident from articles 7(2) 26(2), 44(1), 101 and 102(1). Article 101 which provides that the High Court Division shall have such original, appellate and other jurisdictions and the powers that are conferred on it by the constitution or any other law.

42. To invoke the fundamental rights conferred by Part III of the constitution, any person aggrieved by the order, action or direction of any person performing the functions in connection with the affairs of the Republic, the forum is preserved to the High Court Division. The conferment of this power cannot be curtailed by any subordinate legislation - it being the inalienable right of a citizen. This power cannot be conferred upon any Tribunal by the Parliament in exercise of legislative power or by the High Court Division or the Appellate Division in exercise of its power of judicial review. This Court itself noticed in Mujibur Rahman that "The Tribunals are not meant to be like to the High Court Division or subordinate court over which the High Court Division of the Supreme Court exercises both judicial review and superintendence. The Tribunals are not in addition to the court described in Chapters I and III of Part VI. There is no command nor any necessary intendment in the constitution that the Tribunal or Appellate Tribunal is to be construed as a forum substitute, alternate or co-equal to the High Court Division".

43. Here possibly this Court has overlooked article 44(2) of the constitution. The constitution has conferred legislative power to promulgate law empowering a court to

exercise all or any of the powers of fundamental rights. Though the Parliament has such power, this clause is to be read not in isolation. Parliament's power is limited to the extent of giving powers of judicial review of administrative actions only and not more than that. There is no dispute that there is provision in the constitution in article 117(2) conferring upon the Parliament the power to establish Administrative Tribunal to exercise judicial functions relating to the terms and conditions in the service of the Republic, 'including the matters provided in Part IX'.

44. Chapter-1 of Part IX provides so far as it relates to appointment and conditions of service of persons in the service of Republic, their tenure of office, disciplinary actions and Chapter-II relates to the Public Service Commission. The subordinate judiciary contains in Part-VI. Chapter-II relates to the subordinate judiciary and Chapter III of Part VI relates to Administrative Tribunal. Though this Court in Mujibur Rahman was silent regarding the Administrative Tribunal, clause (2) of article 117 debars the High Court Division of its power of judicial review relating to the terms and conditions of the persons in the service of the Republic. For that purpose it has created an appellate forum to be created by law. By Act No. VII of 1981, the government has established the Tribunal with effect from 5th June, 1981, both for exercising the original and appellate jurisdictions. Later on by Act No.XXIII of 1991, another forum for judicial review of the judgment of the Administrative Appellate Tribunal has been created. Now the question is whether this creation of the original or appellate forum is to be construed as substitute, alternative or co-equal to the High Court Division.

45. If we summarise the language used in Indian provision in article 323A, which provides "Parliament may, by law, provide for adjudication or trial by administrative tribunals of disputes..... with respect to conditions of service of persons.....'. Under our provision article 117 provides 'Parliament may by law establish one or more administrative tribunals to exercise jurisdiction in respect of ..... 'the terms and conditions of persons.....'. The language used in both the enactments is almost identical only with the difference that under the Indian provision the Tribunals have been given the power to make interim orders in appropriate cases subject to fulfillment of certain conditions. It has been observed in L. Chandra Kumar (supra) that the 'judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging function of constitutional interpretation'. We fully endorse the said view, but the question is whether they can be taken as substitutes of High Court Division. There is no doubt that the Tribunals in India cannot act as substitute of the High Courts and Supreme Court which have, it is observed under the constitutional set up been specifically entrusted with such obligation'. Reasons assigned by it is that the 'constitution confers the power to strike down laws upon the High Courts and Supreme Court it also contains elaborate provisions dealing with..... though the tribunals created by Ordinary legislations cannot exercise the power of judicial review of legislative actions to the exclusion of the High Courts, there is no constitutional prohibition against their performing a supplemental as apposed to a substitutional role....'

46. Under the Act VII of 1981, there is provision for an appeal to the Administrative Appellate Tribunal with three members, the Chairman shall be a person who is or has been or is qualified to be a Judge of the Supreme Court, and of the two other members, one shall be a person who is or has been an officer in the rank of Joint Secretary and the other person who is or has been a District Judge, from an order or decision of the Tribunal. So practically the power of a Division Bench of the High Court Division has been given to the Administrative Appellate Tribunal. The composition of the appellate authority by including a high level

administrative officer with specialised knowledge be better equipped besides the judicial officers to dispense with prompt justice. And it is expected that a judicious mix of judicial members and an experienced grass-root officer will serve the purpose effectively and speedily. On the contrary, there is no provision for appeal under the Indian Act of 1985 and the High Courts power of judicial review was ousted except the Supreme Court's power under Article 136. So our provision is more comprehensive to some extent so far as it relates to creation of an appellate forum than that of the Indian except the power for issuing interim order by our Tribunal.

47. We have almost four hundred thousand cases pending in the High Court Division. The docket is increasing day by day. If this trend continues one day it will not be exaggerated to say that the number will exceed one million in ten years. If this process is allowed, the administration of justice is bound to collapse and the peoples perception towards the judiciary will erode. This is not healthy for the administration of justice in a democratic country like ours. There may be excesses in the administration and politics and the Tribunal is set up to maintain equilibrium and check the excesses. To meet the above eventuality, it is high time to think over the matter and reduce the docket by decentralizing the power of the High Court Division and Tribunal's power of alternative dispute resolution should be expanded through subordinate legislations.

48. Part IX of our constitution contains the heading 'The Services of Bangladesh' and in proviso to article 133, the President has been given power to make Rules regulating the appointment and the conditions of service of persons in the service of Republic. Chapter II of this Part, there is an enabling provision in article 137 for 'establishing one or more Public Service Commissions for Bangladesh'. In Masder Hossain, this Court directed the government to make recruitment Rules regulating appointment in judicial service. It observed that the Services (Reorganization and Conditions) Act, 1975 have no application to the judicial service. In pursuance of this direction, the President has created the Bangladesh Judicial Service Commission by Promulgating Rules. The subordinate judiciary contains in Part-VI Chapter-II and Chapter III relates to Administrative Tribunal.

49. As regards the powers and jurisdiction of our Administrative Tribunal section 4 says:

> "(1) An Administrative Tribunal shall have exclusive jurisdiction to hear and determine applications made by any person in the service of the Republic (or of any statutory public authority in respect of the terms and conditions of his service including pension rights, or in respect of any action taken in relation to him as a person in the service of the Republic or of any statutory public authority).
>
> (2) A person in the service of the Republic (or of any statutory public authority) may make an application to an Administrative Tribunal under sub-section (1), if he is aggrieved by any order or decision in respect of the terms and conditions of his service including pension rights or by any action taken in relation to him as a person in the service of the Republic (or of any statutory public authority).
>
> Provided that no application in respect of an order, decision or action which can be set aside, varied or modified by a higher administrative authority under any law for the time being in force relating to the terms and conditions of the service of the Republic (or of any statutory public authority) or the discipline

of that service can be made to the Administrative Tribunal until such higher authority has taken a decision on the matter:

Provided further that, where no decision on an appeal or application for review in respect of an order, decision or action referred to in the preceding proviso has been taken by the higher administrative authority within a period of two months from the date on which the appeal or application was preferred or made, it shall, on the expiry of such period, be deemed, for the purpose of making an application to the Administrative Tribunals under this section, that such higher authority has disallowed the appeal or the application).

Provided further that no such application shall be entertained by the Administrative Tribunal unless it is made within six months from the date of making or taking of the order, decision or action concerned or making of the decision on the matter by the higher administrative authority, as the case may be.

(3) In this section "person in the service of the Republic (or of any statutory public authority)" includes a person who is or has retired or is dismissed, removed or discharged from such service but does not include a person in the defence services of Bangladesh (or of the Bangladesh Rifles)."

50. Under our constitutional scheme, there is no doubt that the power of judicial review in respect of legislative action has not been conferred upon the Tribunal by subordinate legislation. As observed above, it is the High Court Division which has been given the power under articles 7(2), 26, 44(1), 101 and 102(1) which read as follows:

"7(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void".

26(1) All existing law inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void on commencement of the Constitution.
(2) The State shall not make any law inconsistent with any provisions of this part, and any law so made shall, to the extent of such inconsistency be void.
(3)....."

"44(1).The right to move the High Court Division in accordance with clause (1) of article 102, for the enforcement of the rights conferred by this Part is guaranteed.
"101. The High Court Division shall have such original, appellate and other jurisdictions and powers as are conferred on it by this Constitution or any other law."
"102(1). The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution."

51. If the right to move the High Court Division is guaranteed and this power having been conferred on the High Court Division by the constitution, it cannot be said that for enforcement of that right and as the right to judicial review under article 102(1) is a guaranteed one, if a citizen's fundamental rights is infringed, the remedy for enforcement of that right is conferred by the constitution under article 102(1). Therefore, the exercise of this power by the High Court Division cannot be curtailed or taken away by the Parliament.

52. Apparently a Tribunal created by an ordinary legislation or subordinate legislation cannot exercise the power of judicial review of legislative action. It is only the Supreme Court which is the creation of the constitution itself can exercise that power because this power has been given by constitution itself. If the entire scheme of the constitution is looked into, it will appear that the three organs of the State have been created by the constitution of which the judiciary is headed by the Supreme Court, and the other two organs are the Legislature and the Executive. These three organs are independent and not dependent on any other organ but in a unitary form of government, these three organs must work harmoniously with a view to avoiding any conflict in the administration of justice. Each organ, is therefore, supplementary to the other. Our Fore Fathers were conscious about the independence of judiciary and realizing any future encroachment over judiciary, they gave full independence to the Supreme Court in the administration of justice. This will be borne out from the following discussions.

53. Clause (4) of article 94 says, the Chief Justice and other Judges shall be independent in the exercise of their judicial functions. They cannot be removed by any provisions of subordinate legislation. The Supreme Court is a court of record. A law declared by the Appellate Division is binding on all courts and the decisions of the High Court Division are binding on all courts subordinate to it. All authorities, executive and judicial in the Republic shall act in aid of the Supreme Court. All staff of the Supreme Court shall be appointed by the Chief Justice. The remuneration payable to the Judges of the Supreme Court shall be charged upon the Consolidated Fund and the remuneration, privileges and other terms and conditions of service of the Judges shall be determined by Act of Parliament. These are the safeguards of the Judges of the Supreme Court for discharging their duties and responsibilities independently.

54. The Judges are under obligation to subscribe an oath as per provisions of article 148 in accordance with the 'Third Schedule'. Article 148 speaks of subscribing an oath by all constitutional office holders as soon as he enters upon the office. In accordance with this provision the President, the Prime Minister, the Speaker, the members of Parliament, the Election Commissioners and other constitutional holders of office have to subscribe oaths. But the oath of a Judge is some what different from other constitutional office holders. Judges have to subscribe an oath to "Preserve, protect and defend the Constitution and the laws of Bangladesh". In respect of other holders of constitutional posts they are not required to subscribe an oath to defend 'the laws'. They have to subscribe oath to 'preserve, protect and defend the constitution'. So, the Judges of the highest Court are defenders of the 'law' and the 'constitution'. 'Law' according to the constitution means 'any Act, Ordinance, Order, Rule, Regulation, Bye law, Notification or other legal instruments, and any customs or usage, having the force of law'.

55. Therefore, it is the Supreme Court alone which is empowered to examine whether or not any law is inconsistent with the constitution. The Parliament has given the legislative power under article 65 to promulgate law but this power is circumscribed by limitations and

if it exercises any power which is inconsistent with the constitution, it is the Supreme Court which being the custodian of the constitution and is manned by the Judges who are oath bound to protect the law to examine in this regards. The Supreme Court is the only organ of the State to see that any law is in consonance with the constitution. So, where the constitution confers the power upon the Supreme Court to strike down laws, if found inconsistent, such power cannot be delegated to a Tribunal created under subordinate legislation. In the alternative, the Supreme Court cannot delegate its power of judicial review of legislative action to a Tribunal. It is only on the principle that the donee of a limited power cannot, by the exercise of that very power, convert the limited power into an unlimited one or in the alternative a delegatee cannot exercise same or more power than the delegator.

56. Let us look at the powers that can be conferred upon the Supreme Court. Article 101 states that the High Court Division shall have the original, appellate and other jurisdictions and powers as are conferred on it by the constitution or any other law. So, apart from the constitution, the Parliament can confer any other power upon the High Court Division by subordinate legislation. There is no doubt about it. Similarly as to the powers of the Appellate Division, sub-clause (c) of clause (2) of article 103 provides that if the High Court Division "has imposed punishment of a person for contempt of that Division; and in such other cases as may be provided by Act of Parliament" an appeal shall lie as of right. I am of the view that the Framers ought to have included the latter part of sub-clause (c), such as, "and in such other cases as may be provided for by Act of Parliament" by a separate sub-clause because the empowerment of these two powers conflict each other. This will be evident if we consider the Bengali version in sub-clause (N) which says "উক্ত বিভাগের অবমাননার জন্য কোন ব্যক্তিকে দন্ডদান করিয়াছেন"; and in the next sentence it is said "এবং সংসদে আইন-à¡l¡ ®kl ‡f বিধান করা হইবে, সেরূপ অন্যান্য ক্ষেত্রে " This Bengali version is more clear and accurate than the English version and this version will prevail over the English version. The first part of the clause says about the power of contempt and the other part relates to the conferment of powers by Parliament upon this Court. So, there is no nexus between these two.

57. If we compare the constitutional provisions between ours and the Indian, the Indian one is more comprehensive than ours so far as it relates to making of interim orders in urgent cases with a view to preserving the subject matter of the litigation in *status-quo* for the time being. Such order is necessary for equitable considerations and it is an extraordinary relief, which is normally granted in accordance with reasons and sound judicial principles. It is not a grace or on default of any person. It is passed in the interest of justice and it is necessary in order to prevent the abuse of the process of law, or to prevent wastage or to maintain the situation as on date or from recurrence of certain incident which were existing as on the date presenting such application.

58. Under the Indian provision as opposed to our provision, article 245 under the heading 'Distribution of Legislative Powers' provides extent of laws to be made by Parliament and by Legislatures of the States. Article 246 which contains in the same Chapter relates to 'Subject-matter of laws made by Parliament and by the Legislatures of States.' Clause (1) is relevant for our consideration which provides "notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List 1 in the Seventh Schedule (in this constitution referred to as "Union list") (emphasis supplied). In the Seventh Schedule, Entry No.77 under the heading "Constitution and Jurisdiction of Courts"- list are: (a) the jurisdiction and powers of the courts are several entries; Entry No.77, List 1; of the Supreme Court relating to any matter. Entry No.95, List 1, of all courts other than the Supreme Court, relating to any matter in this List 1, Entry 65 List

2; of all courts other than Supreme Court relating to any matter in List 2 have been included. Article 246 deals with legislative powers of the Legislatures of the Union and the States with reference to the different Lists in the Seventh Schedule. So, there is specific provision in the constitution of India itself enabling the Parliament to add, confer or delete the powers of the Supreme Court as well as of the High Courts.

59. Under our provisions, the President has power to promulgate any Ordinance under Article 93 if the Parliament is dissolved or is not in session. Apart from this legislative power, the Parliament can delegate its power under the proviso to clause (1) of article 65 by Act of Parliament, to make Orders, Rules, Regulations, Bye-laws or other instruments having legislative effect. At any event, the Parliament has the power to invest the power from time to time upon both the Divisions of the Supreme Court by subordinate legislation but this conferment of power cannot supersede the constitutional powers conferred upon this Court. Similarly, the Parliament by this legislative powers cannot take away the powers of both the Divisions of the Supreme Court which are invested on it by the constitution. As discussed above, under article 44, the Parliament may empower any court other than the High Court Division within its local limits of jurisdiction "to exercise all or any of those powers" i.e. the powers that are being exercisable by the High Court Division under the fundamental rights Part.

60. As observed above, though the Parliament has been given wide power to invest upon any court of those powers of the High Court Division, it cannot give all powers to any Court or Tribunal similar to those given by the constitution upon the High Court Division over which I have discussed above. It can be done by a constitutional amendment but then also, the question will arise as to whether the right to move the High Court Division being one of the basic feature of the constitution, the Parliament cannot delegate such power by setting up a parallel Tribunal with powers equal to those of the High Court Division. This will be hit by 'basic feature' doctrine and it will be beyond the amending powers of the Parliament under article 142 of the constitution.

61. In Mujibur Rahman, this Court held that the Administrative Tribunal is not in addition to the courts described in Chapters 1 and III of the Constitution. It, however, observed that the Tribunal or Appellate Tribunal cannot be construed as a forum substitute or co-equal of the High Court Division. Taking the language used in article 44(2), I am of the view that if the original constitution empowers the Parliament to give power to a Court or Tribunal all (of course subject to limitation) or any of the powers of the High Court Division, why not it can empower 'alternative power' to the Tribunal as opposed to 'substitutional' as observed by the Supreme Court of India. But in no case, it can be treated as co-equal to the High Court Division to deal with all matters in respect of the terms and conditions of persons in the service of the Republic, including the matters provided in Part IX, that is to say, the services of Bangladesh. However, we are unable to endorse the views taken by the Supreme Court of India in L. Chandra Kumar (Supra) that "The Tribunals are competent to hear matters where vires of statutory provisions are questioned'.

62. In India as noticed above, its constitution was amended by inserting articles 323A and 323B providing a separate forum of creation of Administrative Tribunals prohibiting the power of judicial review of its decisions except the Supreme Court under Article 32 in respect of disputes and complaints referred to in clause (a) of article 323A or any of the matters specified in clause (2) in article 323B. The power of judicial review conferred on the High Courts under articles 226/227 of the constitution has been given by the Supreme Court

only in respect of matters relating to legislative actions by a Division Bench in L. Chandra Kumar (supra).

63. The Administrative Tribunals of India have been given the power under section 24 to make interim orders but such power cannot be exercised unless "(a) copies of such application and of all documents in support of plea for such interim order are furnished to any party against whom such application is made are proposed to be made and (b) opportunity is given to such party to be heard in the matter. A proviso is added therein empowering the Tribunal to dispense with the above conditions and may make an interim order as exceptional measure if it is satisfied, for reasons to be recorded in writing and that "it is necessary so to do for preventing any loss being caused to the applicant which cannot be adequately compensated in money but any such interim order shall, if it is not sooner vacated, cease to have effect on the expiry of a period of fourteen days from the date on which it is made unless the said requirements have been complied with ....."

64. Under our Administrative Tribunals Act, the powers have been given to the Administrative Tribunal under section 4 to hear and determine applications made by any person in the service of Republic or of any statutory public authority in respect of the terms and conditions of his service including persons right or in respect of any action taken in relation to him as a person in the service of Republic or of any public authority. So, the Tribunal can adjudicate upon in relation to only terms and conditions of service of any public servant or of any statutory public authority. Though an exclusive jurisdiction has been invested upon the Tribunal, it has no power to nullifying any law, rules or regulations. The Tribunal has been given limited power in the relation to those mentioned in sub-section (1) of section 4. Therefore, this Court has rightly held in Mujibur Rahman that the Tribunal cannot strike down any law or rule on the ground of its constitutionality.

65. In Mujibur Rahman, it is observed that "the right of judicial review under Article 102(1) is neither a fundamental right nor a guaranteed one. And the right of judicial review is neither an all-remedy nor a remedy falls or wrongs. It is available only when "no other equally efficacious remedy is provided by law". With due respect, these observations have been made unconsciously and therefore, we are unable to approve the same. The right of judicial review under article 102(1) is a guaranteed one which is embodied in the constitution itself, but if that right is not guaranteed, even if a citizen's fundamental right is infringed, he will be left with no remedy at all. True, article 102(1) has not been retained in the fundamental rights chapter as has been kept in India but in view of article 44(1), it is akin to fundamental right. Similarly the observation that the enforcement of fundamental right is available only when 'no other equally efficacious remedy is provided by law' is also not a correct view, inasmuch as, whenever there is infringement of fundamental rights, any person can move the High Court Division for judicial review of the administrative action under Article 102(1). The question of equally efficacious remedy arises only when it will exercise power under article 102(2) i.e. writ of certiorari and other writs mentioned in sub-clauses (a) and (b) of clause (2). If there is an alternative remedy, the High Court Division's power is debarred. It is only in exceptional cases, it can exercise this power.

66. Under clause (2) of article 102, a citizen cannot invoke judicial review of legislative action. Judicial review under this clause is not available if there is 'any other equally efficacious remedy' is provided by law. Mostafa Kamal J. rightly observed in the last sentence in paragraph 77 that this power of judicial review of legislative action is exclusively preserved to the High Court Division under article 102(1).

67. In Anwar Hossain Chowdhury V. Bangladesh, 41 DLR(AD) 165, this Court by majority held that the power to amend the constitution is there in the constitution itself. An amendment of the constitution is not a grund-norm because it has to be according to the method provided in the constitution. "Total abrogation of the constitution, which is meant by destruction of its basic structure, cannot be comprehended by Constitution". It observed, 'call it by any name 'basic feature' or whatever but that is the fabric of the constitution which cannot be dismantled by an authority created by the constitution itself-namely the Parliament. Necessarily, the amendment passed by the Parliament is to be tested as against article 7, because the amending power is but a power given by the constitution to Parliament; it is a higher power than any other given by the Constitution to Parliament but nevertheless it is a power within and not outside the constitution'.

68. In Khondker Delwar Hossain V. Bangladesh Italian Marble Works, 62 DLR(AD) 298, this Court held in paragraph 231 that "the framers of the constitution made the right to move the Supreme Court of Bangladesh for enforcement of fundamental rights itself a fundamental right". In that case this court approved the views taken in Anwar Hossain (Supra).

69. In Siddique Ahmed V. Bangladesh, 65 DLR(AD)8, this Court held that all laws, Rules, Regulations and Orders in whatever terms those are named must conform to the words of the constitution and any such laws which is inconsistent with the constitution to the extent of the inconsistency is void and non-est in the eye of law. It was further observed that the Parliament can make any law but within the bounds of the constitution which is the embodiment of the will of the people and it can also rectify any Ordinance made by a lawfully elected President following a proper and lawful procedure. This case relates to the Constitution (Seventh Amendment) Act, 1986, which was added in paragraph 19 of the Fourth Schedule of the constitution. This court declared the said Act unconstitutional.

70. There is thus no gainsaying the fact that if the vires of any law is challenged notwithstanding ouster of the jurisdiction of the High Court Division by an Act of Parliament, the High Court Division has power of judicial review to examine the constitutionality of the law. In this connection this Court in Shaheda Khatun V. Administrative Appellate Tribunal, 3 BLC(AD) 155, modified the dictum in Mujibur Rahman observing that "Mujibur Rahman's case is not only case which defines the writ jurisdiction of the High Court Division. We regret to say that the Appellate Tribunal seems to be totally unaware of settled law that notwithstanding ouster of the jurisdiction of the High Court Division by any legislative provision or even under article 102 itself the High Court Division is yet entitled to exercise its power of judicial review under Article 102 if the action complained of before the High Court Division is found to be *coram non judice,* without jurisdiction or taken malafide.' This view has been taken following the cases in Ehtesham Uddin V. Bangladesh, 33 DLR(AD) 154, Ismail Hoque V. Bangladesh, 34 DLR(AD) 125, Mostaque Ahmed V. Bangladesh, 34 DLR(AD)222 and Helal Uddin Ahmed V. Bangladesh, 45 DLR(AD)1.

71. We are unable to endorse views taken in Shaheda Khatun because the cases in Ehtesham Uddin, Ismail Hoque, Mostaque Ahmed and Helal Uddin Ahmed were decided on different premises and context. The principle of law propounded in those cases cannot be applicable in respect of service matters. In those cases, the issues were whether despite specific bar to challenge the orders and conviction by the Tribunals created under the Martial Law Proclamations, Martial Law Regulations and Martial Law Orders, the High Court Division can examine the legality of the decisions or in the alternative, judicial review is

available against decisions of Tribunals created under the Martial Law Proclamations. The writ petitions were filed in the nature of writ of certiorari to quash the judgments. Even there was specific bar ousting the jurisdiction of the High Court Division, it was observed in Helaluddin Ahmed that under three eventualities, that is to say, even in the purported exercise of those powers do not have the effect of validating acts done *corum non judice* or without jurisdiction or malafide, the High Court Division can examine the legality of the judgment.

72. In Ehteshamuddin, the question was in spite of ouster of jurisdiction, in a *writ of certiorai*, the High Court Division can examine the legality of the order. It was observed that in appropriate cases 'the court's power to examine the proceedings has not been taken away. Since it has been conceded by the learned Attorney General that when a proceeding or an action taken under Martial Law Regulation is challenged on the ground of want of jurisdiction or malafide, the superior court in exercise of its writ jurisdiction is competent to make it necessary to discuss this question at length.'

73. In Jamil Huq, this Court by majority while considering the power of judicial review of the High Court Division observed that 'The writ jurisdiction will be attracted if the proceedings are *coram non judice* or malafide. If the court is constituted properly and the offence is cognizable then the proceedings of such court cannot be interfered, with on the ground of procedural irregularities'. In that case, the writ petitioner was convicted by the Court Martial on the charge of mutiny under the Army Act, 1952. In Mostaque Ahmed, he was convicted by the Special Martial Law Court. He challenged his conviction unsuccessfully in the High Court Division. This Court in the context observed that the earlier views taken in such cases are that 'the malafide or coram non judice proceedings are not immune from the scrutiny of the Supreme Court notwithstanding any ouster clause by Martial Law Proclamations'.

74. It is apt to observe here that this Court in Shaheda Khatun has unconsciously approved the views taken in those cases while deciding an issue as to whether in presence of an Administrative Tribunal created under article 117(2) read with article 44(2), the decision of the Administrative Appellate Tribunal is amenable to the writ jurisdiction. The jurisdiction of the High Court Division has been ousted by clause (5) of article 102 read with article 117(2) and the Tribunal has been created in exercise of powers under article 117(2) with powers that are exercisable by it in accordance with article 44(2) read with article 117(1) of the constitution. How then the High Court Division can exercise its power of judicial review of the administrative actions. That's too, in presence of appellate forum and this Court's power to examine the legality of the Appellate Tribunal's decision under article 103. These points have not been considered and addressed in Shaheda Khatun (supra) and unconsciously this court made those observations.

75. In Khalilur Rahman V. Md. Kamrul Ahasan, 11 MLR(AD) 5, the question arose as to whether the High Court Division is competent to entertain a writ petition since the Administrative Tribunal does not possess the power of granting ad-interim relief and since the disposal of the case and the appeal will take long time, by which time, the mischief will be done. This Court taking consideration of sub-section (1) of section 4 of the Administrative Tribunals Act held that the Administrative Tribunals Act does not authorize the Administrative Tribunal or the Administrative Appellate Tribunal to pass any ad-interim order restraining the government or other functionaries from taking any action relating to the terms and conditions of service of the Republic or any statutory authority while the case has been filed by a person. We have held earlier that even without challenging the vires of law,

the High Court Division has jurisdiction to entertain a writ petition on limited ground if there is violation of fundamental rights in view of article 44(1) of the constitution. This point has totally been over looked by this Court in Khalilur Rahman.

76. In Khalilur Rahman (Supra), this court observed that a public servant may out of desperation or just for taking a sportive chance in the summary writ jurisdiction alleged contravention of some fundamental rights which may turn out to be frivolous or vexatious or not even remotely attracted in the case. The court, it is observed, however, is on guard in such attempt that the great value of the rights given under article 102(1) is not frittered away or misused as a substitute for more appropriate remedy available for an unlawful action involving no infringement of any fundamental rights. It further observed that a person in the service of the Republic who intends to invoke fundamental rights for challenging the vires of law or a relief by way of striking down of a particular law on the ground of its constitutionality, writ petition under article 102(1) can be maintained. In the alternative, a person in the service of the Republic can file a writ petition on limited grounds. In other cases, he will be required to seek remedy under Article 117(2). So, this Court did not altogether oust the jurisdiction of the High Court Division, rather in appropriate cases it may exercise its jurisdiction.

77. However, it took the view that since the Administrative Tribunal or the Administrative Appellate Tribunal has no power to pass any interim order relating to terms and conditions of a person in the service of the Republic or of any statutory public authority, in the absence of any power to pass any interim order, though the Tribunal refused the prayer for interim order, the applicant ought to have preferred an appeal, if so advised, but instead, he moved the High Court Division in its writ jurisdiction, which is not maintainable. What we find from the above observations made in paragraph 13 that the court impliedly said the Tribunal has power to make such order in appropriate cases but the applicant has chosen the wrong forum. So far the observation as to the interference of the judgment of the High Court Division is correct view but we are unable to subscribe the view that the Tribunal cannot pass any interim order.

78. We want to make in this connection that except on the limited scope challenging the vires of law or if there is violation of fundamental rights, the power of the High Court Division is totally ousted under clause (5) of article 102 read with article 117(2). If a public servant or an employee of statutory corporation wants to invoke his fundamental rights in connection with his terms and conditions of service, he must lay foundation in the petition of the violation of the fundamental rights by sufficient pleadings in support of the claim. It will not suffice if he makes evasive statement of violation of his fundamental rights or that by making stray statements that the order is discriminatory or malafide. A malafide action or act is a disputed question of fact and law, and the Tribunal is, therefore, competent enough to decide the question of malafide or collusion or arbitrariness in taking the decision. The expression 'malafide' has a definite significance in the legal phraseology and the same cannot emanate out of fanciful imagination or even apprehensions but there must be existing definite evidence of bias and actions which cannot be attributed to be otherwise bonafide, however, by themselves would not amount to be malafide unless the same is accompanied with some other facts which would depict a bad motive or intent on the part of the authority and the same cannot be decided in summarily proceedings in writ jurisdiction.

79. Similarly if an order is said to be without jurisdiction or is contrary to law, the appropriate course open to the applicant is to plead to the Tribunal with such plea and ask for

vacating the order or action. It is altogether within the tenor of the Tribunal. *Coram non Judice* is a Latin phrase which means 'not in the presence of a judge'. It is a legal term typically used to indicate a legal proceeding held without a judge, with improper venue such as before a court which lacks the authority to hear and decide a case in question, or without proper jurisdiction. I find no cogent ground why the Tribunal cannot deal with these issues for the reasons assigned above. Mere superficial pleadings on the point of fundamental rights will not confer any power on the High Court Division in respect of the terms and conditions of service.

80. The observations made in Shaheda Khatun (supra) that if the action complained as is found to be *coram non judice*, without jurisdiction or malafide, the judicial review is available are based on the decisions on different premises and the said views cannot be applicable in service matters in presence of an alternative forum, and this forum is created as per provisions of the constitution. It is to be borne in mind that no case can be an authority on facts. The Tribunal is created as an 'alternative' forum of the High Court Division in respect of specific purposes. If any administrative action is found without jurisdiction or *coram non judice* or malafide, the Tribunal is competent to deal with the same and adjudicate these issues satisfactorily. These issues are within its constituents of the Administrative Tribunal. If the order complained of was passed by an officer who is not competent to make such order, the order would be without jurisdiction. If the Rules provide for the constitution of a domestic tribunal with designated persons but the tribunal was constituted by persons not authorized by the Rules, the action would be *coram non judice*. If the decision is taken malafide out of vengeance or with motive to take revenge, in all those cases the Tribunal can strike down the action taken against the applicant. Article 117(1)(a) specifically provides that the Tribunal can exercise jurisdiction in respect of matters relating to 'the terms and conditions of persons .....' Section 4(1) of the Act of 1980 was also couched with the similar language. The language used in those provisions are so wide enough to come to the conclusion that the Tribunal is competent to deal with those issues. The Tribunal has been given all powers relating to the terms and conditions of service and therefore, there is no reason to restrict the powers of the Tribunal by judicial pronouncement. These matters are within the powers of the Tribunal and therefore, if a public servant wants to challenge the actions as above under article 102(1), it will be barred under clause (2) of Article 117.

81. Let us now consider the cases referred by the parties. In Junnur Rahman V. BSRS, 51 DLR(AD)166, the writ petitioner, a senior principal officer of Bangladesh Shilpa Rin Sangsta challenged a circular containing promotion criteria of BSRS and an office order promoting some other persons to the post of Assistant General Manager superseding him. The High Court Division found no violation of fundamental rights of the writ petitioner under articles 27 and 29 of the constitution and rejected the writ petition as was not maintainable. This Court maintained the judgment of the High Court Division on the view that the writ petitioner did not seek to enforce any fundamental rights, and therefore, it was within the competence to the Administrative Tribunal to entertain the grievance of the writ petitioner. In Delwar Hossain Mia V. Bangladesh, 52 DLR(AD)120, it has been held that a person in the service of the Republic who intends to invoke fundamental rights for challenging the vires of a law will seek his remedy under article 102(1) but in all other cases, he will be required to seek remedy under Article 117.

82. In Government of Bangladesh V. Md. Abdul Halim Mia, 9 MLR(AD)105, it was observed that the right of judicial review under article 102(2) of the constitution is neither a fundamental right nor a guaranteed right. It has further observed that the judicial review of an

administrative action is neither an all weather remedy nor a remedy for all wrongs but is only available when there is no other equally efficacious remedy. The question of enforcement of fundamental rights is not available in the case as the question involved in the decision was mere clarifications of the Rules for giving effect thereto, and therefore, the assumption of jurisdiction under article 102(2) of the constitution for ventilating certain grievance regarding terms and conditions of service of the writ petitioner has never been contemplated. It, however, found no fundamental rights involved in the case. This case does not help the appellants.

83. In Secretary Ministry of Establishment V. Shafi Uddin Ahmed, 2 MLR(AD) 257, a writ petition was filed challenging the promotion to the post of Joint Secretary breaking the seniority. The writ petition was moved on the principle of violation of the fundamental rights, inasmuch as, according to him there was discrimination in considering his case. The High Court Division made the rule absolute. This Court did not interfere with the judgment of the High Court Division on the reasonings that the High Court Division struck down some paragraphs of impugned notifications as ultra vires articles 27 and 29 of the constitution holding that these notifications had the force of law. This Court further held that the writ petitioners invoked article 44(1) of the constitution and the petition was filed for enforcement of fundamental rights and that the Administrative Tribunal has no power to strike down an order for infringement of fundamental rights or any other law and that the right to move the High Court Division under article 102(1) for enforcement of fundamental rights is a fundamental right itself and is guaranteed by under Article 44(1) and has been recognized and that the right of judicial review under article 102(2) is neither a fundamental right nor a guaranteed one.

84. In Shamsun Nahar Begum V. Secretary Ministry of Health and Family Welfare, 3 MLR(AD)68, a writ petition challenging the order of transfer of the writ petitioner. The High Court Division rejected the writ petition summarily. This Court maintained the judgment holding that the writ petitioner's job was transferable, and therefore, such action relates to the terms and conditions of service. The writ petition was barred under article 117(2). The views taken by this Court is based on sound principle. No writ petition is maintainable challenging any action of the authority transferring a government servant from one station to other station, inasmuch as, it being an administrative action for the purpose of proper administration of the department-this relates to the terms and conditions of the service and the remedy, if there be any, lies with the Administrative Tribunal.

85. In Bangladesh V. Mahabubuddin Ahmed, 3 MLR(AD) 121, this Court held that the dismissal of service of an employee of the Republic relates to its terms and conditions of his service. In that case the writ petitioner was dismissed from the service under Martial Law Order No.9 of 1982. He challenged the said order before the Administrative Tribunal which dismissed the case and an appeal from its decision was also dismissed. He then filed the writ petition and the High Court Division made the rule absolute. It was observed that the matter being one relating to the terms and conditions of service, the jurisdiction of the High Court Division has been excluded and that the grounds taken in the order of dismissal were such as fully cognizable by the Administrative Tribunal.

86. In Government of Bangladesh V. Member Administrative Tribunal, 6 MLR(AD)181, a police officer challenged an order of his compulsory retirement under section 9(2) of the Public Servants (Retirement) Act, 1974 before the Administrative Tribunal which upon hearing the parties set aside the order and directed for re-instatement of the officer with

benefits admissible to him. The government without challenging the said judgment before the Administrative Appellate Tribunal, moved a writ petition in the High Court Division. The High Court Division was of the view that writ petition was not maintainable in view of clause (2) of Article 117 of the constitution. This Court maintained the judgment of the High Court Division holding that there was hardly any ground to saying the correctness of the views taken by the High Court Division.

87. In Bangladesh V. A.K.M. Enayet Ullah, 11 BLC(AD)2001, the respondent challenged an order of his retirement by a writ petition before the High Court Division. The High Court Division made the rule absolute. This Court interferes with the judgment of the High Court Division holding that the respondent was a government servant and his remedy was available before the Administrative Tribunal. The order of retirement was in violation of the terms and conditions of the service, and therefore, the writ petition was not maintainable.

88. In Government of Bangladesh V. M. Salauddin Talukder, 15 BLT(AD) 60, the respondent Salauddin Talukder moved the High Court Division by a writ petition challenging his transfer order as Appraiser of Customs and also section 8 of Act XX of 2000 by which the government made different grades equivalent to each other inter- changeable and inter-transferable on the ground that his seniority was affected. The High Court Division made the rule absolute. This Court held that the classification made under section 8 of Act XX of 2000 based on distinctive characteristic of the respective class of officers could not be assailed of on the ground of violation of articles 27 and 31 of the Constitution. The post of Inspector, Appraiser, Preventive Officer and Intelligence Officer were previously third class posts and subsequently they were made second class posts, and therefore, the appointing authority has transferred the respondent as an Inspector. Accordingly, this Court held that the respondent's fundamental rights have not been violated or infringed and the writ petition was not maintainable in view of article 117(2) of the constitution. It was further held that the right to move the High Court Division under article 102(1) of the constitution is guaranteed under article 44(1) but a right of judicial review under article 102(2) is neither a fundamental right nor a guaranteed right one.

89. In Delwar Hossain Mollah V. Bangladesh, 15 BLT(AD) 124, the writ petitioner was appointed as Thana Live Stock Officer on Ad-hoc basis. He along with some other officers of the same department challenged some Rules of Bangladesh Civil Service Examination for Promotion Rules, 1986 on the ground that they were discriminatory and violative of their fundamental rights guaranteed under Articles 26, 27, 29(1) and 31 of the Constitution. The High Court Division discharged the rule.

90. In Md. Shamsul Islam Khan V. Secretary, 8 BLT(AD)64, this Court held that a government servant who intends to challenge the vires of law on the ground of violation of fundamental rights may seek remedy under article 102 of the Constitution but in all other cases his remedy lies before the Administrative Tribunal under Article 117(2) thereof. In that case writ petition filed by the appellant was found not maintainable. In TNT Board V. Md. Shafiul Alam, 8 BLT(AD) 225, this Court held that the respondent being an employee of the Telegraph and Telephone Department, a government employee, and therefore, the High Court Division lacks its jurisdiction to interfere with the action taken against him removing him from service. This Court rejected the respondent's prayer for doing complete justice on the reasoning that such prayer cannot be upheld because the High Court Division which lacks jurisdiction in the matter cannot give him such relief.

91. In Government of Bangladesh V. Abdul Halim, 13 BLT(AD) 120, this Court held that the judicial review under article 102(2) of the constitution is neither a fundamental right nor a guaranteed right. Similarly 'the judicial review of an administrative action is neither an all weather remedy nor a remedy for all wrongs but is only available when there is no other efficacious remedy' and that since there was no infringement of fundamental rights guaranteed under articles 27 and 29 of the Constitution, the writ petition was not maintainable.

92. The next question is whether in the absence of power of the Tribunal to pass any interim order, the judicial review of the administrative action is available in the High Court Division if the action complained of is found acted upon during the pendency of the case before the Tribunal. Clause (b) of section 2 of the Act defines "Tribunal" which means 'the Administrative Tribunal or Administrative Appellate Tribunal established under this Act.' The constitution of the Tribunal has been provided under section 3 as under:

> "Establishment of Administrative Tribunals-(1) The Government may, by notification in the official Gazette, establish one or more Administrative Tribunals for the purpose of this Act.
>
> (2) When more than one Administrative Tribunal is established, the Government shall, by notification in the official Gazette, specify the area within which each Tribunal shall exercise jurisdiction.
>
> (3) An administrative Tribunal shall consist of one member who shall be appointed by the Government from among persons who are or have been District Judges.
>
> (4) A member of an Administrative Tribunal shall hold office on such terms and conditions as the Government may determine."

93. In sub-section (3) it is provided that the member of the Tribunal is among persons who are or have been District Judges. The expression 'District Judge' has been described in the Civil Courts Act, 1887 as a senior most judicial officer of Civil Courts. In the classification of 'Courts' under the Civil Courts Act, clause (a) provides, 'the Court of District Judge' i.e. it is a court. Section 18 provides the ordinary jurisdiction of the District Judge which says: save as otherwise provided by an enactment for the time being in force, the jurisdiction of the District Judge.....' Here also the expression 'District Judge' is used. Again under section 21, it has been provided:

> (1) Save as aforesaid, an appeal from a decree or order of a joint District Judge shall lie –
>
> (a) to a District Judge where the value of the original suit in which.....'

94. So, according to Civil Courts Act, the office of the 'District Judge' is a Civil Court and not a *persona designata*. Similar question arose in Ruhul Amin V. District Judge, 38 DLR (AD) 172. In that case the question was whether a revision or a writ petition will lie in the High Court Division against a judgment passed by an Election Tribunal constituted under the Local Government (Union Parishad) Ordinance, 1983. In sub-section (3) of section 29, it is provided "the decision of the Election Tribunal on an election petition shall be final and shall not be called in question in or before any court". Under the law the Election Tribunal was composed of by a judicial officer. By an amendment of the Ordinance, an appellate forum was created by Ordinance XLIV of 1984. By this amendment, there is a provision to prefer an appeal to the 'District Judge' within whose jurisdiction the election petition in dispute was held and the decision of the 'District Judge' on such appeal shall be final.

95. It has been held in Ruhul Amin (supra) that "the conclusion depends upon the decision regarding the nature of District Judge's function, that is, whether the District Judge, in passing the impugned order, was exercising powers of a Court or acting as *persona designata*? .....if he was exercising the powers of a Court in deciding a dispute he was found to be subordinate to the High Court but if he was acting in his personal capacity that is, as a *persona designata*, he was not amenable to the jurisdiction of the High Court. The dispute in civil nature, judicial officers who decide civil disputes have been empowered to decide election disputes. Procedure for holding the trial of such disputes is the same as that of an Ordinary Civil Court being constituted by munsifs and empowered to decide election disputes relating to right to office, after taking evidence and hearing arguments, both on facts and law, are definitely exercising judicial powers, and not administrative powers, though it may be that they are constituted by the Election Commission, an executive authority'.

96. About the constitution of the Administrative Tribunal, section 3(3) says 'An Administrative Tribunal shall consist of one member who shall be appointed by the Government from among persons who are or have been District Judges'. Section 5 provides the constitution of the Appellate Tribunal with one Chairman and two members and 'the Chairman shall be a person who is, or has been or is qualified to be a Judge of the Supreme Court, and of two other members..... the other person who is or has been a District Judges.' Section 7 provides for the powers and procedure of the Tribunal. Sub-section (1) of section 7 provides that the Tribunal shall have "all powers of a Civil Court, while trying a suit under the Code of Civil Procedure". Sub-section (2) says "any proceedings before the Tribunal shall be deemed to be a judicial proceeding within the meaning of section 193 of the Penal Code".

97. So in all practical purposes the Tribunal or the Appellate Tribunal is exercising powers of a civil court and disposing of Civil disputes determining the terms and conditions of service, that is to say, the right to his office, privileges promotion including pension rights. The Tribunal has power to substitute the heirs in case of death of the applicant. The Tribunal has been given the power under section 7B to amend the pleadings. Again in section 8(2), it is provided that the decision of the Administrative Tribunal be binding upon the parties, that is, the government. Again in section 10A, it is provided that the Administrative Appellate Tribunal has power to punish for contempt of its authority or that of the Administrative Tribunal, as if it were the High Court Division of the Supreme Court'. The language used in Section 10A is self explanatory that the Tribunal has been created as an 'alternative' forum of the High Court Division in respect of matters mentioned above. It can also initiate execution proceeding for enforcement of the judgment. Therefore, the Tribunal or the Appellate Tribunal has all the trappings of a Civil Court.

98. Suppose a gradation list has been published by any department of the government for promotion to the next higher post. The aggrieved employee filed objection to the authority for correction of the gradation list. The authority overlooked the objection and had proceeded with the promotion process of some junior officers and proceeded with filling up all posts superseding the senior officer. He filed a petition to the Administrative Tribunal after complying with all formalities. Could it be said that the Tribunal will be powerless to pass any interim order even in such blatant violation of the law? In that event, the junior officer would become senior to him and will get all benefits if the promotion is acted upon. The disposal of the case before the Tribunal, the appeal, and then a leave petition will take years together. In the meantime, the aggrieved officer may attain superannuation. He will be deprived of his promotion, financial benefits and status. At the fag end of his career, the authority will say, since he has attained superannuation, the cause of action for filing the case

does not exist. Would the Tribunal in such eventuality be a silent spectator for technical reason and avoid its responsibility for doing justice to the aggrieved officer?

99. In some departments of the government, Rules have been framed for promotion, transfer, deputation etc. providing the criteria of transfer of an officer who is technically skilled and fit for promotion to a higher post. If any junior officer without fulfilling the criteria and technical expertise is filled up or promoted to such post, would the Tribunal shirk its responsibility on the plea of having no power. If events change during the pendency of the proceedings, the Tribunal will not be powerless to pass an interim order or an order of status quo-ante under such circumstances in exercise of its inherent powers.

100. Despite the absence of any provision empowering the Tribunal to pass any interim order, the Tribunal is not powerless since it has all the powers of a civil court and in proper cases, it may invoke its inherent power and pass interim order with a view to preventing abuse of the process of court or the mischief being caused to the applicant affecting his right to promotion or other benefit. But the Tribunal shall not pass any such interim order without affording the opposite party affected by the order an opportunity of being heard. However, in cases of emergency, which requires an interim order in order to prevent the abuse of the process and in the event of not passing such order preventing such loss, which cannot be compensated by money, the Tribunal can pass interim order as an exceptional measure for a limited period not exceeding fifteen days from the date of the order unless the said requirements have been complied with before the expiry of the period, and the Tribunal shall pass any further order upon hearing the parties.

101. As observed above, a Tribunal is constituted with a judicial Officer in the rank of a 'District Judge' and therefore, he is a 'civil court' and not 'persona designata'. While prescribing the powers of the Tribunal, it is specifically provided that 'a Tribunal shall have all the powers of civil court'. Monetary compensation cannot be measured while considering the status of an officer. An officer's dignity, status, privilege, position in office etc. cannot be measured in terms of money.

102. The inherent powers of a Tribunal reminds the Judges of what they ought to know already, namely that if the ordinary rules of procedure results in injustice in any case and there is no other remedy it can be broken for the ends of justice. This power furnishes the legislative recognition of the old age and well established principle that every Tribunal has inherent power to act *ex debito justitiae* i.e. to do that real and substantial justice and administration of which alone it exists to prevent abuse of the process of the court. This power can be exercised when no other power is available under the procedural law. Nothing can limit or affect the inherent power of a Tribunal to meet the ends of justice since it is not possible to foresee all possible circumstances that may arise to provide appropriate procedure to meet all those situation. This inherent power is recognized. All tribunals whether civil or criminal possess this power in the absence of any provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "*quando lex aliquid alique, concedit, conceditor, it sine quo res ipsa eshe non potest*" i.e. when the law gives a person anything it gives him that also without which the thing itself cannot exists.

103. It is a power of a Tribunal in addition to and complementary to the powers expressly conferred under the procedural law but this power should not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary

implication conferred by the procedural law. It cannot be exercised capriciously or arbitrarily. It should be borne in mind that authority of the Tribunal exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice the Tribunal has power to prevent such abuse. Therefore, while exercising this power the Tribunal is to consider whether the exercise of such power is expressly prohibited by any other provision and if there is no such prohibition, then the Tribunal will consider whether such power should be exercised or not in the facts of a given case. Reference in this connection is the case of Shipping Corporation of India V. Machadeo Brothers, AIR 2004 SC 2093.

104. Similar question arose in a civil review petition filed by Abdul Quader Mollah in Criminal Review Petition No.17-18 of 2013. Under the International Crimes (Tribunals) Act, 1973 there was no provision for review. The condemned prisoner filed a review petition. Learned Attorney General raised a preliminary objection about the maintainability of the review petition on the ground that in view of article 47A(2) of the constitution, the review petition is not maintainable, inasmuch as, the Act of 1973 is protected by article 47A of the constitution. According to him, a judgment which has attained finality cannot be challenged by resorting to the constitutional provisions which has been totally ousted by the Constitution (Fifteenth Amendment) Act, 2011 and the Constitution (First Amendment) Act, 1972 respectively. This court repelled the objection and held that the review petition was maintainable, inasmuch as, apart from article 105 of the constitution, this court can invoke its inherent power if it finds necessary to meet the ends of justice or to prevent the abuse the process of the court. There is inherent right to a litigant to a judicial proceeding and it requires no authority of law.

105. This Court held that "We cannot overlook the fact that the primary function of the judiciary is to do justice between the parties who bring their causes before it. If the primary function of the court is to do justice in respect of causes brought before it, then on principle, it is difficult to accede to the proposition that in the absence of specific provision the court will shut its eyes even if a wrong or an error is detected in its judgment. To say otherwise, courts are meant for doing justice and must be deemed to possess as a necessary corollary as inherent in their constitution all the powers to achieve the end and undo the wrong. It does not confer any additional jurisdiction on the court; it only recognizes the inherent powers which it already possesses". It further held that "If the law contains no specific provisions to meet the necessity of the case the inherent power of a court merely saves by expressly preserving to the court which is both a court of equity and law, to act according to justice, equity and good conscience and make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the court. It is an enabling provision by virtue of which inherent powers have been vested in a court so that it does not find itself helpless for administering justice.

106. The Tribunal can use its inherent powers to fill up the lacuna left by the legislature while enacting law or where the legislature is unable to foresee any circumstance which may arise in a particular case. There is a power to make such order as may be necessary for the ends of justice and to prevent the abuse of the process of the Tribunal. The inherent powers of a Tribunal are in addition to and complementary to the powers expressedly conferred upon it by other provisions of the Act of 1973. They are not intended to enable the Tribunal to create rights for the parties, but they are meant to enable the Tribunal to pass such orders for ends of justice as may be necessary. Considering the rights which are conferred upon the parties by substantive law to prevent abuse of the process of law, it is the duty of all Tribunals to correct the decisions which run counter to the law.'

107. The High Court Division's power of judicial review and its jurisdiction under article 102(1) cannot be overlooked. It has jurisdiction over ordinary as well as extra ordinary matters - it has a special jurisdiction, it has also testamentary, matrimonial and gorgeous jurisdiction. It can exercise original jurisdiction under the Companies Act, Admiralty and several other special statutes. Its extraordinary jurisdiction enabling it to issue prerogative writs in the nature of habeas corpus, mandamus, prohibition or writ of certiorari. The function of the Administrative Tribunal is a mode of alternative dispute resolution in respect of service matters and the object of creation of this Tribunal is to relieve the High Court Division of its burden in respect of only those matters mentioned in Article 117(1). Similar other alternative dispute resolution forums have been created in the Taxes Department, Customs Department, Labour Courts, Press Council etc. and those Tribunals have been adjudicating matters expeditiously and as a result, the High Court Division's work load is reduced to some extent. Administrative Tribunal is also created keeping the above object in view.

108. Taking into consideration the principles of law discussed above, let us now consider the individual cases on merit as to whether the writ petitions moved in the High Court Division are maintainable.

109. **Civil Appeal No.159 of 2010**

Respondent Sontosh Kumar Shaha claimed that while serving as Senior Assistant Judge, he was served with a notice on 6th September, 2000, with allegations of corruption under Rule 3(b) of the Governments servants (Discipline and Appeal) Rules, 1985. He claimed that his suspension order has not been recommended by the General Administration Committee (G.A Committee) of the High Court Division and it was not also approved by the Full Court. He claimed that he did not take any money for his personal purposes. He took leave due to illness of his mother and denied the misappropriation of taka 19,500/-. He claimed that he did not commit any offence of corruption and no charge has been proved against him. The authority having considered the inquiry report and other materials found him not guilty and discharged him of the charges leveled against him on 24th October, 2001. The writ respondent No.1, the Ministry of Law decided to drop the suspension order and communicated the Registrar of the Supreme Court, but his name did not appear in the promotion list illegally. Pursuant thereto, he made representation for his posting as Subordinate Judge. Despite that the junior officers had been promoted. The writ respondent No.2 issued the second show cause notice on 20th November, 2003, with a recommendation for his removal from the service under Rule 4(3)(c). Pursuant thereto, he filed a writ petition claiming his seniority on the basis of promotion list dated 14th March, 2000 which was duly approved by the President.

110. The issuance of second show cause notice was without lawful authority and of no legal effect. He further stated that the Chief Justice approved of the proposal for suspension and departmental proceedings without placing the matter before the G.A. Committee. Ultimately, the proposal of the writ respondent No.2 for review of the proposal of the writ petitioner was placed before the G.A. Committee and the committee disapproved the proposal. The G.A. Committee did not approve the proposal of the Chief Justice for withdrawal of the suspension order. There was also violation of rule 3(d) of the High Court Rules, Part 1, Chapter-1, and also rule 16(e) of Chapter 1, Part 1, inasmuch as, in respect of the suspension or removal, the Full Court's decision was necessary. On perusal of the pleadings, we find that the respondent did not challenge the vires of any law nor did he claim the violation of his fundamental rights. Whatever statements in respect of violation of fundamental rights were made are superficial in nature without laying any foundation.

111. The High Court Division observed that a departmental proceedings was initiated against the respondent which has been taken without approval of the G.A. committee, and the same was a mandatory provision of law and that the Chief Justice without taking the matter to the G.A. Committee had accorded the approval. On perusal of the record the High Court Division noticed that there was an endorsement at the bottom of the note-sheet with a note of the Chief Justice 'yes' and this proved that the Chief Justice accorded the approval violating rule 3(d) of the High Court Division Rules. This court perused the record and found that this observation was correct but that itself is not a ground for interference. It should be borne in mind that in urgent matters, sometimes the Chief Justice gives approval in respect of some proposals without placing the matter before the G.A. committee, because the calling such meeting takes time and in urgent matters the Chief Justice accords permission subject to the approval of the committee later on. In this case inadvertently the matter has not been placed before the G.A. Committee.

112. In order to avoid more harm to the judiciary, the Chief Justice takes such decision. The Chief Justice being the head of the judiciary is respected by the Judges and his opinion with regard to the superintendence and control over the lower judiciary has primacy and is being honoured by the Judges of the committee. This is a practice being followed by this Court and non-approval of the decision of the Chief Justice was merely an irregularity and not an illegality and this will not vitiate the decision. Suppose, the Chief Justice noticed that some members of the G.A. Committee are unable to attend the court, but for that reason the Chief Justice cannot sit idle leaving urgent and emergency matters pending. The functions of the Supreme Court should not be kept in abeyance due to this technical ground.

113. The High Court Division held that the Ministry of Law having found the respondent not guilty in respect of the allegations made in Case No.4 of 2000, wrote a letter to the Registrar for exonerating him of the departmental proceedings. It renewed its opinion on two other occasions subsequently but the Supreme Court without consenting to the proposal directed the concerned Ministry to issue second show cause notice on 20th November, 2003 and that the order of suspension of the respondent was made in violation of rule 3(d) of the High Court Division Rules. As observed above, this is a mere irregularity and this cannot be a ground for interference by the High Court Division. The High Court Division further held that as per Rules, any decision relating to the terms and conditions of service as a judicial officer should be placed before the Full Court but in case of the respondent, this has not been followed; that the Ministry of Law upon perusal of the inquiry reports and other materials was convinced that the respondent should be exonerated from both the charges; that there was total violation of rule 16 of the High Court Division Rules and the respondent was victimized due to unwitting decision of the G.A. committee; that the G.A. Committee illegally considered the circular of the High Court Division under memo dated 13th April, 2003, which has no manner of application in case of the respondent and that any order passed by the Ministry in accordance with Article 116 of the constitution shall have the force of law.

114. The superintendence and control over all courts and tribunals subordinate to it is upon the High Court Division as per article 109 of the constitution. The Supreme Court has its own system and machinery to evaluate the conduct, discipline, performance of all judicial officers working in the subordinate courts and tribunals. Firstly, through the judgments pronounced by them which ultimately come to the High Court Division for judicial review. Secondly, from the annual confidential reports being prepared in accordance with Rules. Finally, through inspections made from time to time by the Judges of the High Court Division

as per direction of the Chief Justice. This system is being followed right from 1861 when the High Courts were established in this sub-continent under the High Courts Act, 1861. Whenever, any recommendation, proposal or opinion regarding the terms and conditions of service of any judicial officer is made by the Supreme Court, this recommendation is being honoured by the Executive government without further inquiry because the Executive does not have such machinery or system to evaluate the conduct and performance of the judicial officers.

115. If the superintendence and control of the subordinate judiciary is left in the hands of Executive, the independence of judiciary will be in question. From the time of the separation of the judiciary from the Executive, it is the Supreme Court under whose supervision the subordinate judicial officers are working and it supervises its administration and controls the conduct of judicial officers. There cannot be any doubt about it. The lower judiciary cannot be independent if its superintendence and control over the judicial officers remains with the Executive. The Executive is also conscious about that, and all the time it represents that it does not interfere with the administration of justice.

116. If articles 116, 116A are read along with article 109, it will be manifest that it is the Supreme Court which has the exclusive power to supervise and control the terms and conditions of service of the subordinate judicial officers. Article 116 does not control article 109, rather if these two provisions are placed in juxtaposition, it will be clear that the superintendence and control of the officers of the lower judiciary remains with the Supreme Court. At any event, in order to remove any doubt this Court in Khandker Delwar Hossain V. Bangladesh Italian Marble works Ltd., BLD 2010(AD) 1 (special Issue) popularly know as 'Constitution 5th Amendment case' observed:

> "However we are of the view that the words, 'but we find no provision in the Constitution which curtails, demolishes or otherwise abridges this independence' do not depict the actual picture because unless Articles 115 and 116 are restored to their original position, independence of judiciary will not be fully achieved."

117. Despite such observation the government has not restored original article 116. It is hoped that the original article 116 will be restored with a view to avoid any controversy in future. This is healthy for the proper administration of justice. Any opinion given by the Supreme Court regarding the terms and conditions of service of any judicial officer should be respected by the Executive and its opinion cannot be ignored. There cannot be any dual administration in the administration of justice and the same will not be healthy for the administration of justice. If the views taken by the High Court Division is accepted, there will be chaos and confusion in the administration of justice. If we look at the scheme of the constitution, there will be no doubt that the opinion of the Supreme Court regarding the terms and conditions of the service of the lower judicial officers would prevail. There is no doubt about it.

118. The High Court Division further held that the writ petition is maintainable and in this connection, it has noticed the case of Shahida Khatun V. Bangladesh, 3 BLC (AD) 155 and Abul Basher V. Bangladesh, 1 BLC (AD) 77. In respect of Shahida Khatun, we have expressed our opinion earlier. In Shahida Khatun the Administrative Appellate Tribunal was not constituted properly when the impugned judgment was delivered, inasmuch as, it was signed by two members, and therefore, a question arose as to whether the decision of the Appellate Tribunal was *coram non judice*. This Court held that the Tribunal was properly

constituted and in the midst of the hearing, one member departs temporarily and in his absence two other members signed the judgment and thereby it has committed no illegality. The High Court Division possibly wants to mean that since the suspension order of the respondent not having been approved by the G.A. Committee, and the decision having not been placed before the Full Court, the suspension order and the initiation of the proceedings is *coram non judice*. As observed above, in case of emergency the Chief Justice sometimes passes orders relating to the terms and conditions of the service and due to unavoidable situation, the matter had not been placed before the Committee.

119. In this case this court clearly observed that except challenging the vires of law or violation of fundamental rights, judicial review of a decision of authority relating to the terms and conditions of service under article 102(1) is not permissible. None of the above conditions is available in this case and therefore, the writ petition is not maintainable. In respect of Abul Bashar, the writ petition was summarily rejected on the ground that the order impugned in writ petition cannot be said to be malafide or passed for collateral purpose and that no discrimination has taken place at all. In respect of case no.3 of 2000 since no inquiry report is available with the record, we direct the concerned Ministry to appoint an inquiry officer with the consultation of the G.A. Committee and complete the inquiry proceedings within two months from date, since the case is very old one. So this decision does not have any help for the respondent.

120. **Civil Appeal No.131 of 2012**

This appeal arises out of judgment in Writ Petition No.6967 of 2009. It was a public interest litigation filed by the Bangladesh Stenographers Association. Its claim is that some Stenographers of the Appellate Tribunal and the Labour Appellate Tribunal have formed the association. By notification dated 17th May, 1978, the government allowed special allowance to the Stenographers of the Secretariate. One Mir Mohammad Moinuddin, a Personal Assistant-cum-Stenographer filed Writ Petition No.1922 of 1990. Similarly one Md. Shamsul Huq, a Personal Assistant-cum-Stenographer of the Supreme Court also filed Writ Petition No.2256 of 2002 for raising their status and the rules were made absolute. The Stenographers who formed the Bangladesh Stenographers Association (BCS) were being discriminated against, inasmuch as, they were not given status equal to those given to the Stenographers of the Secretariate. Therefore, the refusal to treat the members of the writ petitioners Samity is discriminatory. The High Court Division observed that the Stenographers who were initially appointed on the same pay scale and attached to the Secretaries, Joint Secretaries and Deputy Secretaries of different Ministries were redesignated as Personal Officers and subsequently their posts have been upgraded as class-2 Officers; that the P.A.-cum-Stenographers of the Judges of the High Court Division have been accorded to the similar privilege and that the refusal of the members of writ petitioners Samity is discriminatory. The High Court Division made the rule absolute mainly relying upon some decisions of the Indian jurisdiction.

121. The High Court Division has not at all considered about the maintainability of the writ petition. On the principles discussed above, the writ petitioners' petition was barred under Article 117(2). No question of violation of fundamental rights or any statutory provision was challenged. Discrimination should not be based on a mere possibility of a better classification. The court should look at whether there is some difference which bears a just reasonably to the object of legislation. Mere differentiation in equality or treatment or inequality or burden does not amount to discrimination within the inhibition of the equal protection clause. Suppose an army personnel who has joined the service knowing that he may sacrifice his life during external interference. An employee on the same scale of

different department cannot claim equal opportunity and status with the army officer. Equal opportunity should be given to those who stand on the same footing in the same department. An employee of different department cannot be equated with another employee of another department only because his salary is equal with the other department. The High Court Division has totally overlooked this aspect of the matter.

122. **Civil Appeal No.132 of 2012**

This appeal arises out of a judgment in Writ Petition No.1992 of 2010. Two writ petitioners challenged the letter under memo dated 13th September, 1995, issued by the Ministry of Establishment refusing to upgrade their scale and status. They were appointed as Typist and Upper Division in the Ministry of Food Department. Their claim is that the Ministry has upgraded the Personal Officers of Secretariates. The Supreme Court also upgraded its Stenographers, and therefore, they are also entitled to equal protection of law and status. There was, therefore, discrimination regarding their status and pay scale.

123. The writ petitioners did not plead any violation of fundamental rights in their writ petition nor did they challenge vires of any law. The High Court Division made the rule absolute mainly relying upon a decision of this Court in respect of some employees of the High Court Division. Though the High Court Division observed that there were infringement of writ petitioners' fundamental rights, it has assigned no reason in respect of infringement of such rights. Secondly, as observed above, there was no sufficient pleadings on the question of infringement of fundamental rights. The High Court Division observed that there was violation of articles 27 and 29 of the constitution but mere observation that there was violation of these provisions will not suffice. In the absence of proper pleadings and laying foundation, the writ petition is barred under clause (2) of Article 117.

124. **Civil Appeal No.133 of 2012**

In these appeals, 57 employees who are Upper Division Assistants of the Local Government Engineering Department jointly filed a writ petition seeking a direction to grant second class gazetted status with other benefits. In their petition also they made similar averments made in other writ petitions. They did not make sufficient pleadings as regards violation of fundamental rights except that due to rejection of their prayer, it was claimed, they had been deprived of their rights guaranteed under article 29 of the constitution. The High Court Division in a very concise judgment made the rule absolute relying upon some decisions of this Court in respect of the Personal Assistant-cum- Stenographers of the High Court Division and another writ petition. It has not at all discussed as regards the maintainability of the writ petition and totally ignored the decisions of this court in respect of maintainability of the writ petition.

125. **Civil Appeal No.134 of 2012**

This appeal arises out of a judgment of the High Court Division made in Writ Petition No.1309 of 2010 in which 93 writ petitioners who were in the police service of different wings such as Special Branch, Upper Division Assistants etc. Their claim is that while the employees of the Secretariate and the Supreme Court of Bangladesh in the same rank have been given status and salary, they have been discriminated under articles 27 and 29 of the constitution. They have not also pleaded anything on the question of alleged violation of their fundamental rights by the administrative action of the authority. The High Court Division in a very precise judgment made the rule absolute mainly relying upon the case of Bangladesh V. Md. Shamsul Huq, 59 DLR(AD)54, in respect of the Personal Officers of the Secretariate. This case is not at all applicable as discussed above.

126. **Civil Appeal No.128 of 2015**

In this appeal four writ petitioners who were Lower Division Assistants and Typists of the Directorate of Inspection and Audit Ministry of Education challenged the inaction of the authority by a writ petition. They also made similar averments with other writ petitions as mentioned above. They did not plead the violation of any fundamental rights though they sought for enforcement of fundamental rights guaranteed under articles 27 and 29 of the constitution. The High Court Division in a very slip-shod judgment made the rule absolute mainly on the reasoning that the employees of Directorate of Inspection of Audit, Ministry of Education are regulated by the terms and conditions recruitment Rules, 1984 but they have been deprived of their rights and that the authority have not amended the recruitment Rules illegally. In this case also the High Court Division has not made any finding as regards the maintainability of the writ petition.

127. **Civil Appeal No.119 of 2008**

One Ms. Sabiha Ahmed moved the High Court Division challenging an order under memo dated 11th January, 2000 promoting 15 officers junior to her. Her claim is that she worked in the Directorate of Women's and Children's Affairs for 23 years and posted with the National Women's Training and Development Academy as a teacher in non formal education. In 1982 she was transferred to the Women's Cell in the Ministry of Social Welfare. In due course, she was absorbed as Probation Officer and was posed in the head office of the Directorate of Women's Affairs. She was not given promotion to the post of District Women Affairs Officer although she had rendered service for more than 15 years. In the seniority list published on 30th January, 1999, she was shown at serial No.15 below some junior officers. Subsequently, she was promoted to the post of Assistant Director but on the same date by an another notification dated 11th September, 2000, fifteen officers were promoted to the post of District Women Affairs Officers, although they were all working with her in the same rank and status.

128. The High Court Division upon hearing the parties made the rule absolute. The High Court Division declared the writ petitioner to be the District Women Affairs Officers on and from 11th September, 2000, with attended salary and benefits. The High Court Division entered into the merit of the case and made the above direction. In the writ petition the writ petitioner did not raise any constitutional point of violation of fundamental rights or on the question of discrimination. It is simply stated in the form of submission in paragraph 16 "two impugned orders are both discriminatory, illegal bad in law, malafide, made for collateral purposes and cannot be sustained in law". She made statements of the effect that the authority arbitrarily promoted junior officers with malafide motive. No specific pleadings in that regard have been made. Leave was granted to consider whether "the High Court Division failed to appreciate that the matter relates to the terms and condition of service of the writ petitioner who is a person in the service of the Republic" and as such, the writ petition is not maintainable. We have already observed that a government servant cannot maintain a writ petition in presence of Administrative Tribunal relating to the terms and conditions of service. In the absence of challenging the vires of law, the writ petition is not maintainable.

129. **Civil Petition for Leave to Appeal No.703 of 2014**

17 Upper Division Assistants of the Board of Intermediate and Secondary Education, Barisal sought a direction to upgrade their scale and status similarly with those employees of Bangladesh Secretariate and Supreme Court. They stated that their fundamental rights have been violated by reason of not giving their status and scale. There was not at all pleadings in

support of the claim. The High Court Division made the rule absolute considering its other earlier decisions. According to it the writ petitioners, they being employees of public authority are entitled to the same benefit and uniform terms and conditions of the service. In view of the discussions to be made below, the writ petition is not maintainable.

130. **Civil Petition for Leave to Appeal No.2026 of 2015**

Delay of 322 days is condoned. In this petition 23 Assistant Engineers of the Public Works Department sought a direction to give selection grade pursuant to the provisions of Services (Reorganizations and Conditions) Act, 1975 on the ground that some cadres of the office of the Prime Minister got 50% selection grade and that in respect of BCS (Agriculture Cadre) got higher status pursuant to judgment in a writ petition. The High Court Division made the rule absolute on the reasonings that there was pick and choose policy by the government making discrimination between the cadres and government services and that the said discrimination should be removed. The doctrine of discrimination is not applicable to them because they do not work in the same department.

131. **Civil Petition for Leave to Appeal No.2295 of 2010**

An Upper Division Assistant of Customs, Exercise and VAT Appellate Tribunal sought a direction to convert his post to Administrative Officer on the ground that some staff of the Bangladesh Secretariate have been given higher status and scale and thereby he has been discriminated. The High Court Division made the rule absolute on the reasoning that some employees of the Republic have been given the status while the writ petitioner's claim was denied and thereby there was discrimination and violation of fundamental rights under article 27. This judgment is also hit by the above principles of law discussed above.

132. **Civil Petition for Leave to Appeal No.955 of 2011**

Delay of 158 days is condoned. In this petition 49 Upper Division Assistants of Police Department sought a direction to provide the scale, pay and other facilities as gazetted status similar to those given to the Bangladesh Secretariate. They also made similar statements and claimed that their fundamental rights guaranteed under article 27 have been denied and thereby there was discrimination. The High Court Division following the judgments in earlier writ petitions made the rule absolute.

133. **Civil Petition for Leave to Appeal No.1854 of 2011**

49 Upper Division Assistants to the Police Head Quarter sought a direction to treat them gazetted status in the similar manner of the Upper Division Assistants of the Secretariate. The substance of their claim is altogether similar to those made earlier. The High Court Division made the rule absolute following its earlier judgment in four writ petitions on the reasoning that there was violation of articles 27 and 29 of the constitution.

134. **Civil Petition for Leave to Appeal No.2539 of 2012**

Delay of 322 days is condoned. In this petitions 143 Upper Division Assistants of the Special Branch of Police of different Districts sought enforcement of fundamental rights under articles 27 and 31 of the constitution on the ground that for refixation of their scale and status as gazetted position with those situated in the similar status of the Bangladesh Secretariate. The High Court Division made the rule absolute following its earlier decisions in respect of P.A.-cum-Stenographers of the Secretariate and other employees as mentioned above. On the similar principles of law this writ petition is not maintainable.

135. **Civil Petition for Leave to Appeal No.1782 of 2015**

Delay of 439 days is condoned. In this matter, 23 Upper Divisions Assistants of Bangladesh Public Administration, Savar, sought a direction to give gazetted status similar to those provided with Upper Division status of the Assistants of the Bangladesh Secretariate. The High Court Division made the rule absolute following the case of its earlier judgment and some cases of this Division in 59 DLR(A)54 and 12 BLC(AD)142 on the reasoning that the writ petitioners have been discriminated.

136. **Civil Petition for Leave to Appeal No.1415 of 2011**

44 Upper Division Assistants of the Police Department of different districts sought direction to grant gazetted status- similar to those provided to the Upper Division status of Bangladesh Secretariate. The High Court Division following its decision in writ petition Nos.5608 of 2010 and 5670 of 2010, made the rule absolute on the reasoning that there was violation of article 27 of the constitution. There was no sufficient pleading in support of the claim.

137. **Civil Petition for Leave to Appeal No.1416 of 2011**

23 Upper Division Assistants of the office of Superintendent of Police of different districts sought a direction to give them higher rank and status similar to those given to the Upper Division Assistants of Bangladesh Secretariate. The High Court Division following its earlier judgment in Writ Petition Nos.5670 of 2010, 2256 of 2002, 7456 of 2003, 2256 of 2002 and 7478 of 2002 made the rules absolute on the reasoning that identical matters have already been disposed of and that there was infringement of articles 27 and 29 of the constitution. There was no pleading in support of the claim.

138. **Civil Petition for Leave to Appeal No.1417 of 2011**

32 Accountants of the office of Superintendent of Police of different districts sought a direction to give them gazetted status similar to those given to the Lower Division Assistants and Upper Division Assistants of Bangladesh Secretariate. The High Court Division following the similar set of earlier judgments made the rule absolute. No case has been made out in the writ petition.

139. **Civil Petition for Leave to Appeal No.1418 of 2011**

23 Upper Division Assistants of Prisons Directorate sought a direction to give them gazetted status similar to those given to Upper Division Assistants of the Bangladesh Secretariate. The High Court Division made the rule absolute following its earlier decisions in the above writ petitions on the ground that there has been infringement of their fundamental rights guaranteed under article 27 of the constitution. There is no pleading sufficient for giving such relief.

140. **Civil Petition for Leave to Appeal No.1419 of 2011**

25 employees of Police Department working at Khulna and Chittagong sought direction to grant higher scale and other facilities including gazetted status given to those Upper Division Assistants of the Bangladesh Secretariate. In this case also the High Court Division following its earlier judgments gave the direction as prayed for. No case has at all been made out.

141. **Civil Petition for Leave to Appeal No.1420 of 2011**

21 head Assistant-cum-Accountants of Police Department working in different districts sought a direction to provide gazetted status and scale similar to those given to the Upper

Division Assistant of the Secretariate. The High Court Divisions in a stereo type judgment following its earlier decisions gave the status and benefits as prayed for. There is no sufficient pleading.

142. **Civil Petition for Leave to Appeal No.1421 of 2011**

One employee of Khulna Metropolitan Police sought a direction to grant him higher scale and status of Accounts Officer similar to those given to Upper Division Assistants of the Bangladesh Secretariate. The High Court Division in a verbatim judgment gave the direction as prayer for. In this case also, there is no sufficient pleading.

143. **Civil Petition for Leave to Appeal Nos.644 and 645 of 2015**

Delay in filing of these two petitions is condoned. In these petitions some employees of the High Court Division and the Appellate Division of the Supreme Court of Bangladesh sought direction to grant selection grade, pay and status similar to those given to other officers of the Supreme Court. It is stated in the applications that the Assistant Bench Officers were promoted to the post of Bench Officers (grade 8) as 1st Class Gazetted Officers on and from 1st December, 2003 and they were also upgraded. It is further stated that the Supreme Court by notification under memo dated 11th December, 2011, 19th June, 2012, 31st December, 2012 granted selection grade and pay scale in grade No.7 upgrading from grade No.8 instead of grade No.6 in respect of Bench Officers but no such notification was made in respect of the writ petitioners, and thereby, they were discriminated in granting them selection grade of two tiers from grade No.8 to grade No.6 of the National Pay Scale, 2005.

144. The High Court Division made the rules absolute and directed the writ-respondents to grant them selection grade and pay scale to the writ-petitioners and others standing on the same footing in grade-6, that is, Tk.11000-475x14-17650 as per National Pay Scale, 2005 and Tk.18500-800x14-29700 as per National Pay Scale, 2009 from the date of completion of four years in service as Bench Officers in Class-1 post in the High Court Division with all arrears upon modification of the orders under notification dated 11th December, 2011 circulated under Memo dated 11th December, 2011, notification dated 19th June, 2012, 19th June, 2012 and notification dated 31st December, 2012, 31st December, 2012 and other similar notifications circulated in this regard granting selection grade within 30 (thirty days) from the date of receipt of the judgment.

145. In respect of the above petitions Particularly in C.P. Nos.644 and 645 of 2015, the Bench Readers and Bench Officers were upgraded to 1st Class Gazetted Officers (grade No.8) on and from 23rd February, 2000 and 1st December, 2003 respectively, but the writ petitioners' scale was not upgraded to grade No.6 as selection grade scale, although they have already completed four years service as Bench Readers 1st Class, and therefore, they are entitled to selection grade of two tiers from 8th grade to 6th grade of the National Pay Scale, 1997 (for writ petitioner No.1) and National Pay Scale, 2005 (for writ petitioner Nos.2-4). They further stated that the Supreme Court by notification dated 10th October, 2013, granted selection grade to writ petitioner No.1 and others in grade No.7 but after completion of four years in service, the Bench Readers were granted selection grade scale in grade No.7 instead of grade No.6, and thereby, the writ petitioners were denied such benefit, and therefore, there was discrimination in considering the case of the writ petitioners.

146. The High Court Division made the Rule absolute and directed the writ-respondents to grant them selection grade and pay scale in grade-6, that is, Tk.7200-260x14-10840 as per National Pay Scale, 1997 and Tk.18500-800x14-29700 as per National Pay Scale, 2009 to

writ-petitioner No.1 and Tk.11000-475x14-17650 as per National Pay Scale, 2005 and Tk.18500-800x14-29700 as per National Pay Scale, 2009 to writ-petitioner Nos.2-4 from the date of completion of four years service as Bench Readers of the Appellate Division of the Supreme Court of Bangladesh with all arrears upon modification of the notification dated 10th October, 2013 within 30 (thirty days) from the date of receipt of this judgment. It was directed that the judgment shall be applicable to other Bench Officers and Bench Readers, if any, who are placed in the same status with those petitioners.

147. These petitions are quite distinguishable from the other cases. The writ petitioners invoked their fundamental rights as they were discriminated by the same authority and they are working in the same court. More so, the works of Bench Readers of the Appellate Division and Assistant Bench officers of the High Court Division are completely different. The Bench Readers are appointed from among the Bench Officers/Assistant Bench Officers of the High Court Division and if the Bench Officers get status higher than them, certainly they will be discriminated. It is to be noted that the working hours of these officers is from 9 a.m. to 5 p.m. but they used to work till 8/9 p.m. every day. In respect of Assistant Bench Officers, the very nature of their job is painstaking. They work almost 12/14 hours a day and even on holidays because they are attached to the Judges. During the vacation as well, they cannot enjoy the holidays as they remain busy with the finalization of judgments. The High Court Division has rightly exercised its jurisdiction and we find no infirmity to interfere with the judgment.

148. **Civil Petition for Leave to Appeal Nos.1445, 1768, 2133-2134 and 2320 of 2015**

Five writ petitioners, the Head Assistants of Public Health and Engineering Department, Lakshmipur sought a direction to refix their pay scale and granting gazetted status. They did not make any pleading in respect of violation of its fundamental rights. The High Court Division in an elaborate judgment following the cases of 52 DLR(AD) 120, 1 BLC(AD)44, 44 DLR(AD)111, 9 MLR(AD) 105, 32 DLR(AD) 67 and 46 DLR(AD) 19 discharged the rules on the ground that the writ petitions are not maintainable along with rule issued Writ Petition Nos.8706 of 2009, 8707 of 2009, 7272 of 2009 and 4544 of 2010. This judgment according to us is in conformity of the views taken by this Court.

149. On an overall consideration of the writ petitions, the pleadings, the impugned judgments, we are shocked to note that in none of the petitions except leave petitions Nos.644 and 645 of 2015, the writ petitioners made no sufficient pleadings in support of their alleged violation of fundamental rights which compelled them to seek judicial review of the actions of the authorities. In these petitions they made out a case of discrimination. All these petitions were drawn up in a stereo type manner and except in Writ Petition Nos.6263 of 2014, 6264 of 2014. The High Court Division delivered judgments without looking at the pleadings, the question of law involved in those petitions. We have held earlier that a public servant or an employee of the Statutory Corporation can maintain a writ petition if he challenges the vires of a statute or if his fundamental rights are violated and not otherwise. There are consistent views in this regard of this Court but the High Court Division has totally ignored the statements of law settled by this Court.

150. In respect of violation of fundamental rights, there must be sufficient pleadings in support of the claim that the applicant's cherished rights enshrined in the constitution have been denied by the administrative action for which he seeks protection of his rights and that he will not get the remedy in the Tribunal. It will not suffice if he simply makes a superficial statement of discrimination and/or violation of fundamental rights. A writ petition is decided

on the basis of affidavit evidence and in disposing of such petition, the Law of Evidence Act is not applicable. When he will come with a specific case with sufficient pleadings, there will be scope for contravention of those facts by the authority and then the High Court Division can decide whether those rights claimed by the aggrieved persons have been violated. The applicant cannot raise any disputed fact. If on admitted facts the High Court Division can arrive at the conclusion that the fundamental rights of the litigant have been utterly violated, then certainly it cannot sit as a silent spectator to shirk its responsibility but it is only in rarest of the rare cases the High Court Division shall exercise its power.

151. The constitution being the Supreme Law of the country, if the violation of fundamental rights alleged by the claimant is mixed up with disputed facts and law, then certainly the jurisdiction of the High Court Division to entertain such petition will be ousted and the remedy of the applicant is with the Tribunal. It should be borne in mind that the Tribunal has been created as an alternative forum of the adjudication of service matters only with a view to reducing the backlog of the High Court Division and the constitution has also provides such provision authorizing the Parliament to create alternative institutional mechanism. Alternative Tribunals have been set up in almost all over the countries of the globe and those Tribunals have been working effectively and satisfactorily. If the High Court Division usurps those powers in every case, the provisions contained in article 117(2) will be nugatory. The theory of alternative institutional mechanism has to be recognized and encouraged by the High Court Division.

152. If the High Court Division should not shirk its responsibility of superintendence and control over all Tribunals subordinate to it provided in article 109 of the constitution, it should allow those Tribunals to work in accordance with law otherwise there will create chaos and confusion in the administration of justice. These Tribunals have been created in exercise of the powers provided in the Constitution. It is only constitutional courts alone are competent to exercise power of judicial review to pronounce the constitutional validity of statutory provisions and rules and not otherwise. Our Fore Fathers had incorporated special provisions to ensure that it would be immune from any pressure from the Executive and such powers have not been invested to the lower Tribunals. This precious power shall not be exploited merely on the asking by a litigant lest ends of justice will be defeated. The constitution has provided provisions divesting powers to the traditional courts of a considerable question of judicial works and this includes tax matters, customs matters, industrial and a labour disputes, service matters, petty civil and criminal matters. The Supreme Court being the guardian of the constitution must safeguard the constitution and its mandate. If the Supreme Court itself violates the mandates of the constitution who else will preserve and protect the constitution.

153. Learned Attorney General has placed some Rules of the respective departments of the writ petitioners and submits that since almost all the writ petitioners' services are being governed by their respective service Rules, the writ petitions are not maintainable.

154. We noticed that except one department the government has promulgated Rules in respect of the terms and conditions of the Officers and Employees (Directorate of Inspection and Audit, Ministry of Education Recruitment) Rules, 1984. In this Rules, the procedure for appointment by the direct recruitment and promotions has been provided. The police department have also promulgated f¢mn ¢hi¡N (ee-পুলিশ কর্মকর্তা কর্মচারী) নিয়োগ বিধিমালা, 1996 by gazette notification dated 1st January, 1997. In these Rules, the requisite qualification, the mode of appointment of direct recruits, the departmental promotion and the

promotion to next higher posts have been elaborately mentioned. In this department the post of Senior Assistant is four steps lower than the Administrative Officer intervened by Accounts Officer, Statistics Officer, Head Assistant, Office Super and Typist. If the Head Assistant is upgraded to the rank of Administrative Officer, there will be chaos and confusion in the administrative set up and the other staff will be prejudiced.

155. In the Department of Special Branch, the post of Administrative Officer is a post on promotion from Accounts Officer and Head Assistant is two step lower. If the Head Assistant is promoted/upgraded to the post of the Accounts Officers and the reporters will be prejudiced. Similarly, the Upper Assistants and Accounts Assistants are of the same grade and their status is serial No.7. If these Account Assistants are upgraded to Administrative Officer, then 5 senior posts such as Account Officers, Reporter, Head Assistant, Typist and Librarian will be affected. In Crime Detection Department, the Administrative Officer is at serial No.5 and Office Superintendent/Head Assistant is at serial No.6 and Upper Division Assistant is at serial No.8. If Upper Division Assistant is upgraded to Administrative Officer, two senior officers to them will be prejudiced. In the office of Divisional Deputy Inspector General, (Inspection), it has separate service Rules. In this Department there is no post of Administrative Officer. Now if a Upper Division Assistant or Account officer or Accountant, who ranks at serial No.3 is promoted to the post of Administrative Officer in the similar rank to the Special Department, there will create anomaly in this Department.

156. Similarly in the District Superintendent of Police Department, there is no post like Administrative Officer. If the Head Assistant is upgraded to the post of Administrative Officer, there is no clarification whether such Head Assistant will be upgraded above Medical Officer who is at serial No.1. Similarly the Upper Assistant/Head mohorar, a Reader are at serial No.6. If this Upper Assistant is upgraded to Administrative Officer, there will create more anarchy in the administration.

157. In the Dhaka Metropolitan Police, the post of Administrative Officer is at serial No.1, the Upper Assistant is at serial No.2 and the Head Assistant/head mohora/CA are at serial No.4. If the Head Assistant is upgraded to Administrative Officer, certainly the other two employees who are above their rank and status will be prejudiced. There are criteria for promotion to the higher posts of Administrative Officer. If these criteria are not fulfilled and the Upper Division Assistants are upgraded to the rank of Administrative Officer, the service Rules will be violated. In respect of Chittagong Metropolitan Police also similar provisions for the posts and status. In Khulna Metropolitan Police, the post of Upper Assistant/Head mohora/accountant/reader/CA are in the same rank at serial No.5 and above them is the post of Head Assistant and the Administrative Officer is two step higher than Head Assistant. So, the Khulna Metropolitan Police Service Rules are completely different from Chittagong Metropolitan Police.

158. In respect of Rajshahi Metropolitan Police, the post Head Assistant is one step lower than the Khulna Metropolitan Police. If Head Assistant post is upgraded to Administrative Officer, then the Accounts Officer will be prejudiced and then if the Upper Division Assistant is upgraded to Administrative Officer, the other Upper Employees holding the higher posts will be prejudiced. In the Transmission Department, there is no post like Administrative Officer and Head Assistant are at serial No.1. The post-Upper Assistant/Accountant and Casher are at serial No.3. The post of Head Assistant must have three years experience in the feeder post and Upper Assistant must have five years experience in the feeder post. So, there will create anomaly if this Upper Assistant is upgraded with the Administrative Department.

In Railway Police, there is no post like Administrative Officer and Head Assistant is at serial No.1. Their rank and status is similar to Communication Department. In the Armed Police Battalion, there is no post like Administrative Officer and the post of typist is at serial No.1 and Head Assistant is two step lower than typist. There will also create anomaly if this Upper Assistant is upgraded above typist.

159. In respect of Police Academy, Sarada, there is no post of Administrative Officer and Senior Medical Officer is heading the seniority. A Senior Head Assistant is at serial No.7. If he is upgraded in the rank of Administrative Officer, how he will be accommodated is not clear because if he is accommodated then he will be senior to Medical Officer. The Head Assistant/Upper Assistant and Accountant are at serial No.9. If they are upgraded then they have to supersede eight senior posts. In Local Police Training School, Head Assistant is at serial No.3 and Upper Assistant/Accountant is at serial No.4. If these two groups are upgraded they will be put above the Medical Officer. There is no post of Administrative Officer in this department. In the police hospital, the Superintendent (Medical Officer) is heading the post and Head Assistant-cum-Accountant is at serial No.4 and Office Assistant-cum-Typist is at serial No.6. There is no post like Administrative Officer. If these posts are upgraded as Special Officer, then they must be placed above Superintendents.

160. In the Food Department, there is separate service Rules under the name the Non Cadre Gazetted Officers and Non-gazetted Employees (Director General of Food) Recruitment Rules, 1983. In these Rules, the provisions for recruitment, promotions, scales, everything have been clearly mentioned in the schedule. Head Assistant/Head Assistant-cum-Accountant/ Superintendent are at serial No.9. UDA/LDA cum typist/stenographer/steno typist are at serial No.11. If these two groups are upgraded, since there is no post of Administrative Officer, they must have to be placed at 8 or 9 grade. Certainly they will be placed above the Chemist, which post is senior most and the post has been yearmarked for promotion from Assistant Chemist with five years experience.

161. In the Public administration, there is a service Rules under the name বাংলাদেশ সচিবালয় (ক্যাডার বর্হিভুত গেজেটেট কর্মকর্তা এবং নন গেজেটেট কর্মচারী নিয়োগ বিধিমালা), 2014. Under these Rules, different grades have been amalgamated in rule 6(Gha) and the post of Administrative Officer has been abolished. According to this Rules, the Deputy Secretary (Non-cadre) is at serial No.1, Senior Assistant Secretary (Non-cadre)is at serial No.2, Assistant Secretary (non-cadre) is at serial No.3 and there are different criteria for promotion of those posts from the lower post. These Rules have been promulgated by repealing the previous Rules namely বাংলাদেশ সচিবালয় (ক্যাডার বর্হিভূত গেজেটেড এবং নন গেজেটেট কর্মকর্তা কর্মচারী নিয়োগ বিধিমালা), 2006.

162. Similarly in the Supreme Court, there is a service Rules under the name বাংলাদেশ সুপ্রীম কোর্ট হাইকোর্ট বিভাগ (কর্মচারী নিয়োগ বিধিমালা) 1987. Except one department there are separate service Rules in respect of the writ petitioners regulating the procedure for recruitment, promotion and other related matters. The recruitment, promotion, status and other benefits are being regulated by the respective service Rules of the Departments. Thus it will not be fair to equate the Senior Assistants of the Secretariate with those working in the Supreme Court of Bangladesh, Police Department, Local Government and Engineering Department, Customs Department, various Tribunals, Appellate Tribunals etc. In some departments there are posts of Administrative Officers and alike posts, the post of Administrative Officers has been abolished in the Department and new Rules have been framed deleting those posts. Under such circumstances, if Senior Assistants or Upper

Division Clerks or Stenographers or typists are equated with those posts giving them similar status and rank, there is no use of framing Rules by different Departments. These Rules have been framed by the concerned Departments for the purpose of recruitment, promotion and administration of their employees. One service Rules can not regulate the employees of other Department. Similarly the criteria for appointment of each Department and promotion are completely different.

163. The expression equal protection of law or equality before law has to be interpreted in its absolute sense. All persons are equal in all respect disregarding different conditions and circumstances in which they are placed. Equal protection of law means all persons are equal in all cases. It means the persons similarly situated should be treated equally. The term equality is a dynamic concept with many aspect and diminution and it cannot be confined within traditional and doctrinaire limits. Indian Supreme Court taking into consideration article 14 of the constitution held that article 14 does not forbid reasonable classification for the purposes of legislation. There can be permissible classification provided two conditions are satisfied namely; (a) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together for other left out of the group; (b) differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis. There cannot be any question of discrimination on the ground of some acts providing for different set up and each must be taken to be a class by itself. The legislature has a right to make such provision for its constitution as it thinks fit subject always to the provisions of the constitution. References in this connection are EP Royappa V. TN, AIR 1974 SC 555, Maleka Gandhi V. India, AIR 1970 SC 597, Romana Shetly V. International Airport Authority, AIR 1979 SC 1628, Ajay Hashia V. Khalid Mujud, AIR 1983 SC 130, A L Kalra V. P & N Corporation of India, AIR 1984 SC 1361, Shree Ram Krishna Dal Mia V. Shree SR Tendulkar, AIR 1958 SC 538, S. Azeez Basher V. Union of India, AIR 1968 SC 662, Jibendra Kishore Achary V. Province of East Pakistan, 9 DLR(SC)21 and Kazi Mohammad Akhtaruzzman V. Bangladesh, Writ Petition No.2252 of 2009 disposed of along with three other writ petitions. Sheikh Abdus Sabur V. Returning Officer, 41 DLR (AD) 30 and Bangladesh V. Md. Azizur Rahman, 46 DLR (AD) 19.

164. In Jibendra Kishore (supra), it has been observed, “It is not possible to formulate a comprehensive definition of the clause ‘equal protection of law’; nevertheless some broad propositions as to its meaning have been enunciated. One of these propositions is that equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes, in like circumstances, in their lives, liberty and property and in pursuit of happiness. Another generalization more frequently stated is that the guarantee of equal protection of the laws requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. In the application of these principles, however, it has always been recognized that classification is not arbitrary or capricious, is natural and reasonable and bears a fair and substantial relation to the object of the legislation. It is not for the Courts, in such cases, it is said, to demand from the legislature a scientific accuracy in the classification adopted. If the classification is relevant to the object of the Act, it must be upheld unless the relevancy is too remote or fanciful. A classification that proceeds on irrelevant consideration, such as differences in race, colour or religion will certainly be rejected by the Courts. Applying these tests to the present case, it cannot but be held that if, in consequence of abolishing the system of private rent for agricultural land, it also became necessary to make some provision for the outgoing landlords, the classification

of the landlords in the basis of their net incomes at the time of their expropriation was a necessary, and not an unreasonable, classification."

165. In Sheikh Abdus Sabur (supra), this court held: "Equality before law" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term 'protection of equal law' is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. A single law therefore cannot he applied uniformly to all persons disregarding their basic differences with others; and if these differences are identified, then the persons or things may be classified into different categories according to those distinctions; this is what is called 'permissible criteria' or "intelligible differentia",, The Legislature while proceeding to make law with certain object in view, which is either to remove some evil or to confer some benefit, has power to make classification on reasonable basis. Classification of persons for the purpose of legislation is different from class legislation, which is forbidden. To stand the test of 'equality' a classification, besides being based on intelligent differentia, must have reasonable nexus with the object the legislature intends to achieve by making the classification. A classification is reasonable if it aims at giving special treatment to a backward section of the population; it is also permissible to deal out distributive justice by taxing the privileged class and subsiding the poor section of the people. The above views have been approved in Azizur Rahman (supra).

166. On the above conspectus, we hold the view that almost all the writ petitions except writ petition Nos. 6263 of 2014 and 6264 of 2014 are not maintainable. All judgments except those in writ petition Nos.6263 of 2014 and 6264 of 2014 are set aside. The appeals are, therefore, allowed without any order as to costs with the above observations. C.P. Nos. 1445, 1768, 2133, 2134 and 2320 of 2015 are dismissed. C.P. Nos.1415, 1416, 1417, 1418, 1419, 1420, 1421 of 2015, 703 of 2014, 2026 of 2015, 2295 of 2010, 955 of 2011, 1854 of 2011, 2539 of 2012 and 1782 of 2015 are disposed of with the above observations. Civil Petition for Leave to Appeal Nos.644 and 645 of 2015 are dismissed.

167. This judgment will have prospective operation so as not to disturb the procedure in relation to decisions already rendered.

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APPELLATE DIVISION

PRESENT:
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Muhammad Imman Ali
Mr. Justice A.H.M. Shamsuddin Choudhury

CIVIL PETITION FOR LEAVE TO APPEAL NO.329 OF 2014
(From the judgment and order dated the 29th day of July, 2013 passed by the High Court Division in First Appeal No.105 of 2005)

Md. Nurul Abser	:	. . . Petitioner
-Versus-		
Alhaj Golam Rabbani and others	:	. . . Respondents
For the Petitioner	:	Mr. A. F. Hasan Arif, Senior Advocate with Mr. Kamal-Ul-Alam, Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record
For Respondent Nos.2-4	:	Mr. Mahmudul Islam, Senior Advocate with Zulfiker Bulbul Chowdhury, Advocate instructed by Mr. Zahirul Islam, Advocate-on-Record
For Respondent Nos.1 and 5-8	:	None represented
Date of Hearing	:	The 31st day of May, 2015

Arbitration Act, 2001:
Sections 39, 42, 43 and 44:
A combined reading of the provisions of sections 42, 43 and 39 of the Act, 2001 clearly shows that the only remedy open to a person who wants to set aside an arbitral award is to file an application under section 42 of the Act, 2001 within sixty days from the date of receipt of the award and after the expiry of the period of sixty days as envisaged in the section, the award becomes enforceable within the meaning of section 44 thereof and thus, jurisdiction of the civil Court has impliedly been barred if not expressly. In the context, we may also refer to section 9 of the Code which has clearly provided that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred and therefore, in view of the provision of section 42 of the Act, 2001, clause (d) of rule 11, Order VII of the Code is attracted. ...(Para 18)

The Act, 2001 is a special law and it has been enacted with the sole purpose of resolving the dispute between the parties through arbitration and after an award is given by the Arbitrator(s), if it is allowed to be challenged in a civil suit, then the arbitration

proceeding shall become a mockery and the whole purpose of the arbitration scheme as envisaged in the Act, 2001 shall fail. Therefore, the trial Court rightly rejected the plaint. ...(Para 19)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This petition for leave to appeal has been filed by the plaintiff against the judgment and decree dated the 29th day of July, 2013 passed by a Division Bench of the High Court Division in First Appeal No.105 of 2005 dismissing the same.

2. Facts necessary for disposal of this petition are that the petitioner as plaintiff filed Other Suit No.193 of 2004 in the Court of Joint District Judge, 1st Court, Chittagong on 22.09.2004 impleading the predecessor-in-interest of respondent Nos.1(a)-1(e) and respondent Nos.2-4 as the first party-defendants and respondent Nos.5-7 as the second party-defendants (as described in the cause title of the plaint) and respondent No.8, Bangladesh, represented by the Deputy Commissioner, Chittagong as proforma-defendant for a declaration that the arbitration agreement dated 15.03.2002 executed between him and defendant No.1 and the award given by Alhaj Dostagir Chowdhury on the said date (15.03.2002) as the sole Arbitrator, was illegal, without jurisdiction and was of no legal effect and the same was "ipso facto void illegal"; for further declaration that the award dated 15.03.2002 given by Alhaj Dostagir Chowdhury in respect of the suit property, did not, in any way, affect the tenancy right of the plaintiff in the suit property and his ownership therein (in Bangla, the prayer has been couched as '' ... রোয়েদাদ দ্বারা তপশীলোক্ত সম্পত্তিতে hjc£l ijsjfVuj üa Hhw jjfmLjej üa কোন ভাবেই খর্ব হয় নাই মর্মে উচ্চারনের ডিক্রি quz'') and the third declaration sought in the suit was that the first party principal defendants had no legal right to evict the plaintiff from the suit property through Other Execution Case No.4 of 2004 levied in the Court of Assistant Judge, Second Court, Chittagong for execution of the award dated 15.03.2002 given by Alhaj Dostagir Chowdhury or in any other way.

3. After the service of summonses of the suit, defendant Nos.1-4 entered appearance therein and filed an application under Order VII, rule 11 read with section 151 of the Code of Civil Procedure (the Code) for rejection of the plaint on the ground that there was no cause of action to file the suit and the same was barred under the provisions of the Arbitration Act, 2001(the Act, 2001), as the plaintiff did not file any application for setting aside the arbitral award within sixty days from the receipt of the award as provided thereof.

4. In the application, it was stated, *inter alia*, that the plaintiff was inducted into the possession of the suit property as a temporary monthly tenant under late Alhaj Abul Khair, predecessor of defendant Nos.1-7 and in that connection, a tenancy agreement was executed on 17.04.1995 between the plaintiff on one side and late Alhaj Abul Khair on other side. On 15.03.2002, an arbitration agreement was entered into between the plaintiff and the defendants and in the said arbitration agreement, there was a stipulation that Alhaj Dostagir Chowdhury would be appointed as an Arbitrator with a view to resolve the dispute between the parties expeditiously. Thereafter, said Arbitrator, Alhaj Dostagir Chowdhury, gave an award on 15.03.2002, copy whereof was duly served upon both the parties. Thereafter, the plaintiff did not take any step against the said award within sixty days as contemplated in section 42 of the Act, 2001 and after the expiry of the said statutory period, defendant No.1 levied Other Execution Case No.4 of 2004 under section 44 thereof and Order XXI, rule 15

of the Code for recovery of possession of the suit property. An order was passed in the execution case on 18.03.2004 vide order No.1 for issuing notices upon the judgment-debtor fixing 15.04.2003 for its service return. The judgment-debtor-plaintiff appeared in the execution case and filed written objection on 24.05.2004. On 04.08.2004, the judgment-debtor filed an application under section 151 of the Code for dismissing the execution case by setting aside order No.1 dated 18.03.2004. The learned Assistant Judge by his order dated 11.08.2004 rejected the application. Against the order dated 11.08.2004 of the learned Assistant Judge, the judgment-debtor filed Civil Revision No.197 of 2004 before the District Judge, Chittagong which was pending in the Court of Nari-0-Shishu Nirjatan Daman Tribunal No.1 (Special District Judge, Chittagong) for disposal. The judgment-debtor-plaintiff without praying for any relief against the award within time under the provisions of the Act, 2001, filed the illegal suit just to create obstruction to get possession of the suit property. The plaint was liable to be rejected under clauses (a) and (d) of rule 11 of Order VII of the Code.

5. The application for rejection of the plaint (hereinafter referred to as the application) was contested by the plaintiff by filing written objection contending, *inter alia,* that the application was liable to be rejected as none of the clauses of rule 11 of Order VII of the Code was attracted in the instant suit, particularly, in view of the fact that the plaintiff specifically averred in the plaint that there was no agreement between the parties on 15.03.2002 as alleged by the defendants and the award was not pronounced as per the agreement; that on a plain reading of the plaint, it could not be said that it was either barred by law or the averment made in the plaint did not disclose cause of action to file the suit.

6. The learned Joint District Judge by the order dated 05.04.2005 rejected the plaint. Being aggrieved by the order (the order rejecting the plaint is a decree within the meaning of section 2(2) of the Code), the plaintiff filed First Appeal No.105 of 2005 before the High Court Division. A Division Bench of the High Court Division by the impugned judgment and decree dismissed the appeal; hence this petition.

7. Mr. A. F. Hasan Arif, learned Counsel for the petitioner has, in fact, re-argued the points urged before the High Court Division and has further argued that the High Court Division misconceived the provisions of section 42 of the Act, 2001 vis-a-vis the facts and circumstances of the case as averred in the plaint and thus erred in law in dismissing the appeal on the erroneous view that the plaint could be rejected *"on both the counts i.e. under rule 11 of Order 7 of the Code of Civil Procedure as also under section 151 of the Code of Civil Procedure"* as the plaintiff could not be allowed to re-open the question of validity of an award keeping himself silent without taking recourse to section 42 of the Act, 2001. Therefore, the impugned judgment and decree calls for interference.

8. Mr. Mahmudul Islam, learned Counsel who entered caveat on behalf of respondent Nos.2-4, on the other hand, has supported the impugned judgment and decree. He has argued that section 43 of the Act, 2001 has spelt out the grounds on which an arbitral award may be set aside and the plaintiff could take all the objections in respect of the arbitration agreement and the arbitral award as alleged in the plaint by filing an application under section 42 of the Act within sixty days from the receipt of the award, but he without taking recourse to the said provision of law filed the suit for knocking down the arbitral award, the High Court Division did not commit any error of law in dismissing the appeal and as such, no interference is called for with the impugned judgment and decree and the petition be dismissed.

9. From the order of the learned Joint District Judge, it appears that he rejected the plaint on the view that since the plaintiff did not pray for setting aside the award within sixty days from the receipt of the award under section 42 of the Act, 2001, the suit was hit by the said provision of the Act and the plaint was liable to be rejected under Order VII, rule 11(a) and (b) of the Code; the High Court Division by the impugned judgment and decree endorsed the said view of the learned Joint District Judge.

10. In view of the averment made in the plaint and the relief sought therein as noted earlier, the moot point to be decided in this petition is whether the High Court Division committed any error of law in affirming the order passed by the trial Court rejecting the plaint in view of the provisions of section 42 of the Act, 2001. In order to decide the point, we consider it necessary to quote some statements made in the plaint. In paragraph 2 of the plaint, it has been stated as follows:

> ". . . কিন্তু দূভাগ্য বশতঃ কোন শালিশী এগ্রিমেন্ট সম্পাদন ব্যতিত ১৫/৩/২০০২ইং তারিখের বাদী এবং ১ ew ¢hh¡c£l ü¡r¢la HL¢V L¢bত এগ্রিমেন্ট হওয়ার নামে পার্শ্বোক্ত ১নং ব্যক্তি জনাব আলহাজ্ব দস্তগীর চৌধুরী এর একক স্বাক্ষরে ১৫/৩/০২ইং তারিখ কথিত মতে রোয়েদাদ প্রচারের নামে এবং কথিত রোয়েদাদকে কার্যকরী করণের জন্য চট্রগ্রাম ২য় সহকারী জজ আদালতে ১ম পক্ষ বিবাদীর নামে দাখিলি অপর জারী ৪/২০০৪ইং মামলার বিষয়ে জাতিতে পারিয়া বাদী হতবাক হন। . . . কিন্তু যেহেতু ১৫/৩/০২ইং তারিখে কথিত রোয়েদাদ শালিশী আইন ২০০১ইং সালের বিধান মতে সৃষ্টি না হওয়ায় aiqi ipso facto void-ab-initio quz কথিত রোয়েদাদ সত্বেও ঘরভাড়া মামলা ৫/২০০২ ইং এবং উক্ত জারী মামলা চলাকালীন সময়ে কথিত বকেয়া ভাড়া ও ক্ষতিপূরণের অর্থ দাবী করিয়া ১ম f r ¢hh¡c£ LaL j¡e j¡jm¡ 12/04Cw c¡¢Mm qJu¡u ®k ধুম্রজাল সৃষ্টি হইয়াছে তাহা পরিচ্ছন্নের জন্য অত্র মামলার আশ্রয়ে আসা ব্যতীত অন্যকোন গতান্তর নাই। নিম্নে বর্ণিত কারণাদিতে ১৫/৩/০২ইং তারিখের প্রচারিত রোয়েদাদ শালিশী আইন ২০০১ইং এর পরিপন্থী এবং ipso facto void illegal and without jurisdiction qu Hhw aiqi h¡c£l Jfl L¡kLl£ qCতে পারে না মর্মে ডিক্রী প্রচার হওয়া BhnÉLz"

11. In paragraph 2(Ka), it has been stated "n¡¢mn£ BCe, 2001Cw Hl --- ধারা মতে বাদী এবং ১-4 ew ¢hh¡c£ J 5-৭নং বিবাদীর পূর্ববর্তী আলহাজ্ব আবুল খায়েরের সাথে লিখিত কোন এগ্রিমেন্ট হয় নাই। ফলে কোন Contractual obligations p¢ÙV qu e¡Cz 12/03/02Cw a¡¢lM ®k ¢à-f¡¢rL n¡¢mne¡j¡ Q¢Š²fœ qJu¡l Lb¡ ¢Rm aiqi qu e¡Cz 15/03/2002Cw a¡¢lM A¢m¢Ma HL¢V stamp H h¡c£ Hhw ১নং বিবাদীর স্বাক্ষর যুক্ত কথিত মতে শালিশকার নিয়োগের কথা লিপি থাকিলেও ১৫/০৩/২০০২ইং তারিখের চুক্তিপত্রে বাদীর পক্ষে শালিশকার আলহাজ cÙN£l ®Q±dl£ J ®j¡x e¡¢Sj EŸ£e, Hhw 1-৪নং বিবাদী ও আলহাজ্ব আবুল খায়েরের পক্ষে জনাব এম.এ.ছবুর ও আবুল হাশেম বক্কর এর নাম উল্লেখ থাকিলেও তাহাদের কাহারোও সম্মতি স্বাক্ষর কথিত চুক্তি নামায় নাই এবং বিচার্য বিষয় কি সে সংক্রান্তে কোন বিচার্য বিষয়লিপি হয় নাই। সুতরাং ১৫/৩/০২ইং তারিখের উক্ত কথিত চুক্তিপত্র শালিশী আইন ২০০১ ইং এর বিধান মতে হয় নাই বিবেচিত হইবে।"

12. Paragraphs 2(N), 2(S) and 4 read as follows:

> | | | (N) তর্কিত দলিলের দিন তথা ১৫/০৩/২০০২ইং তারিখে কথিত একক বিচারক কর্তৃক শালিশী রোয়েদাদ প্রদান করার এই অভিনব পন্থা বিচার বিশ্লেষণ করিলে আসলে শালিশের নামে একটি drama অনুষ্ঠিত হইয়াছে মর্মে বিবেচিত হইবে। তর্কিত রোয়েদাদে পক্ষদ্বয়ের কিংবা প্রতিনিধিদ্বয়ের কাহারো কোন প্রকারের স্বাক্ষর নাই। যাহা শালিশী আইনের সংজ্ঞা মতে বাধ্যবাধকতা আছে।
>
> | | | (S) 15/03/2002Cw a¡¢lখের কথিত শালিশনামার এগ্রিমেন্ট এবং রোয়েদাদ n¡¢mn£ BCe 2001Cw Hl 9/11/23/25/27/29/30/38 pq Ae¤¡e¤ d¡l¡ pjq Aepa e¡ qJu¡u শালিশী বিষয়ে সকল কার্যক্রম ipso facto void-ab-initio হয়। এবং যেহেতু শালিশী আইনের বিধান মতে কথিত রোয়েদাদ প্রচারিত হয় নাই। সেহেতু শালিশী আইন এর ৪৪ ধারা অনুসরণ করার কোন প্রয়োজন নাই। কথিত রোয়েদাদ executable না হওয়ার অপর জারী ৪/০৪ইং মামলা চলিতে পারে না।
>
> | | | (4) মামলার হেতু ১২/০৩/০২ইং তারিখে তপশীলোক্ত ভাড়াটিয়া গৃহের বিষয়ে উদ্ভূদ বিরোধ

শালিশী কার্যক্রমের মাধ্যমে নিস্পত্তির সিদ্ধান্ত হওয়ার কালে কিন্তু ১৫/০৩/০২ইং তারিখে বাদী এবং ১নং বিবাদীর স্বাক্ষরে কথিত শালিশী এগ্রিমেন্ট সৃষ্ট কালে এবং ১৫/০৩/০২ইং তারিখে কথিত একক বিচারক হিসাবে জনাব আলহাজ্ব দস্তগীর চৌধুরী LaL ®h-BCe£, HM¢au¡l h¢qia Hhw শালিশী আইন ২০০১ইং এর পরপন্থী মতে রোয়েদান প্রচার করার কালে এবং সর্বশেষে কথিত রোয়েদাদের বরাতে অপর জারী ৪/০৪ইং মামলা পরিচালনে বাদীকে তপশীলোক্ত দোকানগৃহ হইতে উচ্ছেদের প্রক্রিয়া গ্রহণ করা কালে আদালতের এলাকাধীন খুলশী থানার লালখান বাজার মৌজায় উদ্ভব হইয়াছে।"

13. A reading of the above quoted statements of the plaint *prima facie* shows that the plaintiff, in fact, challenged the arbitration agreement dated 15.03.2002 as well as the arbitral award given by the Arbitrator, Alhaj Dastogir Chowdhury on the said date. Before the trial Court, the plaintiff made a grievance that no award was served upon him, in other words, he did not receive any award from the Arbitrator, but the statements made in the plaint (as quoted above) clearly show that he, in fact, received the award. The defendants also in the application under Order VII, rule 11 of the Code categorically stated that the copy of the award was served upon them and the plaintiff. The plea that the plaintiff did not receive the award *prima facie* does not appear to be *bonafide*, because had he not received the award how he could challenge the same in the suit with so many particulars. In the context, the trial Court rightly stated that *"the plaintiff has been demanding that he did not receive the copy of the award, but as soon as he received it he may apply to the proper Court, the learned District Judge Court, but instead the plaintiff has filed this suit here in this Court."*

14. Whether the plaintiff could file the suit challenging the legality of the arbitration agreement and the arbitral award, we consider it relevant to see the provisions of sections 42 and 43 of the Act, 2001 which read as follows:

"**42 Application for setting aside arbitral award-** (1) The Court may set aside any arbitral award under this Act other than an award made in an international commercial arbitration on the application of a party within sixty days from the receipt of the award.

(2) The High Court Division may set aside any arbitral award made in an international commercial arbitration held in Bangladesh on the application of a party within sixty days from the receipt of the award.

43. Grounds for setting aside arbitral tribunal- (1) An arbitral award may be set aside if-

(a) the party making the application furnishes proof that-

(i) a party to the arbitration agreement was under some incapacity;

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case.

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside;

(v) the composition of the arbitral tribunal or the arbitral

procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act.

(b) the court or the High Court Division, as the case may be, is satisfied that-

(i) the subject matter of the dispute is not capable of settlement by the arbitration under the law for the time being in force in Bangladesh;

(ii) the arbitral award is *prima facie* opposed to the law for the time being in force in Bangladesh;

(iii) the arbitral award is in conflict with the public policy of Bangladesh or

(iv) the arbitral award is induced or affected by fraud or corruption.

(2) Where an application is made to set aside an ward, the court or the High Court Division, as the case may be, may order that any money payable by the award shall be deposited in the Court or the High Court Division, as the case may be, or otherwise secured pending the determination of the application."

15. Sub-section (1) of section 42 has clearly spelt out that the Court may set aside any arbitral award under the Act, 2001 other than an award made in an international commercial arbitration on the application of a party within sixty days from the receipt of the award and in section 43 thereof grounds have been enumerated on which an arbitral award may be set aside. And now, if we look at the prayers made in the plaint as stated earlier, it would appear that the plaintiff sought to set aside the arbitral award given by the Arbitrator by seeking declaration that the same was illegal, without jurisdiction, was of no legal effect and was *ipso facto void* and the grounds for seeking such declaration were that no arbitration agreement was entered into between the plaintiff and defendant No.1, and that on the basis of a so-called agreement, an award was given by one Alhaj Dostagir Chowdhury. The plaintiff also alleged that the so-called award was given in violation of the provisions of the Act, 2001; that Alhaj Dostagir Chowdhury was not appointed as the sole Arbitrator as per the provisions of the Act; that none of the parties or their representative signed the award and that the Arbitrator gave the award illegally, without jurisdiction and in violation of the provisions of the Act, 2001. And all these allegations clearly embrace the grounds, particularly, ground Nos.(ii), (iii), (iv) and (v) as enumerated in section 43 of the Act, 2001 quoted hereinbefore. But the plaintiff did not file any application before the District Judge within sixty days from the date of receipt of the award for setting aside the same.

16. In the context, section 39 of the Act, 2001 is also relevant. The section reads as follows:

"**39. Award to be final and binding-** (1) An arbitral award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding both on the parties and on any persons claiming through or under them.

(2) Notwithstanding anything contained in sub-section (1), the right of a person to challenge the arbitral award in accordance with the provisions of this Act shall not be affected."

17. A reading of sub-section (1) of section 39 shows that an arbitral award made by an

arbitral tribunal pursuant to an arbitration agreement shall be final and binding both on the parties and on any persons claiming through or under them. Sub-section (2) thereof has further provided that notwithstanding anything contained in sub-section (1), the right of a person to challenge the arbitral award in accordance with the provisions of this Act shall not be affected.

18. A combined reading of the provisions of sections 42, 43 and 39 of the Act, 2001 clearly shows that the only remedy open to a person who wants to set aside an arbitral award is to file an application under section 42 of the Act, 2001 within sixty days from the date of receipt of the award and after the expiry of the period of sixty days as envisaged in the section, the award becomes enforceable within the meaning of section 44 thereof and thus, jurisdiction of the civil Court has impliedly been barred if not expressly. In the context, we may also refer to section 9 of the Code which has clearly provided that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred and therefore, in view of the provision of section 42 of the Act, 2001, clause (d) of rule 11, Order VII of the Code is attracted.

19. The Act, 2001 is a special law and it has been enacted with the sole purpose of resolving the dispute between the parties through arbitration and after an award is given by the Arbitrator(s), if it is allowed to be challenged in a civil suit, then the arbitration proceeding shall become a mockery and the whole purpose of the arbitration scheme as envisaged in the Act, 2001 shall fail. Therefore, the trial Court rightly rejected the plaint and the High Court Division did not commit any error of law affirming the same and as such, no interference is called for with the impugned judgment and decree.

20. Accordingly, this petition is dismissed.

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APPELLATE DIVISION

Present:
Ms. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali
Mr. Justice Mohammad Anwarul Haque

CIVIL PETITION FOR LEAVE TO APPEAL NO.1827 of 2009
(From the judgment and order dated 24.05.2009 passed by the High Court Division in Civil Revision No.3987 of 2008.)

Mrs. Ruksana Huq and others : .....Petitioners

=Versus=

A. K. Fayazul Huq (Raju) and others : .....Respondents

For the Petitioners : Mr. Fida M. Kamal, Senior Advocate instructed by Mrs. Sufia Khatun, Advocate-on-Record.

For Respondent No.3 : Mr. Probir Niogi, Advocate instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.

Respondent Nos.1 and 2 : Not represented.
Date of hearing : 25.02.2014.

Code of Civil Procedure, 1908
Order I rule 10(2):

Though there is no clear provision mentioning the word 'transposition' but order I rule 10(2) of the Code of Civil Procedure enables the courts to make such transposition, Order I rule 10(2) has empowered the courts to strike out name of any party, either plaintiff or defendant, improperly joined and also to add any persons-either as plaintiff or defendant-who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary for effectual and complete adjudication of the matter. Exercising this very power the courts can make transposition also of either of the parties of a suit or other proceeding to the other category of the parties and the courts also are doing so, and it has become a long practice now. Of course, generally, the courts will not allow transposition of defendants as plaintiffs after striking the names of the original plaintiffs or after transposing them as defendants. But in appropriate facts and circumstances-as these are in the present case-the courts should not be reluctant to make such transposition of the parties for the ends of justice or to prevent abuse of the process of the court. ...(Para 8)

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 24.05.2009 passed by the High Court Division in Civil Revision No.3987 of 2008 discharging the rule.

2. The necessary facts for disposal of this Civil Petition for Leave to Appeal, in short, are as follows:-

The present petitioners, as heirs and successors of late Mr. A. K. Faizul Huq filed Succession Case being No.888 of 2007 in the Court of Joint District Judge, 3rd Court, Dhaka for a certificate of succession under the Succession Act, 1925. During pendency of that proceeding the present respondent Nos.1 to 3, claiming themselves as the second wife, son and daughter of late A. K. Faizul Huq, filed an application on 26.08.2007 praying for being added as parties in that succession case. The court allowed that application vide order dated 12.11.2007 and fixed 02.03.2008 for recording evidence of both the parties. Thereafter, the court recorded the evidence of the opposite party No.1, Mariam Begum since the petitioners side was absent. However, subsequently the court allowed the prayer of the petitioners to cross-examine the opposite party's witness No.1, but without cross-examining the opposite party's witness No.1, the petitioners, on 19.06.2008, filed an application under order XXIII rule 1 of the Code of Civil Procedure praying for withdrawal of the case. At the same time the added opposite parties also filed an application for transposing them as petitioners. The court, after hearing both the parties and considering the facts and circumstances, passed the impugned order dated 11-08-2008 allowing the prayer of the opposite parties to be transposed as petitioners and rejecting the petitioners' prayer for withdrawal of the case and also transposing the petitioners as opposite parties.

3. Being aggrieved by and dissatisfied with that order of the court below the petitioners filed the above mentioned civil revision before the High Court Division and obtained rule. A Single Bench of the High Court Division ultimately, after hearing both the parties and considering the facts and circumstances, discharged that rule holding that the court below committed no illegality in rejecting the petitioners application for withdrawal of the succession case and allowing the opposite parties' prayer for being transposed as petitioners and also transposing original petitioners as opposite parties in that succession case by the impugned judgment and order. Being aggrieved, the petitioners have filed this present Civil Petition for Leave to Appeal.

4. Mr. Fida M. Kamal, the learned Senior Advocate for the leave-petitioners has made submissions to the effect that order XXIII rule 1 of the Code of Civil Procedure has provided the right to these leave-petitioners to withdraw their succession case and that the petitioners filed an application to withdraw their succession case and in that circumstances the court ought to have allowed that application for withdrawal of the succession case. The learned Advocate has argued that by rejecting the prayer of these petitioners for withdrawal of their succession case the court below committed illegality. The learned Advocate has made submissions to the effect also that the added opposite parties-who claimed themselves to be the heirs of late Mr. A. K. Faizul Huq had scope to file a fresh succession case and in the circumstances the court below had no reason to transpose the added opposite parties as petitioners in the succession case filed by the present leave-petitioners. Mr. Fida M. Kamal has advanced argument to the effect also that there is no provision in any law for transposing the opposite parties as petitioners in any case and as such the transposition of the opposite parties as petitioners in the succession case of these leave-petitioners has been illegal. The

learned Advocate has argued to the effect also that the succession case under Succession Act of 1925 being not a suit or even a miscellaneous proceeding the provisions of the Code of Civil Procedure are not applicable in this succession case and as such the impleading of the opposite parties in the succession case as per order I rule 10 of the Code of Civil Procedure also has been illegal.

5. Mr. Probir Niogi, the learned Advocate for the respondents has made submissions to the effect that there has been no violation of any provisions of any law at all in impleading the other heirs of late Mr. A. K. Faizul Huq as opposite parties in this succession case and subsequently in transposing them as petitioners in that succession case. The learned Advocate has argued that the trial court, on consideration of the facts and circumstances, rightly added the other heirs of late Mr. A. K. Faizul Huq as opposite parties in the succession case and subsequently transposed them as petitioners while the original petitioners wanted to withdraw from the said succession case and that the High Court Division, considering all these facts and circumstances, upheld the impugned order of the trial court rightly.

6. We have considered the submissions of the learned Advocates of both the sides and gone through the impugned judgment and order of the High Court Division and also that of the trial court.

7. It appears that these leave-petitioners filed the succession case without disclosing the fact that their predecessor late Mr. A. K. Faizul Huq died leaving second wife and one son and one daughter by that second wife. But when the second wife and her children came to be added as parties in that succession case these leave-petitioners did not raise any objection and consequently they were added as opposite parties. Subsequently when the court fixed the case for hearing these leave-petitioners remained absent and consequently the court took evidence of one of the added opposite parties who also, as heirs of late Mr. Faizul Hoque were claiming succession certificate. These leave-petitioners then appeared before the court and prayed for cross-examining that OPW.1 and the court allowed that prayer but ultimately the leave-petitioners did not cross-examine the OPW.1, rather they filed the application for withdrawal of the succession case. In that circumstances the court rejected the application of these leave-petitioners for withdrawal of the succession case and allowed the application of the added opposite parties to be transposed as petitioners and also transposed these leave-petitioners as opposite parties in that succession case by the order dated 11.08.2008. It appears that the High Court Division, on consideration of all these above facts and circumstances, upheld this order of the trial court holding that there has been no illegality in this order. We also find no illegality in the order dated 11.08.2008 passed by the trial court and also in the impugned judgment and order of the High Court Division upholding this order of the trial court.

8. Considering the facts and circumstances narrated above we do not accept the argument advanced from the side of the leave-petitioners that the trial court committed wrong and illegality by not allowing the leave-petitioners' prayer for withdrawal of the succession case. By the impugned order the trial court transposed these leave-petitioners as opposite parties in that succession and also transposed added opposite parties as petitioners in that succession case which, in effect, resulted in withdrawal of their succession case for these leave-petitioners. The argument of the learned Counsel for the leave-petitioners that there is no provision in law for transposing petitioner as opposite party and opposite party as petitioner in any proceeding-also is not correct. Though there is no clear provision mentioning the word 'transposition' but order I rule 10(2) of the Code of Civil Procedure enables the courts to

make such transposition, Order I rule 10(2) has empowered the courts to strike out name of any party, either plaintiff or defendant, improperly joined and also to add any persons-either as plaintiff or defendant-who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary for effectual and complete adjudication of the matter. Exercising this very power the courts can make transposition also of either of the parties of a suit or other proceeding to the other category of the parties and the courts also are doing so, and it has become a long practice now. Of course, generally, the courts will not allow transposition of defendants as plaintiffs after striking the names of the original plaintiffs or after transposing them as defendants. But in appropriate facts and circumstances-as these are in the present case-the courts should not be reluctant to make such transposition of the parties for the ends of justice or to prevent abuse of the process of the court.

9. Mr. Fida M. Kamal has advanced argument to the effect also that Order I rule 10 of the Code of Civil Procedure is not applicable in a succession case which is neither a suit nor a proceeding as mentioned in section 141 of the Code of Civil Procedure and as such the impleading of the added opposite parties in this succession case was illegal. But we do not accept this argument also of the learned Counsel. Section 141 of the Code of Civil Procedure has provided that the procedure provided in the Code of Civil Procedure in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction. A succession case, in all consideration, is a proceeding in a court of civil jurisdiction. It needs to be mentioned here that these leave-petitioners themselves also filed the application for withdrawal of the succession case as per provision of the Code of Civil Procedure.

10. However, in the circumstances narrated above the court below did not commit any wrong or injustice at all in transposing the added opposite parties as petitioners and the petitioners as opposite parties in the succession case after rejecting the petitioners application for withdrawal of that succession case. The withdrawal of the succession case, if had been allowed, these leave-petitioners would not have been benefited in any way, rather the withdrawal of this succession case would require the added opposite parties to file a fresh succession case causing abuse of the process of court.

11. However, we find no merit in this Civil Petition for Leave to Appeal and hence it is dismissed.

6 SCOB [2016] AD 65

APPELLATE DIVISION

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

CIVIL APEAL Nos.17 of 2012
(From the decision dated 26.01.2010 passed by the Administrative Appellate Tribunal, Dhaka in Appeal No.51 of 2005)
With
CIVIL APPEAL NO.21 of 2012
(From the decision dated 04.03.2010 passed by the Administrative Appellate Tribunal, Dhaka in Appeal No.67 of 2008)

Government of Bangladesh, represented by the Secretary, Ministry of Home Affairs and another.	.....Appellants. (In all the appeals)
-Versus-	
Md. Bellal Hossain Mollik.	.....Respondent. (In C. A. No.17/12)
Md. Tareque Kamal.	.....Respondent. (In C. A. No.21/12)
For the Appellants. (In both the appeals)	Mr. Goutam Kumar Roy, Deputy Attorney General, instructed by Mr. Gias Uddin Ahmed, Advocate-on-Record.
For the Respondent. (In C. A. No.17/12)	Mr. Abdur Rob Chowdhury, Senior Advocate, instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.
For the Respondent. (In C. A. No.21/12)	Mr. Abdur Rob Chowdhury, Senior Advocate, instructed by Mr. Md. Shamsul Alam, Advocate-on-Record.
Date of Hearing.	The 13th January, 2016.
Date of Judgment.	The 13th January, 2016.

Police Officers (Special Provisions) Ordinance, 1976
Section 3
read with
Bangladesh Public Service Commission (Consultation) Regulation, 1979
Regulation 6:
On consideration of section 3 of the Ordinance vis-a-vis regulation 6 of the Regulations, it is obvious that consultation with Public Service Commission is mandatory before

passing the order of dismissal in respect of each of the respondent as section 3 of the Ordinance has not ousted the operation of other laws, rules and regulations. ...(Para 22)

Opinion of Public Service Commission is not binding on the authority.
The consultation with the Public Service Commission is mandatory before passing the orders of dismissal of both the respondents though the opinion of Public Service Commission is not binding on the authority. ...(Para 25)

JUDGMENT

SYED MAHMUD HOSSAIN, J:

1. Both the appeals, by leave, are directed against the decisions dated 26.01.2010 and 04.03.2010 respectively passed by the Administrative Appellate Tribunal, Dhaka in Appeal Nos.51 of 2005 and 67 of 2008 dismissing the appeals and affirming the decisions dated 10.08.2004 and 23.04.208 respectively passed by the learned Members, Administrative Tribunal No.2, Dhaka and Administrative Tribunal No.1, Dhaka, in Administrative Tribunal Case No.70 of 2000 (old) renumbered as Administrative Tribunal Case No.141 of 2003 (new) and Administrative Tribunal Case No.45 of 2006 allowing the cases of the petitioner-respondents on contest.

2. Both the appeals involving similar questions of laws and almost identical facts having been heard together are now disposed of by this single judgment.

3. The relevant facts for the purpose of disposal of Civil Appeal No.17 of 2012, in a nutshell, are:

The petitioner-respondent, Md. Billal Hossain Mallik, joined the police department as Sub-Inspector of Police on 10.01.1987. Subsequently, he was promoted to the post of Inspector of Police on 21.12.1993. While he was serving as the Inspector of Police under Khulna Range, the authority pressed a charge sheet against him on 19.07.1999 on the allegation of misconduct. The petitioner-respondent denied the charge and claimed innocence. After that, appellant No.2 passed the impugned order dated 09.09.1999 reducing the petitioner-respondent to the rank of Sub-Inspector of Police under section 5(e) of the Police Officers (Special Provision) Ordinance,1976. Being aggrieved, the petitioner-respondent preferred a departmental appeal on 19.09.1999 and the same was rejected on 26.01.2000.

4. Against the order of rejection dated 26.01.2000 passed by the concerned departmental authority, the petitioner-respondent filed Administrative Tribunal Case No. 70 of 2000 (old) renumbered as Administrative Tribunal Case No.141 of 2003 (New) before the learned Member, Administrative Tribunal No.2, Dhaka,

5. The respondents-appellants contested the case by filing written objection denying all the material statements made in the application filed before the Administrative Tribunal, contending, inter alia, that on the basis of convincing materials on record, the impugned penalty was rightly awarded to the petitioner-respondent and as such, the impugned order of punishment suffered from no legal infirmity to call for any interference by the Tribunal.

6. The Administrative Tribunal by its decision dated 10.08.2004 allowed the case of respondent on setting aside the order dated 09.09.1999 reducing the petitioner-respondent to the rank of Sub-Inspector of Police from the rank of Inspector of Police.

7. Being aggrieved by and dissatisfied with the decision dated 10.08.2004 passed by the learned Member, Administrative Tribunal, Dhaka, the appellants preferred Appeal No.51 of 2005 before the Administrative Appellate Tribunal, Dhaka. The Administrative Appellate Tribunal, upon hearing the parties, by its decision dated 26.01.2010 dismissed the appeal on contest affirming the decision of the Administrative Tribunal.

8. The relevant facts for the purpose of disposal of Civil Appeal No.21 of 2012, in a nutshell, are:

The respondent herein, Md. Tareque Kamal joined Bangladesh Police as Sub-Inspector of Police on 27.03.1990 and subsequently, he was promoted to the post of Inspector for his satisfactory service. While the respondent had been serving as the Officer-in-Charge at Savar Police Station, Dhaka, appellant No.2 herein most illegally placed the respondent under suspension on 11.01.2005 and served a notice upon him for showing cause on 01.12.2005 under the provision of the Police Officers (Special Provisions) Ordinance,1976 (in short, the Ordinance). In that notice, it has been alleged that the respondent committed offence under section 4(I),(II)(IV)and (VII)of the Ordinance for misconduct, dereliction of duty, corruption and inefficiency. The respondent submitted his reply denying all the allegations under the charge. Appellant No.2 not being satisfied with the written reply of the respondent served provisional order on 09.01.2006 proposing major penalty of dismissal from service. The respondent submitted his reply in time claiming innocence. But appellant No.3 most illegally and arbitrarily passed the final order of dismissal of the respondent from service on 24.01.2006. The respondent preferred an appeal to appellant No.1 on 30.01.2006 but getting no response from the appellate authority, the respondent filed the case before Administrative Tribunal.

9. The appellant herein contested the case by filing written objection denying all the material statements made in the application filed before the Administrative Tribunal. Their case, in short, is that the impugned order dismissing the respondent from service was rightly passed and there was no necessity of consultation with the Public Service Commission in awarding punishment to the respondent under the said Ordinance. There was no illegality or irregularity in the proceeding. As such, the case is liable to be dismissed.

10. The Administrative Tribunal by its decision dated 23.04.2008 allowed the case of the respondent and directed the appellants to reinstate the respondent in service from the date of his suspension with all attending benefits.

11. Being aggrieved by and dissatisfied with the decision dated 23.04.2008 passed by the learned Member, Administrative Tribunal, Dhaka, the appellants preferred Appeal No.67 of 2008 before the Administrative Appellate Tribunal, Dhaka. The Administrative Appellate Tribunal, upon hearing the parties, by its decision dated 04.03.2010 dismissed the appeal on contest affirming the decision of the Administrative Tribunal.

12. Feeling aggrieved by and dissatisfied with the decisions respectively passed by the Administrative Appellate Tribunal, Dhaka, the respondents as the leave-petitioners have filed Civil Petitions for Leave to Appeal Nos.1433 of 2010 and 1555 of 2010 before this Division

and obtained leave respectively in both the civil petitions on 08.01.2012 and 11.12.2011, resulting in Civil Appeal Nos.17 and 21 of 2012.

13. Mr. Goutam Kumar Roy, learned Deputy Attorney General, appearing on behalf of the appellants of both the appeals, submits that the Administrative Appellate Tribunal failed to appreciate that as per section 3 of the Police Officers (Special Provisions) Ordinance,1976 no consultation is necessary with Public Service Commission (PSC) and as such, the decision of the Administrative Appellate Tribunal affirming the decision of the Administrative Tribunal should be set aside.

14. Mr. Abdur Rob Chowdhury, learned Senior Advocate, appearing on behalf of the respondent of in both the appeals, on the other hand, submits that before imposing major penalty upon a class-I and Class-II Government Officers, the authority must consult the Public Service Commission and as the impugned decision does not call for any interference.

15. We have considered the submissions of the learned Deputy Attorney General for the appellants of both the appeals and the learned Senior Advocate for the respondent of both the appeals, perused the impugned judgment and the materials on record.

16. Before entering into the merit of the appeals, it is necessary to go through the common grounds, for which, leave was granted. The grounds are quoted below:

I. Whether both the Administrative Appellate Tribunal and the Administrative Tribunal failed to appreciate that the authority which framed charge against the respondent and eventually awarded the impugned penalty was the controlling authority of the respondent at that time and as such the decision of the Administrative Appellate Tribunal affirming the decision of Administrative Tribunal is liable to be set aside.

II. Whether both the Administrative Appellate Tribunal and the Administrative Tribunal failed to appreciate that as per section 3 of the Police Officers (Special Provisions) Ordinance,1976 no consultation is necessary with the Public Service Commission and as such the decision of the Administrative Appellate Tribunal affirming the decision of the Administrative Tribunal should be set aside.

17. Admittedly, the respondents of both the appeals were dismissed from service by imposing the major penalty on them. The question to be resolved in these appeals is whether before awarding the punishment of dismissal from service consultation with the Public Service Commission is necessary. Admittedly, in both the appeals no consultation was made with the Public Service Commission before awarding punishment of dismissal from service.

18. In order to resolve this issue, it is necessary to go through section 3 of the Police Officers (Special Provisions) Ordinance,1976. Section 3 runs as follows:

> "3. This Ordinance shall have effect notwithstanding anything contained in any law, rules and regulations relating to police-force nor shall prejudice the operation of any other law, rules and regulations including the service conditions of the said police-force."

19. Having gone through the section, it appears that this section in no uncertain terms states that the provision of this Ordinance shall have effect notwithstanding anything

contained in any law, rules and regulations relating to the Police Service but at the same time this section also states that this Ordinance shall not prejudice the operation of any other law, rules and regulations including the service conditions of the said police officers.

20. Regulation 6 of the Bangladesh Public Service Commission (Consultation) Regulation,1979 states that it shall not be necessary to consult the Commission in any disciplinary matter except before passing any order of imposing the penalty of removal, dismissal, compulsory retirement from service, or reduction in rank of a class-I and Class-II Gazetted Officer.

21. Considering regulation 6, it appears that before passing any order of imposing penalty of removal, dismissal, compulsory retirement from service, or reduction in rank of a Class-I and Class-II Gazetted Officer consultation with Public Service Commission is mandatory.

22. On consideration of section 3 of the Ordinance vis-a-vis regulation 6 of the Regulations, it is obvious that consultation with Public Service Commission is mandatory before passing the order of dismissal in respect of each of the respondent as section 3 of the Ordinance has not ousted the operation of other laws, rules and regulations.

23. Admittedly, the respondents of both the appeals were Class-II officers. When they were dismissed from service, no consultation was made with Public Service Commission. Because of this inherent defect in the orders of dismissal of both the respondents, we are of the view that the impugned decisions were passed in accordance with law.

24. In this connection, reliance may be placed on the case of ***Government of Bangladesh vs. A.A.M. Salakuzzaman and another (2000)5 MLR (AD)281***, in which, it has been held that before imposing major penalty upon Class-I or Class-II Government officer, the authority must consult the Public Service Commission. The opinion of the Public Service Commission is not binding upon the Government which can take contrary view in an appropriate case.

25. Having gone through the case cited above it appears that the consultation with the Public Service Commission is mandatory before passing the orders of dismissal of both the respondents though the opinion of Public Service Commission is not binding on the authority.

26. In the light of the finding made before, we do not find substance in these appeals. Accordingly, both the appeals are dismissed.

6 SCOB [2016] AD 70

APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Muhammad Imman Ali
Mr. Justice A. H. M. Shamsuddin Choudhury

JAIL APPEAL NOS. 2-3 OF 2012
(From the judgment and order dated 17th of May, 2006 passed by the High Court Division in Death Reference No. 41 of 2003 with Criminal Appeal Nos. 1181 and 1245 of 2003 and Jail Appeal No.295 of 2003.)

Sohel Dewan @ Mehedi Hasan @ Chanchal	...Appellant (in Jail Appeal No. 2 of 2012)
Billal Hossain and another	...Appellants (in Jail Appeal No. 3 of 2012)
Versus	
The State	... Respondent
For the Appellants (in both cases)	:Mr. Md. Helal Uddin Mollah, Advocate
For the Respondent (in both cases)	:Mr. Biswajit Deb Nath, Deputy Attorney General
Date of hearing & judgement	:The 1st of April, 2015

Penal Code, 1860
Section 302/34:
In the facts of the case before us, where there is some inkling of a doubt as to which of the shots from the firearms of the accused caused the death, or conversely which one of the three accused who fired the shots missed his target, the application of sections 302/34 of the Penal Code was correct, but the question remains as to whether the death sentence would be appropriate. We are inclined towards the view that where the conviction is not under section 302 of the Penal Code simpliciter, and where the complicity of the accused is proved by the aid of section 34 of the Penal Code, then the sentence of death would not be appropriate. ...(Para 16)

J U D G M E N T

MUHAMMAD IMMAN ALI, J:-

1. These two Jail Appeals, by leave, are directed against the judgment and order dated 17.05.2006 passed by the High Court Division in Death Reference No. 41 of 2003 heard along with Criminal Appeal Nos. 1181 and 1245 of 2003 and Jail Appeal No.295 of 2003, accepting the death reference and dismissing Criminal Appeal No. 1181 of 2003 and Jail Appeal No. 295 thereby maintaining the conviction of those appellants under sections 302/34 of the Penal Code. Criminal Appeal No. 1245 of 2003 was allowed acquitting appellant

Emran Hossain alias Rana of the charge levelled against him under sections 302/109 of the Penal Code.

2. Since the both the appeals arise out of the same judgment of the High Court Division, these were heard together and they are dealt with by this single judgment.

3. The relevant facts are as follows:

On 08.08.2002 at about 5:30 p.m. victim Badsha Miah, elder son of the informant Nurjahan Begum, was sitting in front of his place of business, namely Badsha Community Center. At that time the informant along with her grandson P.W. 2 Rafiqul Islam @ Suman, was going to her daughter Jahanara's house and on her way she talked with her son Badsha Miah. When the informant proceeded a little further, she saw Sohel, Billal, Manik and some other persons loitering on the right hand side in front of the market. As she proceeded further, she heard the sound of firing and looked back and saw accused Billal, Sohel and Manik shooting at her son Badsha Miah with the firearms in their hands. Then she cried out for help to save her son. Appellants Billal, Sohel and Manik along with others left the place of occurrence towards the South firing blank shots from their firearms. The informant and Sumon went to Badsha Miah and saw blood oozing from his nose, mouth, neck, belly and his entire body was soaked with blood. Badsha Miah fell on the ground from the chair. Yasin (P.W.3), Sumon(P.W.2) and Dukhu (P.W.4)took Badsha Miah to hospital in a baby-taxi. As the informant was crying, she was taken to her house. After a while she received information from the hospital that Badsha Miah succumbed to his injuries. When the other relatives came to the house of the informant, she along with her 'putra' (brother of daughter-in-law) Rezaul Karim (P.W.8), Sumon and Dukhu went to Kafrul Police Station to lodge the First Information Report (F.I.R.). Accordingly, Kafrul P.S. Case No.11 dated 08.08.2002 was started.

4. After completion of the investigation police submitted charge-sheet No. 4 dated 17.01.2003 against the appellants and two others under sections 302/34 of the Penal Code.

5. After submission of charge sheet the case record was transferred to the Druto Bichar Tribunal No. 4, Dhaka for trial and the case was re-numbered as Druto Bichar Tribunal Case No. 1 of 2003. Charge was framed under sections 302/34 of the Penal Code against the appellants and under sections 302/109 of the Penal Code against the other two accused, which was read over to them, to which they pleaded not guilty and claimed to be tried.

6. During trial the prosecution examined as many as sixteen witnesses who were cross-examined by the defence, but the defence examined none. The defence case of the appellants, as it appears from the trend of cross-examination, was that they did not commit the offence as alleged by the prosecution and that they had been falsely implicated in the case. The appellants were examined under section 342 of the Code of Criminal Procedure when again they pleaded their innocence.

7. After hearing the parties and upon consideration of the evidence and materials on record, the Druto Bichar Tribunal, by the judgment and order dated 17.05.2006, convicted the appellants Shoel Dewan, Billal Hossain and Manik @ Omar Faruque under sections 302/34 of the Penal Code and sentenced them to death. The Tribunal also found the other two co-accused guilty under sections 302/109 of the Penal Code and sentenced each of them to suffer imprisonment for life and to pay a fine of Tk. 5,000/-each, in default to suffer rigorous imprisonment for one year more.

8. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death, which was numbered as Death Reference No.41 of 2003. The appellants also filed Criminal Appeal No. 1181 of 2003 and Jail Appeal No. 295 of 2003 before the High Court Division. The co-convict Emran Hossain @ Rana filed Criminal Appeal No. 1245 of 2003.

9. A Division Bench of the High Court Division after hearing the death reference along with the criminal appeals and jail appeal accepted the reference and dismissed the appeals filed by the appellants. However, the High Court Division allowed Criminal Appeal No. 1245 of 2003 and acquitted the co-convict Emran Hossain @ Rana. Hence, the appellants filed Jail Petition No.11-12 of 2012 before this Division.

10. Leave was granted to consider the following:

> "I. whether the High Court Division failed to consider the vital aspect of the case in confirming the sentence of death awarded by the Tribunal to the petitioners that although P.Ws. 1, 2, 3 and 10 posing themselves to be the eye witnesses stated in their deposition that all the three condemned prisoners fired shots at the deceased from the firearms in their hands, the inquest report and the post mortem report show that the victim received two injuries only and thus, these lead to a controversy as to out of the three appellants whose shot struck the body of the victim; and
>
> II. Whether the above anomaly between the medical evidence and the testimony of the witnesses also creates doubt about the prosecution case and in the circumstances whether their sentence of death may be commuted to imprisonment for life."

11. Mr. Md. Helal Uddin Mollah, the learned Advocate appearing on behalf of the appellants submitted that the alleged eye witnesses, namely P.Ws. 1, 2, 3 and 10 all deposed to the effect that the three accused appellants shot the victim with their firearms as a result of which the victim died. But only two bullets were recovered which belies the prosecution story that the three convict appellants shot and killed the victim. He further submitted that since the evidence of the eye witnesses is not fully consistent with the post mortem examination report and the evidence of the Doctor P.W. 14, doubt is created which is sufficient to commute the sentence of death to one of imprisonment for life and the High Court Division erred in law in not considering this aspect.

12. The State respondent did not file any concise statement. Mr. Biswajit Deb Nath, learned Deputy Attorney General appearing for the State with leave made submissions in support of the impugned judgement and order of the High Court Division.

13. We have considered the submissions of the learned Advocate for the appellants and the learned D.A.G. for the respondent and perused the impugned judgment and order of the High Court Division and other connected papers on record.

14. It appears that only two injuries having been found on the dead body of the victim, there is some doubt created inasmuch as one of the convict appellants did not shoot the victim with any firearm, or his shot, if fired at all, did not hit the victim. There is no doubt from the evidence and materials on record that the presence of the convict appellants at the place of occurrence was established. There is no way of assessment as to which one of the three

convict appellants did not use his firearm against the victim. Hence, there is no illegality in the findings of the trial Court which has been upheld by the High Court Division, that the convict appellants are guilty on an offence under sections 302/34 of the Penal Code. However, the question of sentence based on the given facts and circumstances, has to be looked at carefully.

15. In this regard we may profitably refer to the decision in the case of ***Hari Har Singh and others v the State of UP, 1975 4 SCC 148.*** In that case two of the accused had shot the victim and three others had struck with lathis. The medical evidence indicated that the victim died of the cumulative effect of the injuries. Out of four shots fired by the accused only two hit the victim. It was held that where the accused had not been convicted under section 302 simpliciter the death penalty ought not to have been imposed. On the medical evidence it could not be proved which of the two gunshot injuries was sufficient in the ordinary course of nature to cause the death of the victim.

16. In the facts of the case before us, where there is some inkling of a doubt as to which of the shots from the firearms of the accused caused the death, or conversely which one of the three accused who fired the shots missed his target, the application of sections 302/34 of the Penal Code was correct, but the question remains as to whether the death sentence would be appropriate. We are inclined towards the view that where the conviction is not under section 302 of the Penal Code simpliciter, and where the complicity of the accused is proved by the aid of section 34 of the Penal Code, then the sentence of death would not be appropriate.

17. Moreover, the accused appellants were convicted and sentenced to death by an order of the trial Court dated 21.4.2003. The convict appellants have, therefore, suffered in the condemned cell for almost twelve years. In this connection we may refer to our earlier decision in the case of ***Manik versus The State*** judgment delivered on 19th January, 2015 (unreported) where the sentence of death was commuted to imprisonment for life considering, *inter alia,* the long period spent in the condemned cell.

18. In view of the discussion above, we are of the opinion that ends of justice will be sufficiently met if the sentence of death is commuted to imprisonment for life.

19. Accordingly, the jail appeals, which challenged only the sentence of the convict appellants, are allowed and the sentence of death imposed upon the convict appellants Sohel Dewan @ Mehedi Hasan @ Chanchal, Billal Hossain and Md. Omar Faruq, is commuted to one of imprisonment for life.

6 SCOB [2016] AD 74

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. 68 OF 2009 WITH CIVIL APPEAL NO. 03 OF 2009 WITH CRIMINAL PETITION NO.421 OF 2012.
(From the judgment and order dated 14.02.2008, 18.05.2008, 16.06.2011 passed by the High Court Division in W. P. No.9905 of 2007, W.P.8578 of 2007 and Criminal Miscellaneous Case No.10340 of 2011 respectively)

Anti Corruption Commission	:	Appellant. (In C.A. No.68 of 2009 with C.A. 03/09)
Anti Corruption Commission	:	Petitioner. (In C.P. No.421/12)
=Versus=		
Mohammad Shahidul Islam @ Mufti Shahidul Islam and others.		Respondent. (In C.A.No.68/09)
Md. Harunur Rashid and others		Respondent (In C.A. No.03 of 09)
Md. Obaidul Karim.		Respondent. (In C.P. No.421/12)

For the Appellants (In C.A. 68/09)	:	Mr. Mahbubey Alam, Attorney General with Mr. Khorshed Alam Khan, Adv., instructed by Mrs. Sufia Khatun, Advocate-on-Record.
For the Appellants (In C.A. 03/09)	:	Mr. Mahbubey Alam, Attorney General with Mr. Khorshed Alam Khan, Adv., instructed by Mr. Zahirul Islam, Advocate-on-Record.
For the Petitioner (In Crl.P. No.421 of 2012)	:	Mr. Khorshed Alam Khan, Adv., instructed by Mrs. Mahmuda Begum, Advocate-on-Record.
For the Respondent (In C.A. No.68/09)	:	Mr. Shah Monjurul Haque, Advocate, instructed by Mr. Mvi. Wahidullah, Advocate-on-Record.
Respondent (In C.A. No.03/09)	:	Not represented.
For the Respondent (In Crl. P. No.421/12)	:	Mr. Mvi.Wahidullah, Advocate-on-Record.

Date of hearing : 29-07-2015
Date of judgment : 16-09-2015

Members of Parliament are Public Servants:
The oath that they took referred to their obligation to "faithfully discharge the duty" upon which they were about to enter. They are public servants since they held office by virtue of which they were authorized or required to perform public duty. The word "office" has been used in Articles 3 and 3D of P.O.28 of 1973 meaningfully. ...(Para 46)

The Anti-Corruption Commission Act is applicable in respect of public servant as well as "any other person". ...(Para 56)

Challenging the proceedings of Special cases writ Petition No.9905 of 2007 and 8578 of 2007 are not maintainable inasmuch as Code of Criminal Procedure provides efficacious remedy to get redress if one feels himself aggrieved due to initiation of such criminal proceedings. In such view of the matter those two writ petitions were not maintainable.

...(Para 63)

JUDGMENT

Hasan Foez Siddique, J:

1. The delay of filing in Criminal Petition for leave to Appeal No.421 of 2012 is condoned.

2. Civil Appeal No.68 of 2009, Civil Appeal No.03 of 2009 and Criminal Petition for Leave to Appeal No.421 of 2012 have been heard together and they are being disposed of by this common judgment.

3. Facts of Civil Appeal No.68 of 2008, in short, are that the respondent Mohammad Shahidul Islam @ Mufti Shahidul Islam filed Writ Petition No. 9905 of 2007 challenging the proceeding of Special Case No.02 of 2008 arising out of ACC G.R. No. 40 of 2007 corresponding to Kotwali Police Station Case No.68 dated 30.05.2007 under section 409/104 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947). In the said petition, he sought for direction upon the writ respondent Nos.1-3 to accept customs duty and penal demand made by the writ respondent No.3 dated 05.11.2007 pursuant to adjudication order No. 1033 dated 05.11.2007 passed by the writ respondent No.2 and also challenged the continuation of the aforesaid criminal case stating, inter alia, that he was Member of Parliament for the term of 2001-2006. Taking privilege given by S.R.O No.266-Ain/2005/2098/ Shulka 22.08.2005 he imported Lexus-LX 470-model, UZJIOOR-GNAGK1, Japan origin Jeep under L/C. No.16825010037 dated 21.08.2005 giving undertaking pursuant to the certificate issued by the Speaker of Parliament. Thereafter, the writ respondent No.2 issued a show cause notice on 26.09.2007 to the writ petitioner asking him as to why legal action should not be taken against him for illegal transfer of the said jeep. The writ respondent No.2 by an order dated 05.11.2007 demanded duty of taka 51,00,000/- from the writ petitioner. The writ respondent No.3 issued another notice on 05.11.2007 demanding duty and penalty amounting to tk.148,76,068,96/- from him. Thereafter, on 30.05.2007, a Deputy Director of Anti-Corruption Commission lodged a First Information Report which was registered as Kotwali Police Station Case No.68 dated 30.05.2007 under Section 409/109 of the Penal Code stating that the writ petitioner transferred the aforesaid tax free Jeep to accused Abdul Jabbar Miah before the expiry of four years from the date of importation of the said Jeep violating the provision of law and thereby committed offence. Holding investigation, Anti-Corruption Commission submitted Chargesheet against the writ petitioner under the aforesaid provisions of law and accordingly impugned proceeding was started. The writ petitioner, challenging the said proceeding, filed the instant writ petition in the High Court Division and obtained Rule. The High Court Division made the said Rule absolute by the impugned judgment and order. Thus, the Anti-Corruption Commission has filed this appeal getting the leave.

4. The facts of Civil Appeal No.03 of 2009, in short, are that the respondent No.1 filed Writ Petition No.8578 of 2007 challenging the proceeding of Special Case No. 15 of 2007 arising out of Pallabi Police Station Case No. 37 dated 17.03.2007 under section 5(2) of the Prevention of Corruption Act, 1947 read with Section 409/420 of the Penal Code and Section 156 of the Customs Act. One Md.Younus Ali, Sub- Inspector of Police, lodged a First Information Report with Pallabi Police Station against the writ petitioner stating, inter alia, that at about 13.15 hours on 05.03.2007 members of RAB-2 found a black Hummer Jeep bearing registration No. Dhaka Metro-Gha-11-6195 at the basement-1 of the UTC building. They asked about the ownership of the said Jeep and came to know that the owner of the Jeep was one Enayetur Rahman. Then the RAB personnel asked Enayetur Rahman to appear before the RAB-2 on 06.03.2007 who met the officials of RAB-2 and produced documents in support of his claim of Jeep but finding inconsistencies in the documents, RAB-2 arrested him and seized the Jeep. Writ petitioner Harun-or-Rashid imported the said Jeep under M.P. quota and transferred the same to Enayetur Rahman by showing lesser price than that of market price. The Anti-Corruption Commission holding investigation, submitted charge sheet against the writ petitioner and others under the aforesaid provisions of law. The Metropolitan Special Judge, Dhaka took cognizance

of the offence and, thereafter, transferred the case before the Special Judge, Court No.4, Dhaka where the case was registered as Special Case No.15 of 2007. At the stage of examination of witnesses, the writ petitioner filed the instant writ petition in the High Court Division and obtained Rule. The High Court Division ultimately made the said Rule absolute. Thus, the Anti-Corruption Commission has filed this appeal getting leave.

5. The facts of Civil Petition for Leave to Appeal No. 421 of 2012, in short, are that the respondent Obaidul Karim filed an application under Section 561A of the Code of Criminal Procedure in the High Court Division challenging the proceeding of Special Case No.13 of 2008 corresponding to Metropolitan Special Case No.120 of 2008 arising out of Tejgaon Police Station Case No.17(8) of 2007 under section 409/109 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947. One Abdul Karim, Deputy Director of Anti-Corruption Commission lodged a First Information Report with Tejgaon Police Station against the respondent No.1 stating that Mr. Saidul Haque, Member of Parliament, imported an Infinity Jeep from the U.S.A. opening L/C. No.133505010254 dated 04.05.2005 under M.P. quota. Said Md. Saidul Hauqe used the address of Orion group, House No. 153-154, Tejgaon Industrial Area, Dhaka. On the date of opening L/C, the respondent No.1, through his employee deposited taka 5,00,000/- in the account of Md. Saidul Haque. After receiving the said Jeep, said Md. Saidul Haque gave undertaking stating that he would not transfer the Jeep during the tenure of his membership in Parliament or before expiry of three years from the date of importation. Before delivery of the said Jeep, the respondent No.1 deposited taka 40,00,000/- in the account of Md. Saidul Haque through an employee of Orion Laboratory Limited. Md. Saidul Haque, in collusion with respondent No.1, misappropriated taka 85,50,680/- transferring the said jeep to respondent No.1 thereby they committed offence. The Anti-Corruption Commission, holding investigation, submitted charge sheet against the respondent No.1 and others under the aforesaid provisions of law. The case was transferred before the Special Judge, Court No.8, Dhaka for holding trial. Challenging the said proceeding, the respondent No.1 filed the instant application under section 561A of the Code of Criminal Procedure in the High Court Division and obtained Rule. The High Court Division by the impugned judgment and order dated 16.6.2011 made the Rule absolute, thereby, quashed the proceeding. Thus the Anti-Corruption Commission has filed this criminal petition.

6. Mr. Mahbubey Alam, learned Attorney General with Mr. Khorshed Alam Khan appeared on behalf of the appellant and the petitioner in all the cases. On the other hand, Mr. Shah Manjurul Haque, learned Advocate appeared for the respondent No.1 in Criminal Appeal No.68 of 2009 and Mr. Mvi.Md. Wahidullah, learned Advocate-on-Record on behalf of the respondent No.1 in Criminal Petition for Leave to Appeal No. 421 of 2012.

7. The submissions of the learned Attorney General in all the cases are same, those are, the respondents have committed offences within the meaning of sections 409/109 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act by transferring or purchasing the tax free Jeep before expiry of prescribed time limit. He submits that since the prima-facie cases against the respondents have been made out under the aforesaid provisions of law, the High Court Division erred in law in making the Rules absolute. He submits that the writ petition Nos.9905 of 2007 and 8578 of 2007 against the Criminal proceedings were not maintainable since Criminal Procedure Code provides efficacious remedy to get redress against such types of proceedings if the writ petitioners feel themselves aggrieved. He further submits that members of Parliament are public servants in view of the provisions of Section 21 of Penal Code read with Section 2(b) of the Criminal Law Amendment Act.

8. Mr. Shah Manjurul Haque, learned Advocate appearing for the respondent No.1, in Civil Appeal No.68 of 2008 and Mvi. Md. Wahidullah, learned Advocate-on-Record in Civil Petition for Leave to Appeal No.421 of 2012 submit that the respondents being Members of Parliament were not Public Servants, so initiation of criminal proceedings under Sections 5(2) of the Prevention of Corruption Act read with Section 409/109 of the Penal Code against them were bad in law, the High Court Division rightly passed the impugned judgments.

9. The facts and relevant laws related to the cases are identical. The High Court Division quashed the proceedings mainly on the ground that the Members of Parliament are not Public Servant within the meaning of the expression in any of the clauses of Section 21 of the Penal Code and Section 2(b) of the prevention of Corruption Act, so the initiations of proceedings

against them under Sections 409/109 of the Penal Code read with Section 5(2) of Act II of 1947 were bad in law. The High Court Division relied on the decision in the case of R.S. Nayek Vs. A.R. Antulay reported in AIR 1984 SC 684=(1984) 2 SCC 183. In the cited case it was observed that MLA was not and is not a "public servant" within the meaning of the expression in any of the clauses of Section 21 IPC. It was further observed that MLA does not perform public duty but he discharges constitutional functions and thus he is not a public servant. In the case Ramesh Balkrishna Kulkarni Vs. State of Maharashtra (AIR 1985)SC 1655 Indian Supreme Court further held that a public servant is an authority who must be appointed by Government or a semi government 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 regulation made by the Government.

10. The relevant expressions regarding the definition of Public Servant are:
Section 21. Public Servant: The words "Public Servant" denote a person falling under any description hereinafter following namely:-
: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.

Explanation 1- persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

11. Mr. Haque submits that an M.P. occupies in the Parliament as has been referred to as "seat" instead of "office" in part V. Chapter 1 of the Constitution. They do not hold any "office" and that they do not get any salaries. So they are not "Public servant".

12. It would not be out of place to reproduce the related provisions regarding financial benefits provided in law for the members of Parliament.

13. Article 68 of the Constitution provides-

"Remuneration etc. of members of Parliament- Members of Parliament shall be entitled to such remuneration, allowances and privileges as may be determined by Act of Parliament or, until so determined, by order made by the President."

14. In Bengali version of Article 68 of the Constitution the word "remuneration" has been translated as "*cwiwkwgK*". In the case of Accountant General, Bihar Vs. N. Bakshi reported in AIR (1962) SC 505 Indian Supreme Court held that if a man gives his services, whatever consideration he gets for giving his services is a remuneration for him. Consequently, if a person was in receipt of a payment, or in receipt of a percentage, or any kind of payment which would not be actual money payment, the amount he would receive annually in respect of this would be remuneration. The Supreme Court of India relied upon in In R Vs. Postmaster General, (1986) 1QBD658 where Justice Backburn observed, "I think the word "remuneration" ----- as a quid pro quo". It is a wider term than salary.

15. There is no definition of "remuneration" in the Constitution, but that is not a ground for holding that the expression is used in any limited sense as merely salary. The expression "remuneration" in its ordinary connotation means "reward", recompense pay, wages or salary for service render. It is payment for services rendered or work done. In S & V Stores Ltd. V. Lee, (1969)2 All Er 417, 419 (QBD) it was observed that "remuneration" is not mere payment for work done, but is what the doer expects to get as the result of the work he does in so far as what he expects to get is quantified in terms of money.

16. The mere fact that the position which an M.P. occupies in the Parliament has been referred to as "seat" instead of office is not a sure indicium of the fact that an M.P. is not a "public servant" and it would not be proper to place reliance thereupon for the conclusion of the fact that an M.P. is not a "Public servant". It is true that in the Constitution Member of Parliament has been referred to as a person who holds "seat" of Parliament. But the words "seat" and "Office" are interchangeable terms and either of them can be used while referring to a member of Parliament.

17. The term "office" has been defined in the Oxford English Dictionary, in the following words:- "Duty attaching to one's station, position or employment; a duty service, or charge, falling or assigned to one; a service or task to be performed; A position or place to which certain duties are attached, especially one of a more or less public character, a position of trust, authority, or service under constituted authority; a place in the administration of Government, the public service, the direction of a corporation, company, society etc.

18. The word, "office" has got the following meaning as given to it in Stroud's Judicial Dictionary of Words & Phrases.

> "In any case, an office necessary implies that there is some duty to be performed".

19. Blackstone defined an "office" as "a right to exercise a public or private employment, and to take the fees and employments thereunto belonging." Cockburn C.J. thought that "an office necessarily implies that there is some duty to be performed." The formulation of Rowlatt J. has frequently been endorsed in the House of Lords "---- an office or employment which was a subsisting, permanent, substantive position which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders.----"

20. The word "office" has been defined in Black's Law Dictionary, an "assigned duty" or "function". Synonyms are "post" ,"appointment" , "situation", "place", "position", and "office" commonly suggests a position of (especially public) trust or authority."

21. The word "Office" is of indefinite content. One of its various meanings is a position or place to which certain duties are attached, especially one of a more or less Public Character (Rajendra Shankar Tripathi V. State of U.P,1979 Cr.LJ 243) Black's Law Dictionary further defines office" as right, and correspondent duty, to exercise a public trust. The most frequent occasions to use the word "office" arise with reference to a duty and power conferred on an individual by the Government, and when this is the connection, "Public Office" is a usual and more discriminating expression. But a power and duty may exist without immediate grant from government, and may be properly called an "office". Public office defines as, "The right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of Government for the benefit of the public. An agency for the state, the duties of which involve in their performance the exercise of some portion of the sovereign power either great or small."

22. The term "office" has also been a subject matter of interpretation in American Jurisprudence, in following manner;

> "..... Ordinarily and generally, a public office is defined to be the right, authority, and duty created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. The position is an office whether the incumbent is selected by appointment or by election and whether he is appointed during the pleasure of the appointing power or is elected or a fixed term."
>
> "A public officer is such an officer as is required by law to be elected or appointed, who has a designation or title given him by law, and who exercises functions concerning the public assigned to him by law".

23. Grahm Zellic in an article "Bribery of Members of Parliament and the Criminal Law" published in Public Law, 1979, has cited the observations of Sir Issac J, which are in the following words:-

> "When a man becomes a Member of Parliament, he undertakes high public duties. Those duties are inseparable from the position; he cannot retain the honour and divest himself of the duties. The position, independent of the Member, is subsisting, permanent and substantive and will be filled by others after him; this is provided by law; and it is certainly of a more, rather than less, public character, Erskine May in fact speaks of "Corruption in the Execution of their office as Members. There is nothing to stop a Court, therefore, holding that membership of Parliament constitutes an office....."

24. Taking into consideration the above quoted definitions and observations, the Delhi High Court in the case of L.K. Advani V. Central Bureau of Investigation reported 1997 Cri.L.J.2559 has observed:

> "Let us now see as to whether an M.P. holds an office? Admittedly, an M.P. enjoys a status and position. He is also required to perform public duties under the Constitution. Thus it can be safely concluded therefrom that a Member of Parliament is holder of an office."

25. In R.V. Whitaker (1914-3KB.1283) it was held, "A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go supply his payment and the public have an interest in the duties be discharges, he is a public officer".

26. Best C.J. in Henly V. Mayor of Lyme, (1928)5 Bing 91, to the view that "--- every one who is appointed to discharge a public, duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer------ It seems to me that --- if a man takes a reward- Whatever be the nature of that reward, whether it be in money from the crown, whether it be in land from the crown, whether it be " in lands or money from any individual, - for the discharge of a public duty, that instant he becomes a public officer ---"

27. Well discussed case in this regard is the case of P.V. Narashima Rao Vs. State (CBI/SPE) reported in (1998) 4 SCC page 626. In that case, facts, in short, were that, in the General Election for the Tenth LokSabha held in 1991 the Congress (I) party emerged as the single largest party and it formed the Government with P.V.Narasimha Rao as Prime Minister. On 26-7-1993, a motion of no confidence was moved in the Lok Sabha against the minority Government of P.V. Narasimha Rao. The support of 14 Members was needed to have the no-confidence motion defeated. On 28-7-1993, the no-confidence motion was lost, 251 Members having voted in support and 265 against. Suraj Mandal, Shibu Soren, Simon Marandi and Shailendra Mahto, Members of the Lok Sabha owning allegiance to the Jharkhand Mukti Morcha (the JMM), and Ram Lakhan Singh Yadav, Ram Sharan Yadav, Roshan Lal, Anadicharan Das, Abhay Pratap Singh and Haji Gulam Mohammed, Members of the Lok Sabha owning allegiance to the Janata Dal, Ajit Singh group (the JD, AS), voted against the no-confidence motion. Ajit Singh, a Member of the Lok Sabha owning allegiance to the JD, AS, abstained from voting thereon. One Shri Ravindra Kumer of Rashtriya Mukti Morcha filed a complaint dated 1-2-1996 with the "CBI" wherein it was alleged that in July 1993 a criminal conspiracy was hatched pursuant to which the above –named Members agreed to and did receive bribes, to the giving of which P.V. Narasimha Rao, MP & Prime Minister, Satish Sharma, MP & Minister, Buta Singh, MP. V. Rajeshwara Rao, MP, N.M. Revanna, Ramalinga Reddy, MLA, M.Veerappa Moily, MLA & Chief Minister, State of Karnataka, D.K. Adikeshavulu, M. Thimmegowda and Bhajan Lal, MLA & Chief Minister, State of Haryana, were parties, to vote against the no-confidence motion. A prosecution being launched against the aforesaid alleged bribe-givers and bribe takers subsequent to the vote upon the no-confidence motion, cognizance was taken by the Special Judge, Delhi. The persons sought to be charged as aforesaid filed petitions in the High Court at Delhi seeking to quash the charges. By the judgment and order under challenge, the High Court dismissed the petitions. They preferred appeals. The appeals were heard by a Bench of three learned Judges and then referred to a Constitution Bench. The argument on behalf of the appellants to be considered by the Constitution Bench, broadly put, was that by virtue of the provisions of Article 105, members of Parliament are immune from the prosecution and that, in any event, they cannot be prosecuted under the Prevention of Corruption Act, 1988.

28. Relevant portions of the majority view of the cited case was as follows:

> "We will first examine the question whether a Member of Parliament holds an office. The word "office" is normally understood to mean "a position to which certain duties are attached, especially a place of trust, authority or service under constituted authority. In Macmillan V. Guest Lord Wright has said:
>
> The word "office" is a indefinite content. Its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following: " A position or place to which certain duties are attached, especially one of a more or less public character.

29. Lord Atkin gave the following meaning:

> an office or employment which was subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders."

30. Lord Wright said:

> An office means no more than a position to which certain duties are attached.

31. In R.V. White, 13 SCR (NSW) 332 the Supreme court of New South Wales has held that a Member of the State Legislature holds an office. That view has been affirmed by the High Court of Australia in Boston (1923) 33 CLR 386. Issacs and Rich, JJ.said:

> A Member of Parliament is, therefore, in the highest sense, a servant of the State; his duties are those appertaining to the position he fills, a position of no transient or temporary existence, a position forming a recognized place in the constitutional machinery of government. Why, then, does he not hold an "office'? In R. V. White it was held, as a matter of course, that he does. A person authoritatively appointed or elected to exercise some function pertaining to public life. "Clearly a Member of Parliament is a "public officer" in a very real sense, for he has, in the words of Williams, J.

32. In Habibullah Khan V. State of Orissa (1993 Cr.L.J 3604) the Orissa High Court has held that a Member of the Legislative Assembly holds an office and performs a public duty. The learned Judges have examined the matter keeping in view the meaning given to the expression "office" by Lord Wright as well as by Lord Atkin in McMillan V. Guest (1942 AC 561).

33. The next question is whether a Member of Parliament is authorized or required to perform any public duty by virtue of his office. In R.S. Nayak V. A.R. Antulay Supreme Court of India has said that though a Member of the State Legislature is not performing any public duty either directed by the Government or for the Government but he no doubt performs public duties cast on him by the Constitution and by his electorate and he discharges constitutional obligations for which he is remunerated fees under the Constitution."

34. In P.V. Narashima Rao's case it was further observed that under the Constitution M.P is responsible to Parliament and act as watchdogs on the functioning of the Council of Ministers. In addition, a Member of Parliament plays an important role in parliamentary proceedings, including enactment of legislation, which is a sovereign function. The duties discharged by him are such in which the State, the public and the community at large have an interest and the said duties are, therefore, public duties. It can be said that a Member of Parliament is authorised and required by the Constitution to perform these duties and the said duties are performed by him by virtue of his office.

35. Issac, J., (1920)-27CLR 494, has further said:

> " One of the duties is that of watching on behalf of the general community the conduct of the executive, of criticising it, and if necessary, of calling it to account in the constitutional way by censure from his place in Parliament- censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possess."

36. In R.V Boston (1923) 33 CLR 386 it was further observed that the fundamental obligation of a Member in relation to Parliament of which he is a constituent unit still subsists as essentially as at any period of our history. That fundamental obligation which is the key to this case is the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community.

37. Those duties are of a transcendent nature and involve the greatest responsibility, for they include the supreme power of moulding the laws to meet the necessities of the people, and the function of vigilantly controlling and faithfully guarding the public finances.

38. In P.V. Narashima Rao's the Supreme Court of India finally observed:

> "1. A. Member of Parliament does note enjoy immunity under Article 105(2) or under Article 105(3) of the Constitution from being prosecuted before a criminal

court for an offence involving offer or acceptance of bribe for the purpose of speaking or by giving his vote in Parliament or in any committees thereof.

2. A Member of Parliament is a public servant under Section 2(c) of the Prevention of Corruption Act, 1988.

3. Since there is no authority competent to remove a Member of Parliament and to grant sanction for his prosecution under Section 19(1) of the Prevention of Corruption Act, 1988, the court can take cognizance of the offences mentioned in Section 19(1) in the absence of sanction but till provision is made by Parliament in that regard by suitable amendment in the law, the prosecuting agency, before filing a charge-sheet in respect of an offence punishable under section 7, 10, 11, 13 and 15 of the 1988 Act against a Member of Parliament in a criminal court, shall obtain the permission of the Chairman of the Rajya Sabha/Speaker of the Lok Sabha, as the case may be."

39. Indian Supreme Court lastly held, "Having considered the submissions of the learned Counsel on the meaning of the expression "public servant" contained in section 2 (c) of the 1988 Act we are of the view that a Member of Parliament is a Public Servant for the purpose of the 1988 Act."

40. Relevant provision provides in Section 2(b) of the Criminal Law Amendment Act (XL of 1958) regarding expanded definition of "public servant" is as follows:

2. Definitions- In this Act, unless there is anything repugnant in the subject or context-

(a)-------

(a)(a)----

(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 organisation constituted or established under any law;'

41. There can be no doubt that coverage of section 2(b) of Act XL of 1958 is far wider than that of section 21 of the Penal Code. The two provisions have only to be looked at by side to be sure that more people can now be called public servants for the purposes of the anti-corruption law.

42. Realising the importance of honesty and probity in public life and to weed out the corruption rampant amongst the Public servants, the legislators thought it fit and proper to frame a comprehensive legislation in the form of Anti-corruption Commission Act (Act-V of 2004). Before that they provided the above mentioned expanded definition of "Public servant" substituting 2(b) quoted above in Criminal Law Amendment Act, 1958 by the Ordinance No.VI of 1978.

43. In the expanded definition of the public servant, the legislators, amongst others, added, "a------ Member..... of any other body".

44. The word "any" as mentioned section 2(b) included "all" or "every" as well as "some" or "one" depending on the context of the subject matter of the statute. The word "any" used in section 2(b) has diversity and may be employed to indicate "all" or "every" as well as "some" or "one". The word "body" as used section 2(b) means a number individually spoken of collectively, usually associated for a common purpose, joined in a certain cause or united by some common tie or occupation. The parliament is a legislative body which is a creation of the Constitution itself. The main function of parliament is law making, that is, legislative. Earlier a member of the parliament had no specific function as to the custody, receipt or disbursement of any public money. But, today, that is not whole true. There is little change of the situation. It would not be irrelevant here to give some examples regarding activities of the members of Parliament. For example: ÒProbidhan 5 of *gva¨wgK I D"P gva¨wgK wk¶v †evW, XvKv (gva¨wgK I D"P gva¨wgK †emiKvix wk¶v cwZôv‡bi Mfwbs evW I g¨v‡bwRs KwgwU) cwealbgvjv, 2009* provides- *5| Mfwbs evWi mfvcwZ g‡bvqb|-(1) †Kvb ¯'vbxq wbewPZ msm` m`m¨ Zvnvi wbevPbx GjvKvq Ae¯nZ †evW KZK.¯'xKwLZ. cvß Ggb msL¨K D"P gva¨wgK ¯‡ii †emiKvix wk¶v cwZôv‡bi Mfwbs evWi mfvcwZi `wqZ Mnb Kwi‡Z cwi‡eb †hb D³ GjvKvq Ae¯nZ, GB cwealb gvgjvi AvIZvfz³ b‡n GBiKc Ab¨vb¨ †emiKvix wk¶v cwZôvbmn Zvnvi GBiKc `wqZ MnbKZ. wk¶v cwZôv‡bi msL¨v Pvi Gi AwaK bv nq|Ó* Similarly Section 25 of the *Dc‡Rjv cwil` AvBb, 1998* provides *25| cwil‡`i Dc‡`óv |-(1) MYcRvZš¿x evsjv‡`‡ki mswkøó Abyôvb¨ 65 Gi Aax‡b GKK AvÂwjK*

Gjv‡Kv nB‡Z wbewPZ msMÖn msm` m`m¨ cwil‡`i Dc‡`óv nB‡eb Ges cwil` Dc‡`óvi civgk© Mnb Kwi‡e|Ó There are instances of the activities of the members of Parliament which are related to the executive functions of the State and money disbursement. By different ways the members of Parliament involved themselves in executive functions.

45. As per provision of Article 3 of P.O. No.28 of 1973 a Member shall be entitled to receive a remuneration at the rate of twenty seven thousand and five hundred take per mensem and to the privileges and amenities provided in the order during the whole of his term of office. That is, the Members of Parliament received remuneration from the government during the whole of his term in office. Article 3C(1) of P.O.28 of 1973 provides that a member shall be, entitled to import free of customs duty, value added tax, development surcharge and import permit fee during the whole of his term of office, one car, jeep or microbus of such specification, and on such conditions, as the Government may specify in this behalf. Article 3CC says, "A member shall be entitled to receive a transport allowance at the rate of forty thousand take per mensem. Article 3D provides:

> "A member shall be entitled to receive office expenses allowance at the rate of nine thousand taka per mensem for maintaining an office in his constituency. A member shall also get laundry and miscellaneous expenses allowances, allowances relating to journey performed for the purposes of attending a session, daily allowances travel allowance within the country, insurance coverage, discretionary grant, medical facilities for family members etc."

46. The oath that they took referred to their obligation to "faithfully discharge the duty" upon which they were about to enter. They are public servants since they held office by virtue of which they were authorized or required to perform public duty. The word "office" has been used in Articles 3 and 3D of P.O.28 of 1973 meaningfully.

47. Furthermore, regarding the object of legislation of Anti-corruption Act as stated in the preamble is: *Ò‡`‡k `vwqZ Ges `vwqZgyjK Kvh cwZ‡iv‡ai j‡¶¨ `vwqZ Ges Ab¨vb¨ myôz`ó Aciv‡ai AbymÜvb Ges Z`š cwiPvjbvi Rb¨ GKwU ¯vaxb `vwqZ `gb Kwgkb cwZôv Ges AvbyM½K welqwU m¤ú‡K weavbK‡í cbxZ AvBb*

‡h‡nZz‡`‡k `vwqZ Ges `vwqZgyjK Kvh cwZ‡iv‡ai j‡¶¨ `vwqZ Ges Ab¨vb¨ myôz`ó Aciv‡ai AbymÜvb Ges Z`š cwiPvjbvi Rb¨ GKwU ¯vaxb `vwqZ `gb Kwgkb cwZôv Ges AvbyM½K welqwU m¤ú‡K weavb Kiv mgvPxb I c‡qvRbxq|Ó

48. In the schedule of the ACC Act section, 161 and 409 of the Penal Code and Prevention of Corruption Act, 1947 have been included objectively. Section 17 of ACC Act empowered the Commission to hold inquiry and investigation in respect of the offence as described in the schedule of the Act which runs as follow:

17| Kwgk‡bi Kvhvewj| - Kwgkb wb¤ewYZ mKj ev †h †Kvb Kvh m¤úv`b Kwi‡Z cwi‡e, h_vt-

(K) Zdwm‡j Dwjwl‡Z Acivamg‡ni AbymÜvb I Z`š cwiPvjbv,

(L) Abyôv`Q` (K) Gi Aaxb AbymÜvb I Z`š cwiPvjbvi wfwË‡Z GB Aân‡bi Aaxb gvgjv `v‡qi I cwiPvjbv;

(M) `vwqZ m¤úwKZ †Kvb Awf‡hvM ¯ D‡`¨‡M ev ¶wZM¨ e¨w³ ev Zvnvi c‡¶ Ab¨ †Kvb e¨w³ KÎK `wLjKZ. Av‡e`‡bi wfwË‡Z AbymÜvb ;

(N) `vwqZ `gb welq AvBb Øviv Kwgkb‡K AwcZ †h †Kvb `wqZ cvjb Kiv;

(0) `vwqZ cwZ‡iv‡ai Rb¨ †Kvb AvB‡bi Aaxb ¯xKZ.e¨e¯w` chv‡jvPbv Ges KvhKi ev¯evq‡bi Rb¨ ivócwZi wbKU mycwik †ck Kiv;

(P) `vwqZ cwZ‡iv‡ai welq M‡elYv cwiKíbv ^Zwi Kiv Ges M‡elYvä djvd‡ji wfwË‡Z KiYxq m¤ú‡K ivócwZi wbKU mycwik †ck Kiv;

(Q) `vwqZ cwZ‡iv‡ai j‡¶¨ mZZv I wbôv‡eva mµó Kiv Ges `vwqZi wei‡× MY‡mPZbv MwVZv †Zvjvi e¨e¯nv Kiv;

(R) Kwgk‡bi Kvhvewj ev `wq‡Zi g‡a¨ c‡o Ggb mKj welq‡qi Dci †mwgbvi, wm‡¤úwRqvg, Kgkvjv BZ¨w` Abôv‡bi e¨e¯nv Kiv;

(S) Av_ mvgvwRK Ae¯nvi †cw¶‡Z evsjv‡`‡k we`¨gvb wewfb cKvi `vwqZi Drm wPwýZ Kiv Ges Z`bymv‡i c‡qvRbxq e¨e¯nv Mn‡Yi Rb¨ ivócwZi wbKU mycwik †ck Kiv ;

(T) `vwqZi AbymÜvb , Z`š, gvgjv `v‡qi Ges D³ic AbymÜvb, Z`š I gvgjv `v‡q‡ii †¶‡Î Kwgk‡bi Abyôv`b c×wZ wbaviY Kiv ; Ges

(U) `vwqZ cwZ‡iv‡ai Rb¨ c‡qvRbxq we‡ewPZ Ab¨ †h †Kvb Kvh m¤úv`b Kiv|

49. Section 19 provides*:*

Ò19| AbymÜvb ev Z`šKv‡h Kwgk‡bi we‡kl ¶gZv|-(1) `vwqZ m¤úwKZ †Kvb Awf‡hv‡Mi AbymÜvb ev Z`‡ši †¶‡Î, Kwgk‡bi wbg©ic ¶gZv _vwK‡e, h_vt-

(K) mv¶xi ‡bwUk Rwii I Dc¯wZ wbwðZKiY Ges mv¶x‡K wRÁvmvev` Kiv;

(L) †Kvb `wjj D`NvUb Ges Dc¯vcb Kiv;

(M) mv¶¨ MnY;

(N) †Kvb Av`vjZ ev Awdm nB‡Z cvewjK †iKW ev Dnvi Abyjwc Zje Kiv;

(0) mv¶xi wRÁvmvev` Ges `wjj cix¶v Kivi Rb¨ †bwUk Rwi Kiv; Ges

(P) GB AvB‡bi D‡Ï‡k¨ cÖYK‡í , wbawiZ Ab¨ †h †Kvb welq|

(2) Kwgkb, †h †Kvb e¨w³‡K Abyhvqx ev Z`š mswkó welq †Kvb Z_¨ mieivn Kwievi Rb¨ wb‡`k w`‡Z cwi‡e Ges Abyhvqx cfv‡e wb‡`wkZ e¨w³ Zvnvi †ndvR‡Z iw¶Z D³ Z_¨ mieivn Kwi‡Z eva¨ _wK‡eb|

(3) †Kvb Kwgkbvi ev Kwgkb nB‡Z ˆea ¶gZvcvß †Kvb KgKZv‡K Dc-avivi (1)Gi Aaxb ¶gZv c‡qv‡M †Kvb e¨w³ evav c`vb Kwi‡j ev D³ Dc-avivi Aaxb c`Ë †Kvb wb‡`k B"QvKZfv‡e †Kvb e¨w³ Agvb¨ Kwi‡j Dnv `Ûbxq Aciva nB‡e Ges D³ Aciv‡ai Rb¨ mswkó e¨w³ Abe- 3(wZb) ermi chš †h †Kvb †gqv‡` Kviv`‡Û ev A_`‡Û ev Dfq cKvi `‡Û `Ûbxq nB‡eb|Ó

50. Section 20 provides *:*

Ò20| Z`‡ši ¶gZv|- (1) †dŠR`vix Kvhwewa‡Z hwnv wKQyB _vKzK bv †Kb GB AvB‡bi Aaxb I Dnvi Zdwm‡j ewYZ Aciwamgn- †Kejgvˆ Kwgkb KZK.Z`š‡hvM¨ nB‡e|

(2) Dc-avivi (1) G DwjwLZ Aciwamgn- Z`‡ši Rb¨ Kwgkb, miKwi †M‡R‡U cÁvcb Øviv, Dnvi Aat¯b †Kvb KgKZv‡K ¶gZv c`vb Kwi‡Z cwi‡e|

(3) Dc-avivi (2) Gi Aaxb ¶gZvcvß KgKZvi, Aciva Z`‡ši welq, _vbvi fvicvß GKRb KgKZvi ¶gZv _wK‡e|

(4) Dc-avivi (2) I (3) Gi weavb m‡Ë I , Kwgkbvi M‡Yi GB AvB‡bi Aaxb Aciva Z`‡ši ¶gZv _wK‡e|Ó

51. Section 21 of the Act provides*:*

Ò21| †MdZv‡ii we‡kl ¶gZv|- GB AvB‡bi Ab¨vb¨ weav‡b hvnv wKQyB _vKzK bv †Kb, Kwgk‡bi †Kvb KgKZvi hw` wekvm Kwievi hyM¥ msMZ KviY _v‡K †h, †Kvb e¨w³ Zvnvi wbR bv‡g ev Ab¨ †Kvb e¨w³i bv‡g ¯vei ev A¯vei m¤úwËi gwjK ev `Lj`vi hvnv Zvnv‡`i †NwlZ Av‡qi mwnZ Am½wZc~Y Ges hvnv aviv 27 Ges Aaxb `Ûbxq Aciva, Zvnv nB‡j D³ e¨w³i weiæ× †Kvb GRvnvi `v‡qi nBevi c‡eB Abyhvqx Av‡e¨K nB‡j D³ KgKZv, Kwgk‡bi cevbygv`b Mnb Kwiqv, D³ e¨w³‡K †MdZvi Kwi‡Z cwi‡eb|Ó

52. Section 26 of the Act provides*:*

Ò26| mnvq m¤úwË †NvIbv- (1) Kwgkb †Kvb Z‡_¨i wfwË‡Z Ges Dnvi we‡ePbvq c‡qvRbxq Z`š cwiPvjbvi ci hw` GB g‡g mšó nq †h, †Kvb e¨w³, ev Zvnvi c‡¶ Ab¨ †Kvb e¨w³, ˆea Dr‡mi mwnZ Am½wZc~Y m¤úwËi `L‡j iwnqv‡Qb ev gwjK Kvbv ARb Kwiqv‡Qb, Zvnv nB‡j Kwgkb, wjwLZ Av‡`k Øviv, D³ e¨w³‡K Kwgkb KZK wbawiZ c×wZ‡Z `vq `wq‡Zi weeiY `wLjmn D³ Av‡`k wbawiZ Ab¨ †h †Kvb Z_¨ `wL‡ji wb‡`k w`‡Z cwi‡e|Ó

53. Section 27 of the Act provides:

Ò27|ÁvZ Av‡qi Drm ewnfz¨ m¤úwËi `Lj |- (1) †Kvb e¨w³ Zvnv wbR bv‡g ev Zvnvi c‡¶ Ab¨ †Kvb e¨w³i bv‡g, Ggb †Kvb ¯vei ev A¯nvei m¤úwËi `L‡j iwnqv‡Qb ev gwjK Kvbv ARb Kwi.hv‡Qb, hvnv Amvay Dcv‡q AwRZ nBqv‡Q Ges Zvnvi ÁvZ Av‡qi Dr‡mi mwnZ Am½wZc~Y ewjqv g‡b Kwievi h‡_ó KviY iwnqv‡Q Ges wZwb D³ i¡c m¤úwË `Lj m¤ú‡K Av`vj‡Zi wbKU wePv‡i m‡Š–vIRbK e¨vL¨v c`vb Kwi‡Z e¨_ nB‡j D³ e¨w³ Abyhvqx 10(`k) ermi Ges Abb¨ 3 (wZb) ermi chš †h †Kvb †gqv‡` Kviv`‡Û `Ûbxq nB‡eb Ges Z`ywi A_`‡Û I `Ûxq nB‡eb; Ges D³ i¡c m¤úwËmgn- ev‡RqvwB hvM¨ nB‡e|Ó

54. Analysing the scheme of the ACC Act, it can be said that there is complete departure from Penal Code and Act II of 1947. All those provisions are to be applicable for “any person” who committed the offences mentioned therein. Act has been enacted with the specific object of altering the existing anti-Corruption laws so as to make them more effective by widening their coverage and by strengthening the provisions and also to widen the scope of the definition of “public servant”. Those persons should be tried by the Special Judge. Section 28 of the Act provides -

Ò28| Aciv‡ai wePvi, BZ¨vw` |-(1) AvcvZZ ejer Ab¨ †Kvb AvB‡b wfbi¡c hvnv wKQyB _vKzK bv †Kb, GB AvB‡bi Aaxb I Dnvi Zdwm‡j ewbZ Aciwamgn- ‡Kejgvˆ †¯úkvj RR KZK.wePvh‡hvM¨ nB‡e|Ó

55. From non-obstante clause as provided in section 28 of the Anti-Corruption Act cleared that the provision of the Anti-Corruption Act shall prevail over any other law.

56. In view of the provisions quoted above, it appears to us the Anti-Corruption Commission Act is applicable in respect of public servant as well as “any other person”. The Prevention of Corruption Act, 1947 and Anti Corruption Commission Act and Criminal Law Amendment Act, 1958 are the enactments which are meant for the benefit of the public. The main aim of those Acts are eradiction of the Corruption which is permeating every nook and corner of the country.

Corruption by public servants has now reached a monstrous demension in Bangladesh. Its tentacles have been grappling even the institutions established for the protection of the State. Those must be intercepted and impeded the orderly functions of the public officer, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyze the functioning of such institutions and thereby hinder the democratic polity. Hence, the laws should be so interpreted which would serve the object of the Acts. The founding fathers of the Constitution envisioned the legislators as men of character, rectitude and moral uprightness whose sole object was to serve the public with dedication, to be open, truthful and legal. We are reminded here of the memorable words of H.G. Wells. He was of the view:

> "The true strength of rulers and empires lies not in armies or emotions, but in the belief of men that they are inflexibly open and truthful and legal. As soon as a Government departs from that standard, it ceases to be anything more than "the gang in possession" and its days are numbered." Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operative public institution.

57. Franklen has said-

> "Let honesty be as the breath of they soul; then shall thou reach the point of happiness, and independence shall be they shield and buckle, they helmet and crown; then shall they soul walk upright, nor stoop to the silken wretch because he hath riches, nor pocket an abuse because the hand which officers it wears or ring set with diamonds"

58. Thomas Jefferson said-

"The whole of Government consists in the art of being honest."

59. J.A.G Griffith in "Parliament" Functions, practice and procedure, has cited Edmund Bruke while Commentina on the functions of the Members of Parliament. Accordingly to him, "It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication, with his constituents. Their wishes ought to have great weight with him, their opinion, high respect, their business, unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions to theirs--- and above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living----------your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you, if he sacrifices it to yours opinion."

60. In the case of Raja Ram Pal V. Hon'ble Speaker reported in (2007) 3 SCC 184 J. Raveendran, J, has observed that the appropriate course in case of allegation of corruption against a Member of Parliament , is to prosecute the Member in accordance with law.

61. In L.K. Advani's case (supra) it was finally observed, "Now each and every person who holds an office by virtue of which he is required to perform any public duty in the discharge of which the State, public or the community at large is interested would be deemed to be a 'public servant'. It is no more necessary that to be a "public servant" the said person must be in the pay of the Government or remunerated for the performance of any public duty by the Government." In fact, in India finally the controversy has been settled in the case of P.V.Narsimha Rao(Supra) in which it has been observed that Member of Parliament is a public servant for the purpose of Prevention of Corruption Act.

62. We are, therefore, of the view that a member of Parliament holds an office and by virtue of such office he is required or authorized to carry out duties and such duties are in the nature of public duties.

63. Another important aspect is that challenging the proceedings of Special cases writ Petition No.9905 of 2007 and 8578 of 2007 are not maintainable inasmuch as Code of Criminal Procedure provides efficacious remedy to get redress if one feels himself aggrieved due to initiation of such criminal proceedings. In such view of the matter those two writ petitions were not maintainable.

64. Whether the accused respondents have committed any offence within the meaning of section 409/109 of the Penal Code read with section 5(2) of Act II of 1947 or not are to be decided after recording evidence by the trial Court.

65. In view of such circumstances, we find substance in the submissions made by Mr. Mahbubey Alam, learned Attorney General.

66. Accordingly, we find merit in the appeals as well as in civil petition. Thus the judgment and order dated 14.02.2008 passed by the High Court Division in Writ Petition No.9905 of 2007, judgment and order dated 18.05.2008 passed by the High Court Division in Writ Petition No.8578 of 2007 and judgment and order dated 16.06.2011 passed by the High Court Division in Criminal Miscellaneous Case No.10340 of 2011 are set aside.

67. Consequently, C.A. 68 of 2009 and C.A. No.03 of 2009 are allowed. The Criminal Petition for Leave to Appeal No. 421 of 2012 is hereby disposed of. The respective trial Court are directed to proceed with the respective proceedings in accordance with law.

6 SCOB [2016] HCD 1

High Court Division

CRIMINAL MISCELLANEOUS CASE NO.27080 OF 2010.

Anowar Ahmed and another
.....Petitioners

Versus

The State
..….Opposite party

Mr. Tabarak Hossain with
Mr. Md. Akhter Hossain Majumder
….....For petitioners.

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 17th September, 2015.

PRESENT:
MS. JUSTICE SALMA MASUD CHOWDHURY
AND
MR. JUSTICE F.R.M. NAZMUL AHASAN

Code of Criminal Procedure, 1898
Section 561A:
The customs authority being satisfied about the import documents, released the imported cloths from customs station and the petitioners handed over the imported cloths to the importer as C and F Agent from the Custom Area and place of business of the petitioners is the Customs House or Custom Area as per section 2(i) and 207 of the Customs Act, 1969 and Rule 2(b) of the Rules 1986 and consequently petitioners are in no way responsible for the alleged offence. The petitioners as agent cannot be held liable for the work of the Principal and thus the petitioners committed no offence within the meaning of sections 420/468/469/471/34 of the Penal Code. ...(Para 14)

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 taken against the accused petitioners in Metro. Special Tribunal Case No.132 of 2008 arising out of G.R. No.3416 of 1994 corresponding to Mirpur Police Station Case No.93 dated 28.11.1994 under sections 25(1) 25(B) and 25(Kha) of the Special Powers Ac, 1974, so far it relates to the petitioners concerned, now pending in the Court of Metropolitan Special Tribunal No.2, Dhaka 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 Keramot Ali Fakir, Detective Officer, Customs Detective and investigation Paridaptor being the informant lodged a first information report with the Mirpur Police Station alleging that S.M. Azizur Rahman, Proprietor of M/S Fahad Garments on 23.11.1994 vide Bill of Entry No.6889 Rotation No.9/3/94, License No.119 imported 1,49,000/- yards of cloth which was released by a

Clearing and Forwarding agent namely Chistia Over Seas from Chittagong Port and the informant as per the direction of his higher authority, he along with other officers of the inquiry found out that one S.M. Azizur Rahman is the owner of said Garments factory but no cloth was found there and as such it was suspected that said cloth has been sold out in the black market and after interrogation said Azizur Rahman informed that he has sold out the cloths and machineries of the Garments factory to one Colonel (Ret.) M.A. Khalek, Proprietor of Gausia New Wears, Mirpur before 3 months and hence it was suspected that said Azizur Rahman and Khalek in collaboration with each other imported the said cloths and sold out those in the black market and hence the present case.

3. The police investigated the case and submitted charge sheet against the accused persons under section 25(1)/ 25(B)/25(Kha) of the Special Powers Act, 1974.

4. The case record was transmitted to the Court of the Metropolitan Special Tribunal No.2, Dhaka for trial who took cognizance against the accused persons and thereafter the accused persons filed an application before the Tribunal under section 265C of the Code of Criminal Procedure for discharging them from the charge and after hearing, the Tribunal rejected the application filed by the accused petitioners and accordingly charge was framed against all the accused persons under section 25(1), 25(B) and 25(Kha) of the Special Powers Act, 1974.

5. The petitioner obtained bail from the Court below.

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

7. Mr. Tobarak Hossain, the learned Advocate appearing on behalf of the petitioners submits that the petitioners are innocent and they have been falsely implicated in the present case. He also brings into the notice of this Court that no offence is disclosed against the petitioners in the first information report and the charge sheet was submitted after 14 years of lodging of the first information report and the petitioners are the Clearing and Forwarding agent and their function is to submit the papers and documents given by the importers and those were not created by the Clearing and Forwarding agent and the concerned authority held the report to get the goods released. He next submits that the ingredients of section 420/468/469/471/34 of the Penal Code are totally absent against the petitioners. The learned Advocate refers section 222 and 224 of the Contract Act of 1872 and submits that the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him and an agent is indemnified against consequences of acts done in good faith. Lastly the learned Advocate submits that till today not a single witness has been examined by the prosecution.

8. Ms. Sakila Rawshan, the learned Deputy Attorney General appearing on behalf of the State opposes the Rule and submits that the quashment of the proceedings at the stage when trial has already begun and prosecution witnesses are examined is not permissible. In support to her contention the learned Deputy Attorney General refers a decision as reported in 13 M.L.R.(AD) page 103.

9. 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.

10. It appears that the present two petitioners were not named in the first information report which was lodged on 23.11.1994 against one accused person under section 20/468/469/471/34 of the Penal Code alleging that cloths were imported through Letter of Credit under bond but those were sold out in black market. After 14 years of the lodging of the first information report, the charge sheet was submitted, wherein 6 persons were included including the petitioners and the allegations against the petitioners was that they in collusion with the first information report named accused persons released the goods from Chittagong port. Admittedly the goods were not contraband items and through letter of credit the owner of the alleged garments industry brought the goods and released the goods through clearing and forwarding agent. It is the subsequent allegation that the cloths were sold in the black market.

11. Section 222 of the Contract Act runs as follows:- Agent to be indemnified against consequences of lawful acts- The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

12. Section 224 of the Contract Act runs as follows:- Non-liability of employer of agent to do criminal act- Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

13. Section 223 of the Contract Act says that where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

14. The customs authority being satisfied about the import documents, released the imported cloths from customs station and the petitioners handed over the imported cloths to the importer as C and F Agent from the Custom Area and place of business of the petitioners is the Customs House or Custom Area as per section 2(i) and 207 of the Customs Act, 1969 and Rule 2(b) of the Rules 1986 and consequently petitioners are in no way responsible for the alleged offence. The petitioners as agent cannot be held liable for the work of the Principal and thus the petitioners committed no offence within the meaning of sections 420/468/469/471/34 of the Penal Code. The petitioners as Clearing and Forwarding Agent are responsible only in releasing the imported cloths from the customs station as per documents submitted by the importer to the customs and the Bank. The petitioners not being the first information report named accused persons and being Clearing and Forwarding Agent under the provisions of 207 of the Customs Act, 1969 and Customs Agents Rules 1986 there being no allegations of violation of any provisions of Customs Act, 1969 and the Rules, 1986, and they acted within the authority provided to them under Rule 2(b) of the Rules, 1986. Sections 207/208 and 209 of the Customs Act, 1969 prescribes the liability of the importer as Principal and not the agent.

15. The exercise of jurisdiction under section 561A of the Code of Criminal Procedure will depend upon the facts and circumstances of each case. This Court can interfere at any stage of the proceedings where the facts are so preposterous that no case can stand against the

accused and the further continuation of the proceedings would only cause harassment to the accused being an abuse of the process of the Court.

16. Considering the facts and circumstances of the case, we are of the view that the further proceedings of the present proceedings against the petitioner would be nothing but sheer abuse of the process of the Court, which needs to be quashed for ends of justice as there is nothing on record to connect the present petitioners with the alleged offence.

17. In the result, the Rule is made absolute. The proceedings of Metro. Special Tribunal Case No.132 of 2008 arising out of G.R. No.3416 of 1994 corresponding to Mirpur Police Station Case No.93 dated 28.11.1994 under sections 25(1) 25(B) and 25(Kha) of the Special Powers Ac, 1974, so far it relates to the petitioners are concerned, now pending in the Court of Metropolitan Special Tribunal No.2, Dhaka are hereby quashed.

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

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

6 SCOB [2016] HCD 5

High Court Division
(Special Original Jurisdiction)

I.T. Ref: Application No. 461of 2007
With
I.T. Ref: Application No. 462of 2007
With
I.T. Ref: Application No. 463 of 2007
And
I.T. Ref: Application No. 464of 2007

Bright Textile Industries (Pvt.) Limited
...Assessee-Applicant.
Versus
The Commissioner of Taxes
...Respondent.

Mr. Sarder Jinnat Ali, Adv. with
Mr. Umbar Ali, Adv.
...For the Assessee-applicant.

Mr. Saikat Basu, AAG. with
Ms. Nasrin Parvin Shefali, AAG
...For I.T. Department.

Heard on: 19.10.2014 & 27.10.2014
And
Judgment on: The 19th November, 2014

Present:
Justice A.F.M. Abdur Rahman
And
Justice Md. Emdadul Haque Azad

Income Tax Ordinance, 1984
Section 35:
The DCT concern, prior to discarding the book versions of the accounts has to raise dissatisfaction as to the method of accounting as to its cumbersomeness that the true and correct income of the Assessee-applicant cannot be deduced therefrom or to pin point the defect in the accounts; else the DCT concern has to accept the book version of the accounts as submitted by the Assessee-applicant and audited and certified by the chartered accountant. ...(Para 21)

Income Tax Ordinance, 1984
Section 83:
It has been provided under the provision of section 83(2) of the Income Tax Ordinance 1984 that while the DCT concern desires to rely upon the non-verifiability of any expenditure claimed to have been incurred by the Assessee-applicant and shown in the accounts, has to serve a further notice upon the assessee concern directing him to produce adequate evidence as to the said point. ...(Para 22)

Judgment

A.F.M. Abdur Rahman, J:

1. With the following formulated question made in the supplementary-affidavit in all these 4(four) Income Tax Reference Applications, the Assessee-applicant, Bright Textile Industries (Pvt.) Limited, preferred the instant Income Tax Reference Applications under section 160(1) of the Income Tax Ordinance 1984, which having been involved similar and

identical question of law have been heard analogously and now disposed off by this single judgment.

1. *Whether, in the facts and on the circumstances of the case, the Tribunal under section 159(2)/29 was justified in maintaining the disallowances that had been made by the DCT without affording an opportunity to cause it to be verified and that it had been done in breach of section 35 read with sections 29 and 83(2) of Income Tax Ordinance 1984.*
2. *Whether, in the facts and on the circumstances of the case, the Tribunal under section 159(2)/35(3)/35(4)(c) was justified in maintaining excess estimate over the disclosed receipt of processing income in violation of section 35(4) in as much as the applicant had complied with the provisions of sections 35(3) and 75(2)(d)(iii) of the Income Tax Ordinance 1984.*

2. ***Facts of the Cases:***

It has been asserted in the Income Tax Reference Application No. 461 of 2007, relating to assessment year 2001-2002, that the Assessee-applicant is a private limited company, incorporated under the Companies Act 1913 and engaged in textile production, Cloth Making, Sales, Cloth Dyeing, Sizing, printing, Finishing and processing, from where the Assessee-applicant derives income. The Assessee-applicant company maintained its accounts under the mercantile system of accounting as per the requirements of section 75(2)(d)(iii) of the Income Tax Ordinance 1984 and the same is regularly audited by the chartered accountant firm which was submitted and recommended by the Board of directors in its general meeting and the same is later submitted before the registrar of Joint Stock Companies, complying the provision of Companies Act 1995. The Assessee-applicant company is a income tax assessee under the TIN. 248-200-4475/Sha-86 and enjoying the tax holiday period from its inception for five years.

3. It has been further asserted in the instant Income Tax Reference Application No. 461 of 2007, that the assessment year 2001-2002, is the last year of tax exemption and the Assessee-applicant, pursuant to the notice served by the DCT concern under section 93 of the Income Tax Ordinance 1984, disclosed a net loss of Tk. 19,04,656.00 and submitted all the supporting documents and evidence as to the book version of account as per the requirements of section 35(3) of the Income Tax Ordinance 1984. Later, pursuant to the notice served under section 79 and 83(1) of the Income Tax Ordinance 1984, the authorized representative of the Assessee-applicant conducted hearing before the DCT concern who upon discarding the book version of the accounts disallowed the incurred expenses and estimated the trading accounts of the Assessee-applicant and ultimately ascertained the income of the Assessee-applicant at an exorbitant amount of Tk. 18,23,67,825.00.

4. In Income Tax Reference Application No. 462 of 2007 relating to assessment year 2002-2003, it has been asserted that the Assessee-applicant submitted its income tax return pursuant to the notice under section 93 of the Income Tax Ordinance 1984, disclosing a net loss of Tk. 50,17,785.00 and the DCT concern upon hearing the authorized representative of the Assessee-applicant disallowed the book version of the account of the Assessee-applicant as to the incurred expenditure and the trading account and ascertained the income of the Assessee-applicant at an exorbitant amount of Tk. 15,51,97,862.00.

5. In Income Tax Reference Application No. 463 of 2007, relating to assessment year 2003-2004, it has been asserted that the Assessee-applicant submitted its income tax return pursuant to the notice under section 77 of the Income Tax Ordinance 1984, disclosing a net loss of Tk. 28,71,667.00 and the DCT concern upon hearing the authorized representative of the Assessee-applicant, discarded the book version of the account as to the incurred expenditures and also the trading accounts and ascertained the income of the Assessee-applicant at an exorbitant amount of Tk. 23,28,21,620.00.

6. In Income Tax Reference Application No. 464 of 2007 relating to assessment year 2004-2005 it has been asserted that the Assessee-applicant submitted its income tax return pursuant to the notice served under section 77 of the Income Tax Ordinance 1984, disclosing a net loss of Tk. 7,89,589.00 and the DCT concern upon hearing the authorized representative of the Assessee-applicant discarded the book version of the account of the Assessee-applicant as to the incurred expenditures and also the trading accounts and ascertained the income of the Assessee-applicant at an exorbitant amount of Tk. 30,00,29,524.00.

7. Being aggrieved with and highly dissatisfied by the said assessment orders, the Assessee-applicant preferred three appeals before the first appellate authority, the Commissioner of Taxes (Appeal), being BuLl A¡f£mfœ ew- 200,201,202/p¡-86/LxAx-8/05-06 relating to assessment year 2001-2002, 2002-2003 and 2003-2004 and also preferred BuLl Bf£mfœ ew- 450/p¡-86/LxAx-8/05-06 relating to assessment year 2004-2005. All those first appeals having being disposed off allowing either partly or disallowing the grounds of appeal the Assessee-applicant preferred further preferred appeal before the Taxes Appellate Tribunal, being ITA No. 799 of 2006-2007 relating to assessment year 2001-2002, I.T.A. No. 800 of 2006-2007 relating to assessment year 2002-2003, ITA No. 801 of 2006-2007 relating to assessment year 2003-2004, which were heard analogously by the Division Bench-1, Dhaka of the Taxes Appellate Tribunal. The Assessee-applicant further appeal before the Taxes Appellate Tribunal, being I.T.A. No. 2159 of 2006-2007 relating to assessment year 2004-2005, which was also heard by the Division Bench-1, Dhaka, of the Taxes Appellate Tribunal, separately. But all these appeals before the Taxes Appellate Tribunal also having been failed, the Assessee-applicant preferred the instant Income Tax Reference Applications with the formulated question in the substantive application and further reformulated in the supplementary-affidavit as aforementioned.

8. ***Claim of the Taxes department:***

Upon service of the notice of the instant Income Tax Reference Application, the learned Assistant Attorney General Ms. Nasrin Parvin along with the learned Assistant Attorney General Mr. Saikat Basu, appeared on behalf of the Taxes Department and filed affidavit-in-reply wherein it has been claimed that the DCT concern has correctly made his assessment order enhancing the income of the Assessee-applicant by disallowing the claimed incurred expenditure and also estimated the trading account since the Assessee-applicant failed to substantiate the book version of the accounts for which the true and correct income could not be deduced from the said account. The DCT concern upon expressing its reasoning in the assessment order since disallowed the expenditure and estimated the trading account in accordance with the power available to under section 35(4) of the Income Tax Ordinance 1984, the two lower appellate authorities correctly and lawfully considered the entire aspect of the assessment order and confirmed the same and as such the instant questions, as have been formulated in the Income Tax Reference Applications, are not required to be answered in negative and in favour of the Assessee-applicant.

9. The learned Advocate Mr. Sarder Jinnat Ali, represented the Assessee-applicant, while the learned Assistant Attorney General Ms. Nasrin Parvin, argued on behalf of the Taxes Department at the time of hearing of the Income Tax Reference Application.

10. ***Argument of the Assessee applicant:***

The learned Advocate Mr. Sarder Jinnat Ali, while taken this court through the four assessment orders, made by the DCT concern for the relevant assessment year, has drawn the attention of this court as to the latitude of power available under the provision of section 35(4) of the Income Tax Ordinance 1984 and vigorously argued that these four cases are the burning example of whim and caprice employed by the DCT concern, since the DCT concern while disallowing the incurred expenditure and estimating the trading account, ascertained so exorbitant income of the Assessee-applicant that cannot be believed under the facts and circumstances of the cases. The DCT concern estimated the income of the Assessee-applicant at an amount of Tk. 40,00,00,000.00 for the assessment year 2001-2002, which was disclosed by the Assessee-applicant at a loss of Tk. 19,04,656.00, wherein the DCT concern disbelieved the disclosed income from processing of textile at an amount of Tk. 40,00,00,000.00, disbelieving the disclosed amount at Tk. 2,36,34,728.00. Similarly, the DCT concern enhanced the income of the Assessee-applicant for the assessment year 2002-2003 at an amount of Tk. 20,69,30,482.00, which was disclosed at a loss of Tk. 50,17,785.00 by the Assessee-applicant, while the DCT concern disbelieved the amount of income from the textile processing at an amount of Tk.1,78,86,138.00 and estimated the same at an amount of Tk. 45,00,00,000.00. The DCT concern similarly ascertained the income of the Assessee-applicant for the assessment year 2003-2004 at an amount of Tk. 23,28,21,620.00 which was shown as loss of Tk. 28,71,667.00, while the DCT concern disbelieved the income of the Assessee-applicant from the textile processing at an amount of Tk. 1,98,15,546.00 and ascertained the same at an amount of Tk. 50,00,00,000.00. The DCT concern further similarly enhanced the income of the Assessee-applicant for the assessment year 2004-2005 at an amount of Tk. 30,00,29,524.00 which was shown as a loss of Tk. 7,89,589.00 while the DCT concern disbelieved the income from the textile processing at an amount of Tk. 2,49,04,288.00 which the DCT concern estimated the income of the Assessee-applicant at an amount of Tk. 60,00,00,000.00. These being a whimsical and non-believeable estimation of income of the Assessee-applicant by the DCT concern, the two lower appellate authorities were required to consider the evidence as have been produced in support of the book version of the accounts, which were audited and certified by the chartered accountant and to set aside the assessment order and to direct the DCT concern to accept the return as have been filed by the Assessee-applicant, which was audited and certified by the chartered accountant complying the provision of Companies Act 1995 and filed return as per the provision of section 75(2)(d)(iii) and section 35(3) of the Income Tax Ordinance 1984. But that being not done the question as have been formulated by the Assessee-applicant are required to be answered in negative and in favour of the Assessee-applicant.

11. The learned Advocate Mr. Sarder Jinnat Ali further argued that two of the pertinent question have already been decided by this court and the apex court of this country, that the DCT concern in order to invoke its power under section 35(4) of the Income Tax Ordinance 1984 in respect of discarding the book version of the accounts of Assessee-applicant, has to raise dissatisfaction as to the method of accounting with a farm reasoning that the method regularly employed by the Assessee-applicant is so cumbersome that the actual and true income cannot be deduced therefrom and further if the DCT concern finds that any of the expenditure claimed to have been incurred by the Assessee-applicant was not adequately evidenced, the DCT concern was mandated under the provision of section 83(2) of the

Income Tax Ordinance 1984 to direct the Assessee-applicant by way of issuing notice to furnish further evidence on any point. But that has not been done in the instant four Income Tax Reference Applications, the questions as have been formulated by the Assessee-applicant is required to be answered in negative and in favour of the Assessee-applicant.

12. In this respect the learned Advocate Mr. Sarder Jinnat Ali relied upon the cases of Titas Gas (T&D) Limited-Vs-The Commissioner of Taxes, reported in 53 DLR, the case of Mark Builder Limited-Vs-The Commissioner of Taxes, reported in 59 DLR 463 and the case of M/S. Easter Hardware Stores-Vs-The Commissioner of Taxes, reported in 54 DLR 125, respectively.

13. ***Arguments of the Taxes department***

The learned Assistant Attorney General Ms. Nasrin Parvin relying upon the assertion made in the affidavit-in-opposition argued that the DCT concern had no other alternative but to estimate the income of the Assessee-applicant since the Assessee-applicant failed to substantiate the claimed expenditure made in the book version of the accounts and since the Assessee-applicant claimed the expenditure to have been incurred by it, it is the duty of the Assessee-applicant to substantiate the same by filing adequate evidence before the DCT concern, since admittedly the DCT concern has issued and served the notice under section 79 of the Income Tax Ordinance 1984 and further also issued notice under section 83(1) of the Income Tax Ordinance 1984, which obliged the Assessee-applicant to submit all the evidence before the DCT concern for his consideration. In the instant four cases the DCT concern has categorically expressed his opinion that nothing of the evidence as to substantiate the claimed incurred expenditure have been submitted before the DCT concern and as such the DCT concern has lawfully and correctly estimated the income of the Assessee-applicant. This being the lawful act of the DCT concern, the two appellate authorities did not set aside the assessment order and as such the questions formulated by the Assessee-applicant in these four Income Tax Reference Applications are not required to be answered in negative and in favour of the Assessee-applicant.

14. ***Deliberation of the court:***

We have heard the learned Advocate and perused the materials on record.

15. The power for disbelieving the genuinity of incurred expenditure by the DCT concern emerges from the provision of section 35(4) of the Income Tax Ordinance 1984 which reads as follows;

> ***Income Tax Ordinance 1984***
> ***Section 35(4): Method of accounting—***
> *(1) –(3)…….....*
> *(4) Where—*
> *(a) no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Deputy Commissioner of Taxes, the income of the Assessee cannot be properly deduced therefrom; or*
> *(b) in any case to which sub-Section (2) applies, the Assessee fails to maintain accounts, make payments or record transactions in the manner directed under that sub-Section; or*
> *(c) a company has not complied with the requirements of sub-Section (3);*
> *the income of the Assessee shall be computed on such basis and in such ner as the Deputy Commissioner of Taxes may think fit.*

16. Under the aforesaid provision the DCT concern may discard the book version of the accounts maintained and submitted by the Assessee-applicant under the following pre-condition;

> *(i) where the Assessee-applicant did not employ a method of accounting regularly or (ii) the method of accounting employed regularly is so cumbersome that the true and correct income of the Assessee-applicant cannot be deduced therefrom (iii) the provision of sub-section (2) of section 35 of the Income Tax Ordinance 1984 for not complied with (iv) the company has not comply with the requirement of sub-section (3) of section 35 of the Income Tax Ordinance 1984.*

17. Unless theses four pre-conditions are fulfilled the DCT concern is not empowered to disbelieve or discard the book version of the accounts submitted by the Assessee-applicant, which has been categorically decided in so many cases disposed off by this court and the apex court of this country, out of which some of them are profitably examined herein;

18. The aforesaid provision was taken for consideration in the case of Titas Gas (T&D) Ltd. –Vs- The Commissioner of Taxes, reported in 53 DLR 209, wherein their Lordship in this Bench, differently constituted, held as under;

> *The legal position is that in the computation of income profit and gains of company the DCT is entitled to reject the books of accounts if he is of the opinion that no method of accounting has been regularly employed by the assessee or if the method employed is such that the income of the assessee cannot be properly deduced therefrom or that a company has not complied with the requirement of sub-section (3) of section 35 of the Ordinance.*

19. Similarly in the case of Mark Builders Ltd.–Vs-The Commissioner of Taxes, reported in 59 DLR 463 their Lordship in this Bench, differently constituted, further held as follows;

> *The latitude available to the Deputy Commissioner of Taxes under section 35 is no doubt very wide but cannot be thought to be without any restraint in the process of assessment of the total income of an assessee under sub-section (2) of section 83 of the Ordinance. Discretion of statutory authority in the exercise of statutory power, particularly in taxation matter if though to be unlimited then exercise of such discretion may result in arbitrariness and selectivity.*
>
> *After close examination of the power of the Deputy Commissioner of Taxes under section 83 of the Ordinance to assess the total income of an assessee, we find that after submission of a return or revised return by the assesee, if the Deputy Commissioner of Taxes is not satisfied with the return, he shall serve a notice under sub-section (1), requiring the assessee to appear either in person of through a representative or produce the evidence that the return is correct and complete. After hearing the person or his representative and/or considering the evidence produced pursuant to the notice, he may under sub-section (2) require further evidence on specified points before he could complete the assessment. That could only be done by asking again in writing the assesee to produce evidence upon such points as he should specify, the Deputy Commissioner of Taxes appears to be acquainted with.*

20. In the case of Eastern Hardware Store Ltd.–Vs-The Commissioner of Taxes, reported in 54 DLR (2002) 125 their Lordship in this Bench on the provision of section 35(4) of the Income Tax Ordinance 1984 held as under;

> *As the Appellate Additional Commissioner of Taxes did not find any defect either with the method of accounting or in the accounts neither of them can resort to estimation under section 35(4) of the Ordinance and thereby both of them acted illegally and that illegal order has been mechanically affirmed by the Appellate Tribunal which cannot be sustained in law.*

21. The *ratio decidendy* as appears from the aforesaid cases that the DCT concern, prior to discarding the book versions of the accounts has to raise dissatisfaction as to the method of accounting as to its cumbersomeness that the true and correct income of the Assessee-applicant cannot be deduced therefrom or to pin point the defect in the accounts; else the DCT concern has to accept the book version of the accounts as submitted by the Assessee-applicant and audited and certified by the chartered accountant.

22. Further to such obligation of the DCT concern it has been provided under the provision of section 83(2) of the Income Tax Ordinance 1984 that while the DCT concern desires to rely upon the non-verifiability of any expenditure claimed to have been incurred by the Assessee-applicant and shown in the accounts, has to serve a further notice upon the assessee concern directing him to produce adequate evidence as to the said point. This provision of section 83(2) of the Income Tax Ordinance 1984 reads as follows;

> ***Income Tax Ordinance 1984***
>
> ***Section 83(2): Assessment after hearing.—***
>
> *(1)……..*
>
> *(2) The Deputy Commissioner of Taxes shall, after hearing the person appearing, or considering the evidence produced in pursuance of the notice under sub-section (1) and also considering such other evidence, if any, as he may require on specified points, by an order in writing assess, within thirty days after the completion of the hearing or consideration, as the case may be, the total income of the assessee and determine the sum payable by him on the basis of such assessment, and communicate the order to the assessee within thirty days next following.*

23. This being the decision of this court, that the DCT concern cannot rely upon his so called finding that no evidence has been submitted in support of the incurred expenditure, without complying the provision of section 83(2) of the Income Tax Ordinance 1984 the same is required to be complied with by the DCT concern and in its default the two lower appellate authorities. In the instant four cases the DCT concern committed the same error but the two appellate authorities remain oblivious of the same. Therefore, the question as have been formulated in this respect in these four Income Tax Reference Applications are also required to be answered in negative and in favour of the Assessee-applicant.

24. Under the reasoning and discussion as above, this court finds merit in these four Income Tax Reference Applications which are required to be allowed.

25. In the result, the instant four Income Tax Reference Applications are allowed.

26. The questions formulated in the supplementary-affidavit filed the instant Income Tax Reference Applications are hereby answered in negative and in favour of the Assessee-applicant.

27. However, there shall be no order as to cost.

28. The connected rules being No 70(Ref:)/2011, 71(Ref:)/2011, 72(Ref:)/2011 and 73(Ref:)/2011are disposed off accordingly.

6 SCOB [2016] HCD 13

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 5232 OF 2011

Md. Saidur Rahman Sarker
… Petitioner
Versus

Bangladesh and others
… Respondents

Mr. Md. Ruhul Quddus with
Mr. Md. Kamal Parvez
… For the petitioner

Mrs. Salma Rahman, AAG with
Mr. Titus Hillol Rema, AAG
… For respondents No. 1-11

Mr. Fahad Mahmud Khan
… For respondent No. 12

Heard on the 15th, 18th & 19th November
And
Judgment on the 24th November, 2015

Present:
Ms. Justice Zinat Ara
And
Mr. Justice A.K.M. Shahidul Huq

It does not appear that the Election Commission, after admitted declaration of schedule for holding election of Botlagari Union, has taken independent decision of its own considering the facts and circumstances of the case. Rather, it passed the impugned order at the proposal/direction of the Ministry of Local Government, Rural Development and Co-operatives. Therefore, it cannot be said that the impugned order passed by the Election Commission is lawful. ... (Para 13)

Since the respondents of this case, who are directly related in this matter, have not denied the case of the writ-petitioner, we have no option but to accept the case of the writ petitioner. ...(Para 17)

Judgment

Zinat Ara, J:

1. In this Rule Nisi, the petitioner has called in question the legality of the office order under Memo No. Ni.Ka.Sha./Ni-1/UP Nirbachan-1 (Parichalana)/Rang-Division/2011/342 dated 01.06.2011 issued by respondent No. 3 (Annexure-M to the writ petition) staying election of Botlagari Union Parishad under Syedpur Upazilla of Nilphamari District, scheduled to be held on 29.06.2011.

2. Pertinent facts necessary for disposal of the Rule are as under:-

The petitioner is a permanent inhabitant of Botlagari Union Parishad under Syedpur Upazilla of Nilphamari District (hereinafter referred to as Boltagari Union). The petitioner is the present Chairman of Boltagari Union and he was a candidate in the election of the Union scheduled to be held on 29.06.2011. Botlagari Union is

constituted with nine Wards and total voters of the Union are 21,954. Out of which, proposal was given to form another Union at Sonakhuli Mouza (shortly stated as Sonakhuli) consisting of 8,846 voters only. The process for constitution of Sonakhuli as a separate Union has started from February, 2010. On 21.09.2010, the Deputy Commissioner, Nilphamary, by Memo No. **জেপ্র/নীফা/এলজি/ইউপি/বিঃ নুঃ ইপা নং/৩(১৮)/০৫/৩৬৮** with reference to,- (1) Local Government Division Memo No. **স্থাসবি/ইপি/ইউপি ৪০/২০০৮/৭৬** dated 3rd February, 2010, (2) self office Memo No. **জেপ্র/নীফা/এলজি/সাঃ নিঃ/৩(২৪)/০৩/৫৮** dated 24th February, 2010 and (3) Upazila Nirbahi Officer, Syedpur Memo No. **ইউএনও/সৈয়দ/এলজি(ইউপি)/০৪-২১/০৫-০৭/৫১৫** dated 22 June, 2010 informed respondent No. 1, Bangladesh, represented by the Secretary, Ministry of Local Government, Rural Development and Co-operatives that the separation of Sonakhuli Mouza from Botlagari Union is not consistent as per **ইউনিয়ন পরিষদ বিভক্তিকরণ নীতিমালা** (shortly, the Nitimala) due to non-fulfillment of criteria relating to population, area and income of the said Mouza. Under the said Nitimala, for formation of a separate Union, a total population of 20,000-25,000, an area of 18-20 square kilo-meters and annual income of Tk. 3,50,000/- are necessary. But Sonakhula Mouza has a population of 18,595 persons, an area of 11.16 square kilo-meters and a total annual income is of Tk. 1,73,558.57/- only vide Annexure-B to the writ petition. Respondent No. 8 by Memo No. **সঃ কঃ (ভূঃ)/সৈয়দ/১০-১১/২৪৬** dated 10.13.2011 (Annexure-C to the writ petition) issued a letter to respondents No. 10 and 11 for measuring the area of Sonakhuli Mouza. Thereafrer, Upazilla Land Officer, Nilphamari on 10.04.2011 published a preliminary list upon demarcation and fixing area, numbers and particulars of three Wards of Sonakhuli Mouza requesting objection, if any, within fifteen days from the date of publishing thereof. However, there is no legal bar to hold election under Memo No. **নিকস/পল্লী ১/১(১০)/ইউপি নি পরিঃ/২০১১/২০৪** dated 20.04.2011 under Paripatra-2 containing that 414 Upazilla have been ordered to hold Union Parishad election between 05.06.2011 to 05.07.2011. On the basis of the said Paripatra-2, respondent No. 5 vide Memo No. **জেনিঅ /নীফা /ইঃ পঃ নিঃ /৭(১১) /২০১০ /১৬৬** dated 26.04.2011 issued advertisement declaring election schedule of Botlagari Union Parishad along with four other Unions under Upazilla Syedpur, District Nilphamari. As per schedule, the election was scheduled to be held on 29.06.2011. Thereafter, respondent No. 7 by Memo No. **ইউএনও/সৈয়দ/এলজি(ইউপি)/০৪-২১/০৭-১০/৩৮৫** dated 03.05.2011 issued a letter to respondent No. 4 for taking steps for publishing Gazette Notification under section 13(8) of the Local Government (Union Parishad) Ain, 2009 (hereinafter referred to as the Ain, 2009). After scrutinizing Sonakhali Union Parishad Formation Report, the Deputy Director, Local Government, Nilphamari, by Memo No. **জেপ্র /নীফা /এলজি /ইউপি/ বিনুইগ্রাস /৩(১৮) /০৫-১১ /১৫৫** dated 16.05.2011 issued a letter to respondent No. 7 to follow the Ain, 2009 correctly. Respondent No. 6 by Memo No. **উনিঅ/সৈয়দ/ইউঃ পঃ নির্বাচন ৬(১)/২০১০-২৪** dated 22.05.2011 published advertisement of election of Botlagari Union and declared that nomination papers will be accepted between 23.05.2011 and 03.06.2011. The petitioner, the present Chairman of Botlagari Union, in response to the said advertisement, applied to

respondent No. 6 for contesting the election by depositing Tk. 5,000/- through Challan in Form No. 69 dated 31.05.2011. Respondent No. 6 on 02.06.2011 received the application of the petitioner being application No. 2 dated 02.06.2011. Respondent No. 4 by Memo No. জেপ্র /নীফা /এলজি /ইউপি /বিনুইগস /৩(১৮) /০৫-১১ dated 23.05.2011 requested respondent No. 1 to hold election of Botlagari Union. Respondent No. 6 by Memo No. ইউনও /সৈয়দ /এলজি(ইউপি) /০৪-২১/০৭-১১/৪১৬ dated 24.05.2011 submitted a report to respondent No. 4 to take further step in forming separate Union at Sonakhuli Mouza. The respondent No. 3 by Memo No. নিকাস /নি-১ /ইউপি নির্বাচন-১ (পরিচালনা) রং-বিভাগ /২০১১ /৩৪২ dated 01.06.2011 (hereinafter stated as the impugned order) issued order staying the election of Botlagari Union scheduled to be held on 29.06.2011.

3. In the backdrop of the aforesaid admitted facts and circumstances, the petitioner has filed this writ petition and obtained the Rule.

4. Respondent No. 12, the Convener of Sonakhuli Union Parishad Bastobayon Committee, contested the Rule by filing an affidavit-in-opposition denying part of the statements made in the writ petition contending, inter-alia, that the Upazilla Nirbahi Officer, Syedpur, lawfully requested the Deputy Commissioner, Nilphamari, for forming a separate Union as per the Ain, 2009; that there is no impediment under any law to create a new Union, namely, Sonakhuli Union Parishad; the grounds set forth in the writ petition are vague, without basis, unspecified, indefinite; that the schedule date of election of Sonakhuli Union Parishad expired long before and, as such, the impugned order has lost its efficacy and the Rule is, thus, liable to be discharged.

5. Mr. Md. Ruhul Quddus, the learned Advocate for the petitioner, appearing with Mr. Md. Kamal Parvez, takes us through the writ petition, the annexures thereto and put forward the following arguments before us:-

(1) the impugned order dated 01.06.2011 (Annexure-M to the writ petition) has been issued from the Election Commission Secretariat (respondent No. 3) pursuant to motivated recommendations of respondents No. 4 and 6;

(2) the impugned order has been issued violating the provision of section 13(8) of the Ain, 2009;

(3) Gazette Notification for formation of a separate Union at Sonakhuli Mouza has not yet been published according to the provision of the Ain, 2009 and, as such, there is no legal bar to hold election of Botlagari Union;

(4) from the letter issued by respondent No. 4 (Annexure-B to the writ petition) it is evident that Sonakhuli Mouza does not fulfill the conditions relating to population, area and income to form a separate Union as required under the Nitimala;

(5) in the above scenario, the impugned order issued by the Election Commission Secretariat under the signature of Assistant Secretary at the instruction of the Government, without taking independent decision by the Election Commission, after publication of the election schedule, is without lawful authority, arbitrary, malafide and liable to be struck down;

(6) the respondents should be directed to declare fresh election schedule for holding election of Botlagari Union.

6. In reply, Mr. Fahad Mahmood Khan, the learned Advocate for added respondent No. 12, contends that there is no legal bar to create a new Union, namely, Sonakhuli Union Parishad. He next contends that Upazilla Nirbahi Officer, Syedpur lawfully requested the Deputy Commissioner, Nilphamari to constitute a separate Union as per the Ain, 2009. He finally contends that the date of election of Botlagari Union, as declared by the District Election Commissioner, Nilphamari, has expired long before and, as such, the Rule is liable to be discharged.

7. Mr. Khan, however, frankly concedes that there is no legal bar in holding election of Botlagari Union, due to the initiation of a process for formation of another Union i. e. Sonakhuli Union.

8. Ms. Salma Rahman, the learned Assistant Attorney General, appearing with Mr. Titus Hillol Rema, the learned Assistant Attorney General, present in court, has not made any submission before us, as they have not received any instruction from respondents No. 1 to 11.

9. We have examined the writ petition, the affidavit-in-opposition submitted by added respondent No. 12 and the connected materials on record and the relevant provisions of law. We have also examined the impugned order (Annexure-M to the writ petition).

10. In this writ petition, the only question to be decided by us is the legality of the order under Memo No. নিকাস/নি-১/ইউপি নির্বাচন/(পরিচালনা)/রং-বিভাগ/২০১১/৩৪২ dated 01.06.2011 issued by the Election Commission Secretariat under the signature of the Assistant Secretary.

11. To examine the legality of the impugned order, it is necessary to quote the relevant portion of the said order which reads as under:-

> "……বর্ণিত অবস্থায় স্থানীয় সরকার বিভাগ কর্তৃক প্রেরিত প্রস্তাব অনুযায়ী নীলফামারী জেলার সৈয়দপুর উপজেলাধীন বোতলাগাড়ী ইউনিয়ন পরিষদের অবশিষ্ট ০৬টি ওয়ার্ডের সীমানা নির্ধারণ চুড়ান্ত না হওয়া পর্যন্ত উক্ত বোতলাগাড়ী ইউনিয়নের নির্বাচন স্থগিত রাখার নিমিত্তে স্থানীয় সরকার, পল্লী উন্নয়ন ও সমবায় মন্ত্রণালয়, স্থানীয় সরকার বিভাগ, ইপ-১ অধিশাখা এর প্রেরিত প্রস্তাব নির্বাচন কমিশন অনুমোদন করেছেন।"
>
> (Underlined by us)

12. From the above order, it transpires that the Election Commission has not taken any decision independently while passing the impugned order dated 1st June, 2011 after declaration of election schedule. The Election Commission, for the purpose of holding election of a Union, has to work independently and take decision independently considering the facts and circumstances of a Union.

13. From the above quoted order, it does not appear that the Election Commission, after admitted declaration of schedule for holding election of Botlagari Union, has taken independent decision of its own considering the facts and circumstances of the case. Rather, it passed the impugned order at the proposal/direction of the Ministry of Local Government, Rural Development and Co-operatives. Therefore, it cannot be said that the impugned order passed by the Election Commission is lawful.

14. Mr. Fahad Mahmood Khan, the learned Advocate for respondent No. 12, also admits that there is no legal bar in holding election, if the process for formation of another Union Parishad is going on.

15. We would further like to note that in this case,- (1) Bangladesh, represented by the Secretary, Ministry of Local Government, Rural Development and Co-operatives, (2) the Election Commission for Bangladesh, represented by the Chief Election Commissioner and Election Commissioners, Election Commission Secretariat, (3) the Secretary, Election Commission Secretariat, (4) the Deputy Commissioner, Nilphamari, (5) the District Election Officer, Nilphamari, (6) Upazila Election Officer, Syedpur, Nilphamari, (7) Upazilla Nirbahi Officer and Assistant Returning Officer, Syedpur, Nilphamari, (8) The Assistant Commissioner (Land), Syedpur, Nilphamari and (9) The Deputy Election Commissioner, Rangpur and two others have been made parties as respondents. But, unfortunately, none of the said respondents appeared to contest the Rule by filing any affidavit-in-opposition denying and controverting the statements made in the writ petition.

16. Added respondent No. 12 is the Convener of a Committee for the purpose of formation of Sonakhuli Union Parishad. But the learned Advocate for respondent No. 12 also concedes the legal proposition that there is no legal bar to hold election, if the process of formation of another Union Parishad from a Mouza of a Union Parishad is going on.

17. Since the respondents of this case, who are directly related in this matter, have not denied the case of the writ-petitioner, we have no option but to accept the case of the writ petitioner.

18. This view of ours is supported by the decision in the case of Government of Bangladesh and others vs Md. Gazi Shafiqul and others reported in 19 BLC (AD) (2014) 163, wherein it has been decided as under:-

> "……
> Admittedly, when no affidavit-in-opposition was filed before the High Court Division denying or controverting the case of the writ-petitioners …….., the High Court Division had no option but to accept the case of the writ-petitioners ……."

19. In view of the above, we are constrained to hold that the impugned order issued by the Election Commission under the signature of the Assistant Secretary (Ni-3), Election Commission Secretariat, is not lawful.

20. Thus, we find merit and force in the submissions of Mr. Quddus and we find no merit in the submissions of Mr. Khan.

21. However, the schedule date of election of Botlagri Union Parishad, Syedpur, Nilphamari, is already over. Therefore, the Election Commission is directed to declare a fresh date of election for the aforesaid Botlagari Union in accordance with law.

22. With the above observations and directions, the Rule is disposed of.

23. No costs.

24. Communicate the judgment to respondents No. 1 to 9 at once.

6 SCOB [2016] HCD 19

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 8542 of 2011

M. A. Hashem

….. Petitioner.

Versus

The Artha Rin Adalat No.2, Dhaka and others

… Respondents.

Mr. T. H. Khan, Senior Adv. with
Mr. Rokanuddin Mahmud, Senior Adv.,
Mr. Mostafizur Rahman Khan,
Mr. Mohammad Ahasan
Ms. Adita Afroz Hasan
Ms. Nushrat Mafiz, Advocates
… for the Petitioner.

Mr. Mainul Hossein, Senior Adv. with
Mr. Mizan Sayeed, Advocate and
Mr. F.K.M. Ahsan Mahbub, Adv.
…… for the Respondent Nos. 2,5-9.

Dr. Rabia Bhuiyan, Senior Advocate
…… for the Respondent No. 3.

Heard on 04.09.2014, 14.09.2014, 15.09.2014, 22.10.2014, 23.10.2014, 13.11.2014, 16.11.2014, 17.11.2014, 2011.2014, 08.12.2014, 09.12.2014, 11.12.2014, 14.12.2014, 25.06.2015.
Judgment on: 13.8.2015.

Present:
Mr. Justice Syed Refaat Ahmed
And
Mr. Justice Mahmudul Hoque

Statutory privilege:
A statutory privilege is a nascent right reserved to an individual person but this privilege is lost once he/she himself infringes it or abandons it voluntarily. The Writ Petitioner in fact has abandoned the statutory privilege by willfully and deliberately refraining from depositing the balance amount of bid money within the prescribed period of limitation. By filing the application seeking permission to deposit the balance 75% bid money instead of depositing the amount directly, the auction purchaser relinquished his known statutory right as auction purchaser and waived all his rights to the property in question as well as the earnest money deposited by him. ...(Para 25)

The right of redemption of the mortgagor:
It is this Court's view that the distinction between legal and equitable rights and interest does not exist under the existing legal régime governed by the Transfer of Property Act, 1882. Thus, the right of redemption of the mortgagor is not an equitable right but a legal right conferred by statute. Therefore, a mortgagor under Bangladeshi law always

retains a legal interest before and after the expiry of the date of payment. Therefore, the right of redemption is not an equitable form of relief to be given on such terms as the court considers equitable but a statutory right conferred and available only upon terms statutorily defined and stated. In view of the above, it is found that the Judgment-Debtors/Respondents being mortgagors of the property in question possessed an inalienable right to redeem their property at all material times. The right of the Respondents over the mortgaged property is, accordingly, found by this Court to have been created when the property was mortgaged. Such right remained inalienable and in fact even after expiry of the date of repayment. ...(Para 33)

Where there is equal equity the law shall prevail:
Under the rule of equity, the holder of a legal as well as an equitable interest shall be preferred on the basis of the principle that where there is equal equity the law shall prevail. In other words, a legal interest is superior as between two persons having equitable interest because equity follows the law. ...(Para 34)

Artah Rin Adalat Ain, 2003
Section 33:
As per section 33(2) of the Act, the Petitioner has forfeited all rights and privileges upon his failure to deposit the balance amount of bid money within the stipulated period of ten days time. Furthermore, there is no scope to interpret the law to give the Petitioner a technical or tactical advantage of a ninety-day extension in the name of Artha Rin Adalat (Amendment) Ordinance, 2007. This is because equity follows the appropriate rules of law and does not replace or violate the law. Therefore, the Writ Petitioner may not now be allowed to frustrate justice on the ground of mere technical interpretation of any aspect of law and equity. ...(Para 36)

Artah Rin Adalat Ain, 2003
Section 38 and 45:
Sections 38 and 45 of the Act contain the provisions of amicable settlement. Under the above provisions of law, the Judgment-Debtors and the Decree-Holder Bank could settle the dispute between them at any stage of the suit and even at the execution stage. Since the mortgaged property has been redeemed and the execution proceeding was withdrawn following an amicable settlement between the Judgment-Debtors and the Decree- Holder, the auction purchaser Petitioner is not found to be entitled to any relief as prayed for in the present case. ...(Para 41)

Judgment

SYED REFAAT AHMED, J:-

1. In this Application under Article 102 of the Constitution a Rule Nisi has been issued at the instance of the Petitioner calling upon the Respondents to show cause as to why the Order No. 105 dated 29.09.2011 passed by the Respondent No.1, the learned Judge of the Artha Rin Adalat No. 2, Dhaka in Artha Jari Case No. 249 of 2011 cancelling/setting aside the auction held and accepted by Order No. 45 dated 01.12.2003 arising out of Title Suit No. 202 of 1999 of the Artha Rin Adalat No. 2, Dhaka (Annexure-M to the Writ Petition) 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 to this Court may seem fit and proper.

2. Facts relevant for disposal of this Rule are that the Decree-Holder Bank as plaintiff (Respondent No. 3) instituted Title Suit No. 217 of 1993 for realization of outstanding loan amounting to Tk. 1,14,65,356/-. against Rush International Ltd. and 7 others, namely, Mr. S.B. Zaman, Managing Director, (2) Mrs. Nusrat Ara Zaman, (3) Mrs. Ismatunnessa Khanam, (4) Mr. S.A. Rabbani, (5) Mr. S.M. Hossain, (6) Mrs. Amena Begum and (7) Ms. Soheli Pervin and other six Directors of the Rush International Limited. Since none of the defendants contested the suit, the suit was decreed ex parte on 26.08.1999 (decree signed on 05.091999) in preliminary form and later on the decree was made final on 11.07.2000 (decree signed on 17.07.2000) against all the defendants. The Decree-Holder Bank filed Title Execution Case No. 150 of 2000 on 23.11.2000 against all the Judgment-Debtors to execute the said decree for realization of Tk. 2,59,49,528/-.

3. During pendency of the Execution case on 12.04.2002 the Judgment-Debtor No. 2 Mr. S.B. Zaman died leaving behind as his heirs and successors (1) Mohammad Junayed Quader, (2) Ms. Badrunnessa, (3) Ms. Tabassum Rifat, (4) Ms. Bushra Rubayet, (5) Ms. Sumaiya Zaman, (6) Ms. Tasnuva Amrin Zaman who were substituted on 07.09.2003 in the said Title Execution Case No. 150 of 2000.

4. The Executing Court fixed 26.07.2003 for holding auction of the mortgaged property and accordingly notice of auction was published in the daily 'Manabzamin' and 'Dainik Bhorer Dak'. But on the date of auction due to prayer for withholding the auction sale made by the Decree-Holder Bank, the Court below fixed 09.09.2003 again for holding auction of the mortgaged property and directed to publish notice in the daily "Jonokontho". In the auction held on 09.09.2003, the highest price quoted was Tk. 2.97 crore. However, the quoted price being insufficient the auction sale was again postponed by the Court below at the prayer of the Decree-Holder Bank and fixed again on 17.09.2003 for holding auction of the mortgaged property. On 17.09.2003, the quoted price was found at Tk. 5.26 crore but on the selfsame ground of insufficiency the auction sale was again postponed.

5. At this stage, the said Title Execution Case No. 150 of 2000 got transferred to the Artha Rin Adalat No. 4, Dhaka and was renumbered as Title Execution Case No. 1210 of 2003. The transferee Court fixed 27.09.2003 for taking steps under Section 33(4) of the Artha Rin Adalat Ain, 2003 ("Act"). Thereafter, the Court by Order dated 11.10.2003 fixed 20.11.2003 for holding auction and directed to publish the auction notice in two dailies namely, 'Jonokontho' and the daily 'Ittefaq'. On the date the only price quoted was by one Mr. Aziz Al Kaiser for an amount of Tk. 6.03 crore but the Court again refused to accept the bid on the ground that there is likelihood of getting higher price and thereby fixed 29.11.2003 as the next date of auction.

6. On the date fixed the Writ Petitioner submitted the bid quoting the price at Tk. 6.06 crore but the Court again finding the quoted price inadequate fixed 01.12.2003 as the next date of auction. On 01.12.2003 the quoted price submitted by the Petitioner was finally accepted by the Court vide Order No. 45. Another Decree-Holder namely, A.B. Bank Ltd., also filed an application on that date to reject the bid but it was not allowed by the Court below. The Petitioner on that date deposited Tk.1,51,75,000/- vide Pay Order No. 168554/2003 dated 30.11.2003 equivalent to 25% of the bid money and, accordingly, the Court considering the bid as the highest accepted the same and directed him to deposit the

balance amount of 75% bid money through Treasury Challan in the Court within ten working days from the date vide Order No. 45 dated 01.12.2003.

7. The said Order No. 45 dated 01.12.2003 was challenged by the Judgment-Debtors by a Writ Petition being No. 7354 of 2003 before this Court in which besides issuing Rule this Court also granted Order of Stay vide Order dated 15.12.2003. Later on, upon hearing, the Rule was discharged vide Judgment and Order dated 01.04.2004.

8. The Judgment-Debtors filed a Civil Miscellaneous Petition for Leave to Appeal before the Appellate Division challenging the aforesaid Judgment on 03.11.2004. The Judge-in-Chamber of the Appellate Division was pleased to stay operation of the aforesaid Judgment vide Order dated 08.11.2004. Thereafter, the Appellate Division upon hearing the Civil Appeal No. 41 of 2005, was pleased to dismiss the same vide Judgment and Order dated 28.05.2009.

9. The Petitioner auction purchaser obtained the certified copy of the Judgment and Order dated 28.05.2009 passed in Civil Appeal No. 41 of 2005 on 11.06.2009 which was a Thursday. On the next opening day on 14.06.2009 the auction purchaser filed an application before the Artha Rin Adalat No. 4, Dhaka seeking permission to deposit the rest 75% of the bid money in the Title Execution Case No. 1210 of 2003. On the same date, the Judgment-Debtor, Mr. Junayed Quader filed two applications, one under Order 21, Rule 89 of the Code of Civil Procedure and another under Section 57 of the Act for cancellation of the auction held on 01.12.2003 and for permission to deposit the full decretal amount. The Petitioner filed two separate written objections against the aforesaid two applications. The Petitioner auction purchaser filed another application on 06.09.2009 with the prayer for depositing 75% balance bid money by way of Treasury Challan. After hearing all the pending applications as stated above, the Court passed the Impugned Order No. 105 dated 29.09.2011 cancelling the auction held on 01.12.2003. It is at this juncture that Petitioner preferred the instant Application under Article 102 of the Constitution and obtained the present Rule and Order of Stay.

10. The Respondent Nos. 2,3,5,6 to 9 contested the Rule by filing Affidavits-in-Opposition and Supplementary Affidavit-in-Opposition denying all material allegations made in the Application contending inter alia that the Artha Rin Adalat by Order No. 45 dated 01.12.2003 accepted the bid of the Petitioner and directed him in clear terms to deposit the balance 75% bid money within the stipulated period of ten working days from the date of acceptance of the bid as per provisions of Section 33(2) of the Act. But the Petitioner, after clear thirteen days had elapsed, filed an application before the Executing Court merely seeking permission to deposit the balance 75% bid money on 14.06.2009. The period of limitation as mentioned in Section 33(2) of the Act is mandatory. It is contended that since the Petitioner as auction purchaser failed to deposit the balance 75% of bid money within the statutory period, he forfeited all his rights and claims over the mortgaged property and his earnest money was also liable to be forfeited. That notwithstanding, the Court below was kind enough not to forfeit the said amount and allowed him to draw or collect the earnest money. Having realized the said fact of default and consequences thereof, the Petitioner filed a fresh application on 14.06.2004 seeking permission to deposit the balance bid money within ten days from the date of permission as apparent from the prayer in the said application.

11. The further case of the Respondents is that the Rule was obtained by concealing material facts. It is pointed out that the mortgaged property has already been redeemed and the money Execution Case has accordingly been withdrawn by the Bank upon full

satisfaction of its claim and, therefore, the Petitioner is not entitled to the reliefs as prayed for.

12. It is also stated that until filing of the application seeking permission to deposit 75% bid money the Petitioner got thirteen clear working days and after filing of the said application he got another period of about twenty-six months till passing of the Impugned Order on 29.09.2011 when there was no restraining order from any court in effect and he could easily have deposited the balance bid money but evidently failed to do so. The auction sale in question, it is submitted, was cancelled due to default of the Petitioner to deposit the balance amount of 75% bid money within time fixed by the law. After cancellation of the auction sale by the Impugned Order the Respondents got the mortgaged property redeemed following an amicable settlement with the Decree-Holder Bank before issuance of the instant Rule and as such the Rule has automatically become infructuous.

13. Mr. Rokanuddin Mahmud, Senior Advocate with Mr. Mustafizur Rahman Khan, Advocate appearing on behalf of the Petitioner submit that the Respondent No. 1 by Order No. 45 dated 01.12.2003 accepted the bid submitted by the Petitioner and directed him to deposit the rest 75% of bid money within ten working days through Treasury Challan. But on and from 02.12.2003 the Civil Court went on annual vacation up to 31.12.2003. In the meantime, the Judgment-Debtor/Respondent No. 2 filed Writ Petition No. 7354 of 2003 in the High Court Division and obtained a Rule and Stay against the operation of the said Order dated 01.12.2003 passed in the Money Execution Case No. 1210 of 2003. The said Order of Stay dated 15.12.2003 continued till disposal of the said Writ Petition No. 7354 of 2003 by this Court vide Judgment and Order dated 01.11.2004. However, the same was also stayed by the Judge-in-Chamber of the Appellate Division vide Order dated 08.11.2011 passed in Civil Miscellaneous Petition for Leave to Appeal No. 678 of 2004 and the same continued till disposal of the Civil Appeal No. 41 of 2005 by the Appellate Division on 28.05.2009. The Writ Petitioner received the certified copy of the Judgment and Order dated 28.05.2009 on 11.06.2009. The next two days i.e. 12.06.2009 and 13.06.2009 were a Friday and Saturday respectively i.e., weekly holidays. By showing the aforesaid chronology of events and dates Mr. Mahmud submits that although the Court below directed to deposit the balance amount of 75% bid money within ten working days but it was not possible on the part of the Petitioner to do so because of the Stay Order passed in the said Writ Petition and subsequently at the appellate stage by the Appellate Division.

14. Mr. Mahmud consistently maintained that the period of limitation has not been exhausted in the facts and circumstances. As stated above, initially he argued that by virtue of the Order No. 49 dated 14.03.2004 the execution proceedings had been halted despite the non-existence of any restraining Order from the higher court on the ground that the said Order allegedly stayed the execution proceeding until receipt of further Order. Accordingly, Mr. Mahmud submits that the claim of the Respondents as to having only thirteen working days before filing of the application seeking permission to deposit the balance 75% of bid money is not sustainable in the eye of law. He also submits that although Section 33(2) of the Act (before promulgation of the Artha Rin Adalat (Amendment) Act, 2010) speaks about the limitation period of ten days, the position altered considerably after the amendments introduced to the said Act during the 2007 Caretaker-Emergency period. Amendments sought to be introduced under the Artha Rin Adalat (Amendment) Ordinance, 2007 ("Ordinance") first extended the limitation period from ten days to ninety days. After repeal of the Ordinance, the Artha Rin Adalat (Amendment) Act, 2010 ("amending Act") subsequently incorporated the provisions by inserting a "*saving clause*" therein. Mr. Mahmud made

detailed and elaborate submissions on this point of law stating that the Petitioner is entitled to get the benefit of the extended period of ninety days as amended by the Ordinance with the aid ultimately of the amending Act. It is also argued that as a general rule of construction, law is prima facie prospective in operation and it cannot have retrospective operation except in certain cases unless the intention of the legislature in favour of the retrospective operation is clearly evident from the express words or necessary implication. The aforesaid presumption against retrospective construction can be rebutted in case of enactments which affects only procedure as distinct from substantive rights accrued. Relying on this exception, it was argued by Mr. Mahmud that the said Act being a procedural law the presumption against retrospective operation will not be applicable in case of amending legislation. In support of his contention Mr. Mahmud relied on decisions from various jurisdictions, e.g. *Hitendra Thakur vs. Maharashtra* reported in *AIR 1994 SC 2623, Maharaja Chintamoni vs. Bihar* reported in *AIR 1999 SC 3609, State vs. Muhammad Jamil* reported in *20 DLR (SC)315, Adnan Afzal vs. Sher Afzal* reported in *PLD 1969 SC 187, Wright vs. Hale* reported in *(1860) 39 L.J. Ex. 40, Gardner vs. Lucas* reported in *(1878) 3 App. Cas. 582, per Lord Blackburn at p.603* and *Boodle vs. Davis* reported in *(1853) 8 Ex. 351*. He has argued that even though the Ordinance ceased to exist by virtue of the operation of Article 93(2) of the Constitution, the incorporation of the *"saving clause"* in the amending Act [i.e. Section 18 in the Artha Rin Adalat (Amendment) Act, 2010] presumably allowing for the ninety-day to be saved has consequentially created an entitlement for the Petitioner to enjoy a limitation period of ninety days instead of just ten days.

15. Learned Advocates, Mr. Mainul Hossein, Mrs. Rabia Bhuiyan, Mr. A. J. Mohammad Ali, Mr. Shamim Khaled Ahmed and Mr. Mizan Sayeed appearing on behalf of the various Respondents commonly submit that this Rule was obtained by suppressing material facts and by misleading the Court. They emphasize in this regard upon the auction sale being set aside on 29.09.2011 by the Artha Rin Adalat No. 2, Dhaka both the Decree-Holder Bank and the Judgment-Debtors reached an amicable settlement in consequence of which the Respondents got the mortgaged property redeemed vide registered Deed of Redemption dated 13.10.2011 and, accordingly, the Decree- Holder upon full satisfaction of the decretal amount withdrew the case on 16.10.2011. The Petitioner auction purchaser filed the Writ Petition on 16.10.2011 and obtained the Rule and Order of Stay on 17.10.2011 by concealing the above vital facts of redemption and the resultant non-existence of the execution proceedings. Such willful suppression of facts, it is submitted, proves that the Petitioner has not come before this Court with clean hands given that he has full knowledge of the compromise and subsequent developments which are manifested in the statements made in the Writ Petition. Therefore, the Respondents argue, the Petitioner is not entitled to the reliefs prayed for either in law or in equity. In support of their contentions they have variously relied on the decisions of the Appellate Division passed in *Social Investment Bank Ltd. vs. Doctor J.H. Gazi and another* reported in *31 BLD (AD) 124*, and as reflected in an unreported Judgment dated 07.05.2014 passed by the Appellate Division in CPLA No. 2125 of 2010 in the case of *Md. Muklesur Rahman and another vs. Govt. of Bangladesh*.

16. The learned Advocate for the Respondent Nos. 2 and 5-9, Mr. Mizan Sayeed has, in particular, made extensive submissions responding to each fact of the Petitioner's case in this Matter. Mr. Sayeed has argued that the Petitioner in his application dated 14.06.2009 prayed for permission to deposit the balance amount of 75% bid money within ten working days from the date of permission. Once permission was given by the Court, no further permission was required under the law. Since the Petitioner was given permission by Order No. 45 dated 01.12.2003 by the Artha Rin Adalat, Dhaka in Money Execution Case No. 1210 of 2003 to

deposit balance amount of the bid money, as such no further permission was required as alleged by the Petitioner. Nevertheless, the Petitioner sought permission to deposit the balance amount of bid money in violation of the provisions of Section 33(2) of said Act. As a consequence, the auction sale was automatically cancelled.

17. Mr. Sayeed has submitted that Order 49 dated 14.03.2004 staying the execution proceedings until receipt of further Order from the High Court does not save the limitation. It is argued that either when the High Court Division or the Appellate Division discharged the Rule or vacated the earlier Order of Stay respectively, it was incumbent upon the parties, in particular the winning side in Writ Petition No. 7354/2005 (i.e. the Petitioner) to communicate the said Orders to the Court below forthwith at least by issuance of lawyer's certificates. The Petitioner, a leading businessman, the Respondents stress, as the highest bidder was expected to exercise reasonable duty of care and attention to deposit the balance amount of 75% bid money at the earliest opportunity within ten working days in order for compliance of the mandatory provisions of law. But he utterly failed to do so. It was misconceived on his part to assume instead that the execution proceeding was in halt despite the non-existence of any restraining Order from the higher Court. The Order 49 dated 14.03.2004 is perceived by the Respondents as having no bearing in the eye of law to save the limitation period prescribed by law, especially when there was no subsisting restraining Order from the higher Courts. Mr. Sayeed submits that the Petitioner was at gross fault for not communicating the higher Courts' Orders forthwith at his best interest towards compliance of the mandatory provisions of law. Having not done so, he cannot now be allowed to take the advantage of his own wrong.

18. It is argued, therefore, the objective test that can aptly be applied in such a matter is the "*reasonable man test" i.e.* whether a reasonable man of ordinary prudence in the position of the Petitioner would have done the same thing. The Petitioner as a reasonable man of prudence and a leading businessmen who happened to have submitted the highest bid, accordingly, ought to have exercised reasonable duty of care and attention to comply with the mandatory period of limitation under Section 33(2) of the Act. He was, accordingly, under an obligation to communicate the Order of the higher Court then and there so that he could deposit the balance bid money at the earliest opportunity towards compliance of the requirements of Section 33(2) of the Act. But for reasons unknown the Petitioner refrained from doing so and, therefore, he is liable to suffer the consequence of such imprudence.

19. Mr. Mizan Sayeed submits that since the Petitioner as auction purchaser failed to deposit the balance 75% bid money within the statutory limitation period of ten days, all his rights and claims were forfeited over the mortgaged property as well as his earnest money under Section 33(2) of the Act because (a) the provisions of Section 33(2) of the said Act are mandatory attracting penalties for default by which the auction purchaser's right is circumscribed and can be irredeemably defeated, and (b) due to non-compliance of the mandatory provisions of a special law, the auction sale was in fact automatically cancelled and reduced to a complete nullity. Mr. Sayeed substantiates his arguments in this regard by reference to a catenae of cases being *Peninsular Shipping Service limited vs. M/S. Faruque Paint and Varnish Manufacturing Company Limited and another* reported in *26 BLD (AD) 172, Saiful Islam (Md) and others vs. Govt. of Bangladesh* reported in *17 BLC(HC) 558, Ishaque (Md) and others vs. Govt. of Bangladesh* reported in *43 DLR(AD) 28, Kaushalya Rani vs. Gopal Singh* reported in *AIR 1964(SC) 260*.

20. Mr. Sayeed continues that since the Act is a special law and Section 33(2) of the said Act prescribes the specific period of limitation and the consequences of failure to do so are also provided therein, hence, no difficulty arises to construe the provisions to be mandatory. In support of his submissions he has referred to the cases of *Gangabai Gopaldas Mohata vs. Fulchand and others* reported in *AIR 1997 (SC) 1812* as well as *10 SCC (1997) 386, Sardara Singh vs. Sardara Singh* reported in *4 SCC (1990) 90* and *Balaram Vs. Ilam Singh* reported in *AIR 1996 (SC) 278*.

21. It is further pointed out that in his application dated 14.06.2009, the Petitioner prayed for permission to deposit the balance amount of 75% bid money within ten working days from the date of permission. This the Respondents view as amounting to seeking extension. It is submitted that since the provisions of Section 33(2) of the Act are mandatory and as such the extension of time for depositing the balance amount of bid money is not permissible under law. Consequentially, the Court has no jurisdiction to extend such time.

22. Mr. Mizan Sayeed has comprehensively analyzed the chronology of events and dates in two segments before us, namely, (1) from 01.12.2003 to 28.05.2009 and (2) from 11.06.2009 to 29.09.2011. Mr. Sayeed pointed out that in the first segment until filing of the application seeking permission to deposit the balance 75% of bid money on 14.06.2009, the Petitioner got thirteen working days, i,e, on 02.11.2004, 03.11.2004, 04.11.2004, 31.05.2009, 01.06.2009, 02.06.2009, 03.06.2009, 04.06.2009, 07.06.2009, 08.06.2009, 09.06.2009, 10.06.2009 and 11.06.2009 when there was no restraining order from any court and during the said period the Petitioner could deposit the balance amount forthwith but clearly failed to do so. Hence, this failure of the Petitioner rendered the auction sale void. It is also emphasized that even if for the sake of argument the limitation period is to be counted from 14.06.2009 onwards as per the claim of the Petitioner, still he cannot save the limitation inasmuch as the Petitioner failed to pay a single farthing let alone the payment of balance 75% of bid money as on the date of passing the Impugned Order on 29.09.2011.

23. In addition to the above, Mr. Sayeed further adds that the mortgaged property in question is the only residential property of the Respondent Nos. 2 and 5-9. In fact, after the death of their predecessor, S.B. Zaman, in 2002 they have been struggling earnestly to save this piece of property. Having managed with great difficulty to settle the outstanding claim of the Decree-Holder Bank, it would now be unjust and illegal for the property to be acquired by the Petitioner in the circumstances despite the fact that the Petitioner failed to comply with the mandatory provisions of law and forfeited all his rights purportedly accrued primarily upon acceptance of the bid as the highest bidder. It is argued that the Respondent Nos. 2 and 5-9 have, accordingly, acquired a vested as well as a fundamental right to redeem their mortgaged property and enjoy the same without any disturbance from any quarter. Mr. Sayeed further submits that if the Rule is made absolute this will make the said Respondents homeless and shall cause multifarious inconveniences not only to the Judgment-Debtors but also to the Decree-Holder Bank. More so, this will also violate the fundamental rights of the Respondents as guaranteed under Article 42 of the Constitution. In view of the above, he argues that the legal, vested and fundamental rights of the Respondents cannot be compared with the ostensible equitable right of the Petitioner on the mortgaged property in question. The Petitioner, Mr. Sayeed emphatically submits, is not entitled to get any equitable relief because equity will not grant relief to rescue him from his self-created hardship. This is because the present situation has arisen from the Petitioner's gross negligence and carelessness due to his failure to deposit the balance bid money within the time specified by law. The prayer is, accordingly, for this Rule to be discharged.

24. This Court has perused the Application and Affidavits filed by all parties and heard the learned Advocates extensively on matters of law and facts.

25. This Court notes at the outset that a statutory privilege is a nascent right reserved to an individual person but this privilege is lost once he/she himself infringes it or abandons it voluntarily. The Writ Petitioner in fact has abandoned the statutory privilege by willfully and deliberately refraining from depositing the balance amount of bid money within the prescribed period of limitation. By filing the application seeking permission to deposit the balance 75% bid money instead of depositing the amount directly, the auction purchaser relinquished his known statutory right as auction purchaser and waived all his rights to the property in question as well as the earnest money deposited by him.

26. Before discussing these issues in detail, it is deemed relevant at this juncture to quote the provisions of Section 18 of the amending Act which runs as follows:-

"১৮। হেফাজত সংক্রান্ত বিশেষ বিধান । (১) অর্থ ঋণ আদালত (সংশোধন) অধ্যাদেশ, ২০০৭ (২০০৭ সনের ৩৯ নং অধ্যাদেশ), অতঃপর উক্ত অধ্যাদেশ বলিয়া উল্লিখিত, দ্বারা সংশোধিত অর্থ ঋণ আদালত আইন, ২০০৩ (২০০৩ সনের ৮ নং আইন), অতঃপর উক্ত আইন বলিয়া উল্লিখিত, এর অধীন কৃত কাজকর্ম বা গৃহীত ব্যবস্থা এই আইন দ্বারা সংশোধিত উক্ত আইন এর অধীন কৃত বা গৃহীত হইয়াছে বলিয়া গণ্য হইবে ।

(২) গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের অনুচ্ছেদ ৯৩ এর দফা (২) এর বিধান অনুসারে উক্ত অধ্যাদেশের কার্যকারিতা লোপ পাওয়া সত্ত্বেও অনুরূপ লোপ পাইবার পর উহার ধারাবাহিকতায় বা বিবেচিত ধারাবাহিকতায় কোন কাজকর্ম কৃত বা ব্যবস্থা গৃহীত হইয়া থাকিলে উহা এই আইন দ্বারা সংশোধিত উক্ত আইন এর অধীনেই কৃত বা গৃহীত হইয়াছে বলিয়া গণ্য হইবে।"

(Emphasis added).

27. Upon a detailed explanation and analysis of the provisions of Section 18 it has been satisfactorily established by the learned Advocates for the Respondents that the Petitioner has no scope to take the advantage of extended limitation period of ninety days as mentioned in the erstwhile Ordinance, firstly, because the alleged bid was accepted by the Artha Rin Adalat on 01.12.2003 i.e. long before the promulgation of the Ordinance to the extent later saved by the amending Act. Therefore, the alleged bid was submitted and accepted under the old Artha Rin Adalat Act, 2003 as it existed before its amendment by the Ordinance. So by no manner of application the alleged auction can be considered as an action taken during the subsistence of the Ordinance. Therefore, the special provisions as to savings under Section 18(1) of the amending Act will not be applicable in the present case. Secondly, by no stretch of imagination can the alleged auction be considered as 'action' taken in continuation after the Ordinance ceased to exist or as a 'step' taken in presumed continuation of the same.

28. The Petitioner has emphasized that he will get the advantage of the extended period of ninety days under the Ordinance. This is on the ground that even though the Ordinance ceased to exist, by virtue of the incorporation of the *"saving clause"* in Section 18 in the amending Act the ninety day limitation is, however, to be treated as saved. With a detailed explanation and analysis of the provisions of Section 18 in the Supplementary Affidavit submitted by the Respondent Nos. 2 and 5-9 on 17.04.2014 it has been satisfactorily controverted thus by these Respondents that the Petitioner has no scope to take advantage of an extended limitation period of ninety days as mentioned in the said erstwhile Ordinance of 2007 which met with its natural death on 25.02.2009 by operation of the provisions of Article 93(2) of the Constitution:

(a) the Ordinance was promulgated on 23.12.2007 (i.e. after about four years of acceptance of the Petitioner's bid). Subsequently, when the first session of Parliament took place on 28.01.2009, the Ordinance was not laid before Parliament at its first meeting on 28.01.2009 for necessary approval as per the requirement of Article 93(2) of the Constitution. As a consequence, the Ordinance met with its natural death on 25.02.2009 upon the expiration of thirty days computed from 28.01.2009. It is important to note that admittedly from the date of promulgation (i.e. 23.12.2007) of the Ordinance up to the date of its natural death (on 25.02.2009), the clock of limitation was at a halt. Hence, clearly there remains no scope whatsoever for the Petitioner to take the advantage of any amendments under the said Ordinance; and

(b) the amending Act was subsequently promulgated by the 9th Parliament in 2010 by incorporating a *"saving clause"* therein vide Section 18 to which the Hon'ble President of Bangladesh gave assent on 30.03.2010 and the same was published in the Official Gazette on 31.03.2010. Again, the Petitioner cannot take any advantage from the provisions of Section 18 of the amending legislation. Firstly, because the alleged auction in question was accepted by the Artha Rin Adalat on 01.12.2003 i.e. long before promulgation of the Ordinance read with the amending Act. Therefore the alleged auction was submitted and accepted under the unaltered Artha Rin Adalat Act, 2003 as it existed before its abortive amendment by the Ordinance. So by no manner of application the alleged auction can be considered as an action taken during the subsistence of the Ordinance. Therefore, the special provisions as to savings under Section 18(1) of the amending Act will not be applicable in the present case. Further, by no stretch of imagination the alleged auction can be considered as an *"action"* taken in continuation after the Ordinance ceased to exist or a *"step"* taken in presumed continuation of the same, because the auction was submitted and accepted on 01.12.2003 i.e. long before the promulgation of the said Ordinance in 2007.

29. There is always a legal presumption against retrospective operation of any statute seeking to impair any existing right or obligation unless from express words or by necessary implication the legislature is clearly seen to have given retrospective operation to the statute. But the aforesaid presumption can be rebutted in case of enactments which affects only the procedure. Relying on this, the Petitioner has argued that he is ostensibly entitled to take advantage of an extended period of ninety days under the amending Ordinance of 2007 to the extent saved by the amending Act. This Court finds the above arguments of the Petitioner to be misconceived, misleading and not sustainable in the eye of law for the following reasons:

(a) the arguments of the Petitioner that presumption against retrospective operation can be rebutted in case of procedural law is not a disputed position of law. But the fact remains that the Ordinance (by which the limitation period of ten days as specified in the old 2003 Act was increased to ninety days by amendment of then existing Section 33(2) of the Act) had its natural death on 25.02.2009 by virtue of the operation of Article 93(2) of the Constitution. Thereafter by incorporating a *"saving clause"* as Section 18 in the amending Act the legislature itself has saved specified rights and privileges of the Ordinance by giving retrospective effect to the "*actions*" or "*steps*" taken during the subsistence of the said Ordinance. Hence, there is found neither any

scope nor any necessity of the rebuttal of presumption against retrospective operation of the Ordinance in the present case;

(c) the scope of rebuttal is possible in the absence of *"saving clause"* or any intention of the legislature to the contrary. A legal presumption is just that i.e. a mere presumption and no more. It is neither absolute nor to be likened to an unqualified privilege. Rather any such legal presumption is subject to the language or dominant intention of the legislature reflected in the amending legislation. So neither presumption nor the rebuttal of the presumption in appropriate case can override or overstep the act of Parliament;

(d) when the legislative intention is reflected in the amending legislation by inserting a *"saving clause"* therein, therefore the question of rebuttal of presumption against the retrospective operation is unnecessary;

(e) since legislative intention is clearly manifested in the *"saving clause"* of the amending Act as Section 18 to give retroactive operation to the said Ordinance to the extent mentioned therein, hence, the Court shall look into the words or terms of the *"saving clause"* while ascertaining the intent of the legislature. In this regard it has to be borne in mind that such clauses are introduced into statutes to safeguard rights which, but for such saving, would be lost; and

(f) evidently, when a *"saving clause"* is provided in any enactment, it becomes a special law of interpretation in respect of matters it deals with and circumscribes, accordingly, the applicability of the general law of interpretation with regard to repeal of an enactment under the General Clauses Act.

30. Therefore, it is clear that as per the terms of the *"saving clause"*, only the action or steps taken during the subsistence of the Ordinance shall come within the purview of such clause. Since the bid submitted by the Writ Petitioner was accepted on 01.12.2003 i.e. long before the promulgation of the Ordinance on 23.12.2007, as such the dispute arising out of the said bid is liable to be regulated under the Act only as it existed. Accordingly, this Court has to confine the ambit and operation of the *"saving clause"* in Section 18 of the amending Act to only action taken during the subsistence of the Ordinance for accrual of any entitlement to any advantage or benefit under the Ordinance.

31. By categoric reference to specified dates in the applicable calendar years it has been argued and explained in detail by the Respondents that even if for the sake of argument the Petitioner is allowed to take the advantage of ninety days he still cannot save the limitation. Because even if the limitation period is counted from 14.06.2009 (as per the argument of the Petitioner) in the meantime more than twenty-six months (i.e. about more than seven hundred and eighty days) had elapsed. According to the Respondents, the Petitioner got three days from 02.11.2004 to 04.11.2004 and subsequently again got ten days from 31.05.2009 to 11.06.2009 but failed to deposit the balance bid money. Interestingly, the Petitioner argued that taking the advantage of ninety days he submitted the application for approving the *Challan* on 06.09.2009 i.e. allegedly on the eighty-fourth day. But as usual, the Petitioner refrained from making an actual payment**.** If the above mentioned thirteen days are added with eighty-four days the alleged application, this Court finds, was in fact submitted out of date on the ninety-seventh day. Furthermore, this Court accepts the Respondents' argument that such application without actual payment in the prescribed form bears no significance for the purpose of the law of limitation. It is found thus that by no manner of application can the Petitioner be found to have saved the limitation. Thus, since the Petitioner failed to pay a single farthing before the learned Court below as on the date of pronouncement of the

impugned Order dated 29.09.2011. It is found that the requirements of Section 33(2) were not complied with and the alleged auction became automatically null and void.

32. Subsequently, Mr. Mahmud, came up with another argument regarding the Petitioner's entitlement to equitable relief on priority basis as opposed to the equitable right of the Judgment- Debtors/Respondents, because the equitable right of the Writ Petitioner was created first in time. Referring to Order No. 45 dated 01.12.2003, it was further argued that the bid of the Petitioner was accepted on 01.12.2003 but on the other hand, the Judgment-Debtors/Respondents deposited the proclamation money and 5% of the bid money only on 01.10.2009 (vide Order No. 75 dated 01.10.2009) which means much later to the acceptance of the bid. Mr. Mahmud stressed that the Judgment-Debtors/Respondents also did not offer to deposit the decretal amount or any amount whatsoever at the time of acceptance of the Petitioner's bid on 01.12.2003 (which incidentally was accepted at the fifth attempt). Mr. Mahmud further submits that the Judgment- Debtors/Respondents also did not pay anything during the pendency of this Writ Petition or during the pendency of the Appeal before the Appellate Division. Given, therefore, that the Judgment- Debtors/Respondents did not deposit any amount whatsoever towards adjustment of the entire decretal dues until 01.10.2009, Mr. Mahmud argues that it is the Petitioner's equity which is following the law and that the equity of the Judgment- Debtors/Respondents are swimming against the law. It is submitted, therefore, that even if for the sake of argument the equity of both the Judgment-Debtors/Respondents and the Petitioner are considered to be equal, nevertheless, due to the reason that the equity of the Petitioner was created first in time such equity will take precedence over the equity of the Judgment-Debtors/Respondents.

33. It is this Court's view that the distinction between legal and equitable rights and interest does not exist under the existing legal régime governed by the Transfer of Property Act, 1882. Thus, the right of redemption of the mortgagor is not an equitable right but a legal right conferred by statute. Therefore, a mortgagor under Bangladeshi law always retains a legal interest before and after the expiry of the date of payment. Therefore, the right of redemption is not an equitable form of relief to be given on such terms as the court considers equitable but a statutory right conferred and available only upon terms statutorily defined and stated. In view of the above, it is found that the Judgment- Debtors/Respondents being mortgagors of the property in question possessed an inalienable right to redeem their property at all material times. The right of the Respondents over the mortgaged property is, accordingly, found by this Court to have been created when the property was mortgaged. Such right remained inalienable and in fact even after expiry of the date of repayment. Resultantly, there is found no scope to argue that the Petitioner's right was first created in terms of time.

34. Accordingly, since the Respondents have already adjusted the outstanding dues of the Decree-Holder Bank in full following a compromise between them in accordance with the law and after cancellation of the bid vide the impugned Order dated 29.09.2011, they are found by this Court to have acquired a vested legal right to redeem their only residential property. Even if for the sake of argument, the Writ Petitioner has allegedly acquired an equitable right, the legal and vested right that has already been acquired by the Respondents is much more superior to that of the Writ Petitioner. The Respondents are in fact, not only the holders of legal, vested and fundamental rights, they also have acquired the equitable right to recover their property from the custody of the Bank. As a consequence, under the rule of equity, the holder of a legal as well as an equitable interest shall be preferred on the basis of the principle that where there is equal equity the law shall prevail. In other words, a legal

interest is superior as between two persons having equitable interest because equity follows the law.

35. In the present case, the Petitioner did not take any action whatsoever since the clock of limitation started ticking as of the date of the impugned Order, i.e. on 29.09.2011. As a consequence, since his legal claim is barred by the limitation as mentioned in a special law he will not be entitled to any equitable relief as well. It may further be mentioned here that equitable claims may also be barred not only by limitation law but also by unreasonable delay or laches. The Petitioner is found to be a defaulter on both counts. In view of the above, the law of equity should not come in aid of the Petitioner as he was not vigilant and has been found slumbering and sleeping on his rights. The Petitioner's claim must fail for following specific reasons resultantly:

i) The Petitioner failed to deposit the balance amount of 75% bid money as per Order No. 45 dated 01.12.2003 passed by Artha Rin Adalat within ten working days firstly, when the Rule issued in Writ Petition No. 7354 of 2003 was discharged on 01.11.2004 and secondly, when the appeal filed by the Respondents was dismissed by the Appellate Division vide Judgment and Order dated 28.05.2009, in both cases it was incumbent upon the Petitioner to communicate the said Orders to the Court below forthwith at least by Lawyer Certificates. But this the Petitioner failed to do so despite the fact that before 14.06.2009 he got as many as thirteen working days to deposit the balance bid money; and

ii) the Petitioner was supposed to deposit the balance amount of 75% bid money through Challan directly to the concerned court as soon as there was no restraining order from any court of law, but instead he filed an unnecessary application on 14.06.2009 seeking permission to deposit the same within ten days from the date of permission.

36. These are all found by this Court to be glaring examples of negligence or carelessness on the part of the Petitioner. Hence, as per the established principles of law he should not now be allowed to take any advantage of his own wrong. This Court finds against the Petitioner, accordingly, It is found, therefore, that as per section 33(2) of the Act, the Petitioner has forfeited all rights and privileges upon his failure to deposit the balance amount of bid money within the stipulated period of ten days time. Furthermore, there is no scope to interpret the law to give the Petitioner a technical or tactical advantage of a ninety-day extension in the name of Artha Rin Adalat (Amendment) Ordinance, 2007. This is because equity follows the appropriate rules of law and does not replace or violate the law. Therefore, the Writ Petitioner may not now be allowed to frustrate justice on the ground of mere technical interpretation of any aspect of law and equity.

37. Mr. Rokanuddin Mahmud also drew this Court's attention to two more new legal issues. *Firstly,* with reference to Rules 653, 654, 656 and 657 of the Civil Rules and Orders ("CRO"), he contends that because of the refusal of the Chief Ministerial Officer to sign on the *Challan* Form the Petitioner could not deposit the balance amount of bid money. *Secondly,* he contends that the Respondent No. 1, Artha Rin Adalat No. 2, Dhaka failed to specify the detailed reason as to why and how the Petitioner failed to deposit the balance amount of bid money within the limitation period. In other words, the Court below failed to show how the auction was time-barred under the relevant provisions of law. As a result, the

Impugned Order dated 29.09.2011 passed by the Respondent No. 1 is submitted to suffer from an error of jurisdiction.

38. The argument above as to refusal of the Chief Ministerial Officer to sign the *Challan* Form is found to play no role in saving the limitation. Rules 640, 642, 653, 658 of the CRO lay down the procedure when the *Challan* will be required and how the same shall be deposited and to whom etc. But by no stretch of application or interpretation may the said procedural provisions be read to prescribe any way to the Petitioner to save the limitation period set by a special law i.e. the Act. Further, this Court finds that the Impugned Order is not one devoid wholly of any reasoning or indeed a non-speaking Order. Upon a careful reading of the Order rather it is apparent to this Court that the Impugned Order contains a satisfactory analysis of facts, description of evidence and materials on record and adequate reasoning on the issues raised before it. Evidently, the Artha Rin Adalat appreciated the relevant provisions of law (i.e. the implication of Section 33(2) of the Act) in their correct perspective and applied the same to the facts and circumstances of the case to arrive at a correct judicial finding. As such in the absence of any specific statutory requirement to give reasons to a particular extent or detail or because of paucity of reasoning on a particular issue, the validity *per se* of the impugned decision cannot be called in question unless the same is found invalid or illegal for some other reasons or to have caused injustice to any party in the proceedings. In the present case, clearly reasons have been recorded in the Impugned Order regarding limitation period, albeit, not in an exhaustive manner. Hence, the same cannot be considered as a fatal defect that goes to the root of the Order or the Court's jurisdiction nor can be argued to reflect an error apparent on the face of the record. This Court is of the view that in the absence of any prescribed form or rules of procedure the reasons recorded by a court need not necessarily be exhaustively detailed or elaborate and the requirement of recording reasons will be satisfied if only the relevant reasons are recorded in an Order. By that reason, this Court remains disinclined to interfere with an Order passed by the Court below merely on the ground that the reasons recorded therein are to an extent inadequate or to a degree insufficient.

39. Finally, Mr. Mahmud submits that the Impugned Order was passed by the subordinate Court in excess of jurisdiction and that, accordingly, ought to be sent on remand to the Court below for retrial. In reply to the said argument, Mr. Sayeed, contends that neither any omission to put emphasis on nor to highlight a particular point of law in a greater detail, nor even a mere failure to give exhaustive reasoning will *ipso facto* destroy a court's jurisdiction. As far as the present case is concerned, it is clearly apparent to this Court that the Artha Rin Adalat No. 2, Dhaka had appropriate power or jurisdiction to decide or determine the matters in issue. That Court does not seem to us to have misinterpreted any statutory provisions of law nor misdirected itself as to the weight of any documentary evidence nor has committed any error of law in deciding an issue. Therefore, it is totally misconceived and misleading to argue that while deciding the issue of limitation, failure to give detailed reasoning will *ipso facto* destroy the jurisdiction of the Court below going to the root of the matter. By no manner of application the same will be considered as acts beyond jurisdiction. It is this Court's finding, therefore, that the Court below seems to have committed no error on the face of the Order. Rather it has correctly found that the Writ Petitioner as auction purchaser failed to comply with the statutory period of limitation of ten days. Indeed, the Respondent No. 1, Court does not seem to have further exercised any arbitrary power for collateral purpose. It is resultantly this Court's view that any and every error of law does not call for interference. It must be a mistake which must have influenced the ultimate decision and that but for such mistake the decision of the Court below would have been otherwise. In the present case,

clearly the Court below in giving its finding that the Petitioner as auction purchaser failed to deposit the outstanding 75% bid money within the stipulated period of time as prescribed in the special law has not committed any mistake or error of law and fact. There is detected no mistake which has influenced the ultimate decision and but for which mistake the said Court would have decided otherwise.

40. In view of the above facts and circumstances, this Court finds nothing to interfere with in the Impugned Order in *Certiorari* and finds no necessity to remand the case for retrial to the Court below given that the Artha Rin proceedings have been finally disposed of satisfactorily before issuance of the instant Rule and Order of Stay.

41. Finally, this Court notes that Sections 38 and 45 of the Act contain the provisions of amicable settlement. Under the above provisions of law, the Judgment-Debtors and the Decree-Holder Bank could settle the dispute between them at any stage of the suit and even at the execution stage. Since the mortgaged property has been redeemed and the execution proceeding was withdrawn following an amicable settlement between the Judgment-Debtors and the Decree- Holder, the auction purchaser Petitioner is not found to be entitled to any relief as prayed for in the present case. In this regard an unreported judgment of the Appellate Division in CPLA No. 2125 of 2010 (per Mr. Justice Md. Abdul Wahhab Miah) in the case of *Moklesur Rahman and another vs. Government of Bangladesh* is taken note of. In that case the Appellate Division has reiterated its persistent stance in favour of the judgment-debtors/mortgagors when the question of redemption following an amicable settlement with a bank crops up. In the said case, the mortgaged property was sold in auction and the auction purchasers deposited the entire bid money. Nevertheless, the Appellate Division allowed the judgment-debtors to pay the decretal dues to the decree-holder bank with a direction to such bank to accept the money and thus ultimately the mortgaged property was allowed to be redeemed and the decree was satisfied.

42. In the present case, this Court holds in summation that the Petitioner has not acquired any substantive right rather he is a defaulter in making payment of the balance amount of 75% bid money. Consequentially, the Respondents lawfully exercised their right of redemption by settling to the fullest their outstanding dues to the creditor bank immediately after auction being set aside.

43. In light of the above, this Court remains wholly disinclined to favourably dispose of this Application.

44. In the result, the Rule is discharged. The Order of Stay as initially granted is, hereby, recalled and vacated.

45. There is no Order as to costs.

46. Communicate this Judgment and Order to the Respondent No. 1, Artha Rin Adalat No. 2, Dhaka forthwith.

6 SCOB [2016] HCD 34

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 9944 of 2012

Dr. Moazzem Hossain
..... Petitioner

Versus

Bangladesh represented by the Secretary, Ministry of Education, Bangladesh Secretariat, Ramna, Dhaka and others
.....Respondents

Mr. Mohammed Faridul Islam with
Ms. Shamsun-nahar (Laizu) Advocates
.....For the petitioner.

Mr. Kamal-Ul Alam with
Ms. Shahanaj Akther, Advocates
….For the respondent nos. 3 & 4.

Heard on 07.04.2015, 22.04.2015, 17.05.2015, 20.05.2015 & 30.06.2015.

Judgment on 08.07.2015.

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

Writ Court is also a Court of equity:
Will the petitioner continue to suffer loss of his seniority through no fault of his own? Is the Writ Court powerless in this regard? In this connection, it may be pointed out that the Writ Court is also a Court of equity. The principles of natural justice, equity and good conscience demand that the seniority of the petitioner be restored at least from the date of promotion of his colleague Dr. Md. Jubair Bin Alam to the post of Personal Professor on 06.11.2004 who admittedly made his application therefor on 28.12.2003 which was subsequent to the date of making of the application by the petitioner on 21.12.2003. In this way, the injustice done to the petitioner, according to us, can be remedied. ...(Para 25)

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. pwØqi/3H-168/®I-7940 dated 11.06.2012 should not be declared to be without lawful authority and of no legal effect and why the respondents should not be directed to grant the petitioner's seniority both in the Bangladesh University of Engineering and Technology (BUET) and the Department of Civil Engineering of BUET by considering him as a Personal Professor with effect from 21.12.2003, the date of his filing application for the said post and to provide the petitioner with the balance monthly salaries

and allowances as a Personal Professor from the said date (21.12.2003) 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:

Currently the petitioner is a Professor of the Department of Civil Engineering in Bangladesh University of Engineering and Technology (BUET), Dhaka. As a teacher, he has a bright academic carrier to his credit. By dint of his merit and efficiency as a teacher, he was promoted to the post of Associate Professor in due course. Anyway, on 21.12.2003, he made an application to the Registrar, BUET for the position of Personal Professorship during the tenure of the erstwhile Vice-Chancellor Professor Dr. Alee Murtaza. But Dr. Alee Murtaza, out of malafides or bad faith, passed an order that the petitioner's application should not be processed as he was staying abroad. Being a victim of the then Vice-Chancellor's personal grudge and animosity, the petitioner was deprived of his much deserved promotion and plunged in the abyss of despair when his colleagues obtained Professorship on time. However, after a long lapse of time, the application of the petitioner for the post of Personal Professor was placed before the Deans' Committee of BUET and all the Members of the Deans' Committee decided on 08.01.2007 in favour of processing the application and issued a note to the effect that "though there is no bar in the rules, applications from candidates on leave serving as teachers abroad were not processed from the Registrar's office during the last four years". By implication, the Deans' Committee admitted that the petitioner fell a victim to the whim, caprice and arbitrariness of the then Vice-Chancellor and lagged behind in respect of seniority. When another Vice-Chancellor of BUET assumed office, the University Syndicate considered the petitioner's application as a result of which he was granted Personal Professorship by an office-order vide no. pwØqi/fl/Hp-1/®l-648 (60) dated 07.08.2007. But in the meantime, the petitioner lost his deserved seniority both in the BUET as well as in the Department of Civil Engineering. Thereafter on 14.01.2008, he submitted an application to the Vice-Chancellor and Chairman of the Syndicate, BUET praying for restoration of his seniority, but in vain. However, the petitioner's request for restoration of his seniority jolted the BUET Authority out of their slumber and they realized that like the petitioner, many teachers were being victimized by the whim and caprice by the authority. Consequently on 29.06.2009, the Syndicate, with a view to protecting the teachers from the arbitrariness and discrimination of the authority, made a regulation to the effect that a teacher applying for the post of Associate Professor or Professor should be deemed to be serving in the said post since the date of his filing application therefor if he is in active service of the BUET from the date of his filing application to the date of approval by the Selection Board (SB) and the Syndicate. The regulation was notified through an office-order being no. pwØqi/p-57/®l-127 dated 12.07.2009. As the regulation took effect from the date of its framing on 29.06.2009, the petitioner did not get any redress for the injustice done to him. On 13.12.2010, he submitted another application to the Vice-Chancellor of BUET, ex-officio Chairman of the University Syndicate, seeking restoration of his lost seniority. However, one Dr. Md. Jubair Bin Alam, the then Associate Professor, Department of Civil Engineering filed an application on 28th December, 2003 for the post of Personal Professor. As his application was processed on time, he became a Personal Professor by an office-order bearing no. pwØqi/fl/Hp-1/®l-2042 (60) dated 06.11.2004. But regrettably, though the petitioner submitted his application before Dr. Md. Jubair Bin Alam, his application was not processed on time due to the malafide intention of the then Vice-Chancellor. In consequence, the petitioner became much junior to his contemporaries including Dr. Md. Jubair Bin Alam. Despite the admission of the Deans' Committee that the petitioner was a victim of arbitrariness and caprice of the then Vice-Chancellor, the Syndicate expressed its reluctance to redress the wrong done to the petitioner stating that there was no scope whatsoever for

getting retrospective seniority as the decision of the Syndicate took effect from 29.06.2009. This decision of Syndicate was communicated to the petitioner by the impugned Memo No. pwÇqi/3H-168/®I-7940 dated 11.06.2012. Finding no other alternative, the petitioner filed the Writ Petition and obtained the instant Rule.

3. In the Supplementary Affidavit dated 19.04.2015 filed by the petitioner, it has been stated that in the backdrop of a large number of qualified and experienced teachers and lesser number of posts at higher levels and consequential blockade of posts at those levels, posts of Personal Associate Professor and Personal Professor were created by the BUET Authority.

4. In the Supplementary Affidavit dated 24.05.2015 filed by the petitioner, it has been averred that the Syndicate of the BUET by its Memo Nos. pwØqi/fcjb (¢f¢f)/Hp-1/15471/®I-5649 dated 12.05.2015 and pwØqi/fcjb (¢f¢f)/Hp-1/15922/®I-5650 dated 12.05.2015 gave effect to the appointment of Mrs. Fahima Khanum and Dr. Md. Farhad Mina to the post of Personal Professor with effect from 26.01.2014 and 23.08.2014 respectively which were the dates of their filing applications therefor pursuant to the decision of the Syndicate dated 29.06.2009.

5. The respondent nos. 3 and 4 have opposed the Rule by filing an Affidavit-in-Opposition. Their case, as set out in the Affidavit-in-Opposition, in short, runs as follows:

The petitioner has an alternative and equally efficacious remedy available to him against the impugned Memo dated 11.06.2012 before the Chancellor of the BUET under Article 17(1) of the Second Statute of the University made under the Bangladesh Engineering and Technological University Ordinance, 1961. Besides, he has a right to prefer a revision against the impugned Memo dated 11.06.2012 under Article 23 (a) of the said Second Statute of the University. Since the petitioner has not availed himself of either of the fora, the Writ Petition is not maintainable. As against the allegation of malafides or bad faith of the erstwhile Vice-Chancellor of the BUET, namely, Dr. Alee Murtaza, the petitioner did never make any grievance or seek any remedy thereabout before any appropriate authority prior to filing of the Writ Petition. As the principal executive of the University, the Vice-Chancellor took the decision that "Process করা ঠিক হবে না। দেশে ফেরত এসে join করলে process করা হবে" as mentioned in Annexure-'B' to the Writ Petition. Until 30.06.2009, there was no specific rule or procedure or time-frame fixed for processing the application of an applicant for filling up the post of Personal Professor. As such, time varied from applicant to applicant of different departments for processing their such applications for various reasons and requirements. The petitioner's application for Personal Professorship was duly processed in the ordinary course of things. He was granted Personal Professorship by the Syndicate on 07.08.2007 and he duly joined his promoted post on the self-same date (07.08.2007). However, the Syndicate in its meeting dated 29.06.2009 approved the Deans' Committee's recommendation that if a teacher who has applied for the post of Professor is in active service of the University from the date of his application to the date of placing the same before the Selection Board (SB) and the Syndicate for its approval, his appointment will be effective from the date of his application and the said rule framed by the Syndicate was notified through an office-order dated 12.07.2009 to be effective with effect from 30.06.2009. The petitioner was appointed as a Personal Professor on 07.08.2007, that is to say, long before coming into force of the said rule framed by the Syndicate on 30.06.2009. So the above rule has no manner of application to the petitioner who filed his application for Personal Professorship on 21.12.2003 and was appointed as a Personal Professor by the Syndicate vide its office-order no. pwØqi/fl/Hp-1/®I-648 (60) dated 07.08.2007. The petitioner's application dated 13.12.2010 seeking restoration of his seniority was duly considered by the Deans' Committee. By its decision dated 06.07.2011, the Deans' Committee recommended that in view of the decision of the Syndicate dated 29.06.2009,

there was no scope for restoration of the petitioner's seniority from the date of his application dated 21.12.2003. The Syndicate of the BUET in its meeting held on 31.03.2012 considered the proposal for restoration of the petitioner's seniority and decided that his seniority could not be restored and the decision of the Syndicate in this regard was duly communicated to the petitioner by the Memo No. pwØqi/3H-168/®I-7940 dated 11.06.2012. As such, the Rule is liable to be discharged.

6. At the outset, Mr. Mohammed Faridul Islam, learned Advocate appearing on behalf of the petitioner, submits that indisputably the petitioner made an application for Personal Professorship on 21.12.2003 in the Department of Civil Engineering of the BUET, Dhaka and it is further admitted that as the petitioner was staying in Malaysia at the relevant point of time, the then Vice-Chancellor did not process the application of the petitioner for his promotion to the post of Personal Professor as a result of which a long period of time elapsed causing grave prejudice to the petitioner and ultimately after change of stewardship of the University, the application of the petitioner was processed and he was promoted to the post of Personal Professor by the Memo dated 07.08.2007 as evidenced by Annexure-'D' to the Writ Petition; but meanwhile the petitioner lost his deserved seniority and became junior to his colleagues due to the malafides or bad faith, whim and caprice of the then Vice-Chancellor.

7. Mr. Mohammed Faridul Islam further submits that on being promoted to the post of Personal Professor by the Memo dated 07.08.2007, the petitioner made an application for restoration of his seniority by Annexure-'E' dated 14.01.2008 at the earliest opportunity, but the University Authority did not respond thereto and for that reason, the petitioner made another application for restoration of his seniority on 13.12.2010 which was rejected by the University Authority by the impugned order dated 11.06.2012 as evidenced by Annexure-'J-1' to the Writ Petition.

8. Mr. Mohammed Faridul Islam also submits that it is on record that one Dr. Md. Jubair Bin Alam was promoted to the post of Personal Professor in the Department of Civil Engineering of the BUET by an office-order dated 06.11.2004 (Annexure-'H-1' to the writ petition), though he filed his application therefor on 28.12.2003 and had the University Authority processed the application of the petitioner on time, he would have become a Personal Professor before Dr. Md. Jubair Bin Alam; but due to personal grudge, animosity and bad faith of the then Vice-Chancellor, the application of the petitioner was not processed in consequence of which he was victimized and lost his seniority as Professor, notwithstanding the fact that he was promoted to the post of Personal Professor at a belated stage on 07.08.2007.

9. Mr. Mohammed Faridul Islam next submits that although the Syndicate decided that candidates making applications for the posts of Personal Associate Professors and Personal Professors would be promoted from the dates of their applications as per the decision dated 29.06.2009, yet the fact remains that both the petitioner and Dr. Md. Jubair Bin Alam were similarly situated and in that view of the matter, it was morally and legally incumbent on the part of the University Authority to promote the petitioner to the post of Personal Professor of the Department of Civil Engineering at least with effect from 06.11.2004, that is to say, the date on which Dr. Md. Jubair Bin Alam was promoted to the post of Personal Professor and this having not been done by the University Authority, the petitioner did not have a square deal.

10. Mr. Mohammed Faridul Islam also submits that the Writ Petition is very much maintainable under Article 102 of the Constitution inasmuch as there is no other equally efficacious remedy for restoration of his seniority and the fora of appeal and revision are not applicable in the case of the petitioner in that those two fora are meant for the persons who have been found guilty and meted out punishment under the Bangladesh Engineering and Technological University Employees (Efficiency and Discipline) Statute (The Second Statute of the University) and this is why the petitioner was constrained to file the Writ Petition in the High Court Division for redress of his genuine grievances.

11. Mr. Mohammed Faridul Islam further submits that admittedly the application of the petitioner was not processed on time on the score of his staying abroad; but stunningly enough, the same was processed at a subsequent stage when he was also abroad and this self-contradictory stance of the University Authority is responsible for loss of seniority of the petitioner as a Professor of the Department of Civil Engineering and the University Authority did not consider this scenario before issuance of the impugned order dated 11.06.2012 rejecting the application of the petitioner for restoration of his seniority.

12. Per contra, Mr. Kamal-ul-Alam, learned Advocate appearing on behalf of the respondent nos. 3 and 4, submits that as per Article 17(1) of the Second Statute of the University, the petitioner ought to have preferred an appeal to the Chancellor of the University against the impugned order dated 11.06.2012 and the appellate forum is, no doubt, an equally efficacious remedy for redress of the grievances of the petitioner, but he failed to avail himself of the appellate forum at his own peril and that being so, the Writ Petition is incompetent.

13. Mr. Kamal-ul-Alam further submits that as per Article 23 (a) of the Second Statute of the University, the petitioner could have filed an application for revision of the impugned order dated 11.06.2012 to the Chancellor of the University; but admittedly he did not prefer any revision in accordance therewith and in this perspective, the petitioner also failed to avail himself of this equally efficacious remedy disentitling him to the invocation of the writ jurisdiction of the High Court Division under Article 102 of the Constitution.

14. In this respect, Mr. Kamal-ul-Alam adverts to the decision in the case of the Controller of Examinations, University of Dhaka and others…Vs…Mahinuddin and others reported in 44 DLR (AD) 305.

15. Mr. Kamal-ul-Alam further submits that it is true that as per the order of the then Vice-Chancellor of the University, the application for Personal Professorship of the petitioner was not processed at the relevant point of time and the Vice-Chancellor was authorized to pass such an order as he deemed fit; but it cannot be said by any stretch of imagination that he acted out of malafides or bad faith in not passing any order for processing the application of the petitioner for the post of Personal Professorship on time.

16. Mr. Kamal-ul-Alam next submits that the University Authority legally and validly issued the impugned order dated 11.06.2012 rejecting the application for restoration of seniority of the petitioner in view of the decision of the Syndicate dated 29.06.2009 and this is why no exception can be taken thereto.

17. In a last-ditch attempt, Mr. Kamal-ul-Alam submits that it is an admitted fact that the petitioner made the application for Personal Professorship on 21.12.2003 and he was

promoted to the post of Personal Professor by the Memo dated 07.08.2007; but in the meantime, 32 (thirty-two) teachers were appointed as Personal Professors in various Departments of the University and if the petitioner is given seniority in the post of Personal Professor from the date of his application, that is to say, on 21.12.2003, then there will be serious anomalies in the seniority list of the said 32 (thirty-two) Professors who have been working as Personal Professors since their appointment between the period commencing from 22.02.2004 till the date of the petitioner's appointment as Personal Professor on 07.08.2007.

18. We have heard the submissions of the learned Advocate Mr. Mohammed Faridul Islam and the counter-submissions of the learned Advocate Mr. Kamal-ul-Alam and perused the Writ Petition, Supplementary Affidavits, Affidavit-in-Opposition and relevant Annexures annexed thereto.

19. To begin with, we would like to address the question of maintainability or otherwise of the Writ Petition under Article 102 of the Constitution. According to the submission of Mr. Kamal-ul-Alam, the petitioner could have preferred an appeal under Article 17(1) or a revision under Article 23(a) of the Second Statute of the University; but admittedly he did not avail himself of either of the fora and since the appellate forum, or for that matter, the revisional forum provides an equally efficacious remedy for the petitioner, the Writ Petition is necessarily incompetent.

20. It transpires that the Second Statute of the University deals with the efficiency and disciplinary matters of every person employed in the University. It is an indubitable fact that the petitioner was not found guilty and meted out any punishment pursuant to the Bangladesh Engineering and Technological University Employees (Efficiency and Discipline) Statute on the basis of any departmental proceeding. So the question of invocation of the appellate forum as contemplated by Article 17(1) or the revisional forum as contemplated by Article 23(a) of the Second Statute of the University is out of the question. We have gone through the decision reported in 44 DLR (AD) 305 relied on by Mr. Kamal-ul-Alam. The facts and circumstances of that case are ex-facie distinguishable from those of the instant case. Therefore the reliance of Mr. Kamal-ul-Alam on the decision reported in 44 DLR (AD) 305 is of no avail. This being the position, we are led to hold that the submission of Mr. Kamal-ul-Alam that the Writ Petition is not maintainable under Article 102 of the Constitution is bereft of any substance. Against this backdrop, it necessarily follows that the Writ Petition is very much maintainable under Article 102 of the Constitution.

21. It has been alleged on the side of the petitioner that due to personal grudge, animosity and bad faith or malafides of the then Vice-Chancellor of the BUET, namely, Dr. Alee Murtaza, the application of the petitioner for the post of Personal Professorship was not processed immediately after 21.12.2003, the date on which the petitioner made his application. It is true that Dr. Md. Jubair Bin Alam, a colleague of the petitioner of the self-same Department of Civil Engineering made his application for the post of Personal Professorship on 28.12.2003 and his application was duly processed and considered on time and he was promoted to the post of Personal Professor on 06.11.2004 as evidenced by Annexure-'H-1' to the Writ Petition. The specific reason for not processing the application of the petitioner on time was stated to be his absence in Bangladesh. The record shows that the petitioner was granted leave without pay from 16.02.2004 to 15.02.2007 for service in Malaysia and that was the only reason for not processing the application of the petitioner as per the order of the then Vice-Chancellor as evidenced by Annexure-'B-1' to the Writ

Petition. It is admitted that when the application of the petitioner was processed for promotion to the post of Personal Professor, he was also abroad. In this context, we feel tempted to refer to Annexure-'C' dated 08.01.2007. It appears from Annexure-'C' dated 08.01.2007 that though there is no bar in the rules, applications from candidates on leave serving as teachers abroad were not processed from the Registrar's office during the last four years. On the one hand, the application of the petitioner was not processed on time because he was staying abroad. But on the other hand, after the change of stewardship of the University, his application was processed when he was also abroad. So the stance of the University Authority in this regard seems to be self-contradictory, self-defeating, antithetical and paradoxical. The University Authority could have processed the application of the petitioner for the post of Personal Professorship soon after he made his application on 21.12.2003 in the absence of any embargo on his stay abroad. The cause assigned for not processing the application of the petitioner on time, as we see it, is not sustainable in law.

22. Now a pertinent question arises: was the former Vice-Chancellor of the BUET actuated by any malice or bad faith in not processing the application of the petitioner immediately after he made the same on 21.12.2003? There is nothing on record to indicate that the petitioner was singled out for victimization or harassment on the ground of his stay abroad during the tenure of the erstwhile Vice-Chancellor of the University Dr. Alee Murtaza. Rather Annexure-'C' dated 08.01.2007, as referred to above, clinches the whole issue. Mr. Mohammed Faridul Islam has failed to point out the case of a single teacher of the BUET whose application was processed for promotion either to the post of Personal Associate Professor or to the post of Personal Professor during his or her absence abroad. In such a posture of things, we are unable to come to a finding that the petitioner fell a victim to the alleged whim, caprice and malafides or bad faith of the former Vice-Chancellor of the University. But by the same token, we reiterate that in all fairness and in the absence of any embargo or prohibition in the relevant rules, it was incumbent upon the University Authority to process the application of the petitioner for promotion to the post of Personal Professor with utmost diligence and promptitude as soon as he made it on 21.12.2003. Be that as it may, in view of the aforesaid discussions, we are of the opinion that no malice or bad faith can be attributed to the then Vice-Chancellor of the BUET Dr. Alee Murtaza for not processing the application of the petitioner for the post of Personal Professor at the relevant point of time.

23. We find that by Annexure-'E' dated 14.01.2008, the petitioner sought for restoration of his seniority at the earliest opportunity after his promotion as Personal Professor on 07.08.2007. So it appears that the petitioner was vigilant and diligent in the matter of restoration of his seniority as a Professor of the Department of Civil Engineering of the BUET, though that Annexure-'E' dated 14.01.2008 went unheeded. Anyway, the petitioner made another application for restoration of his seniority to the University Authority on 13.12.2010 which was eventually turned down by the impugned order dated 11.06.2012 as evidenced by Annexure-'J-1' to the Writ Petition. This being the panorama, we opine that had the application of the petitioner been processed for promotion to the post of Personal Professor in the Department of Civil Engineering of the BUET immediately after he made the same on 21.12.2003, he might have been appointed to that post on promotion at least on 06.11.2004, the date on which his colleague Dr. Md. Jubair Bin Alam was promoted to the post of Personal Professor.

24. There is no gainsaying the fact that the petitioner lost his seniority through no fault of his own. He was not at fault and this is virtually admitted by the contesting respondent nos. 3

and 4. Regard being had to the decision of the Syndicate dated 29.06.2009, the University Authority could not restore his seniority from the date of his application on 21.12.2003. That decision of the Syndicate dated 29.06.2009 is, no doubt, a stumbling-block in the way of restoration of his seniority.

25. Will the petitioner continue to suffer loss of his seniority through no fault of his own? Is the Writ Court powerless in this regard? In this connection, it may be pointed out that the Writ Court is also a Court of equity. The principles of natural justice, equity and good conscience demand that the seniority of the petitioner be restored at least from the date of promotion of his colleague Dr. Md. Jubair Bin Alam to the post of Personal Professor on 06.11.2004 who admittedly made his application therefor on 28.12.2003 which was subsequent to the date of making of the application by the petitioner on 21.12.2003. In this way, the injustice done to the petitioner, according to us, can be remedied.

26. We find no justification in the contention of Mr. Kamal-ul-Alam that if the seniority of the petitioner is restored, then the seniority of 32(thirty-two) Professors who have been working as Personal Professors since their appointment between the period commencing from 22.02.2004 till the date of the petitioner's appointment as Personal Professor on 07.08.2007 will be adversely affected and there will be serious anomalies in the University Administration. This is because the case of the petitioner is a singularly exceptional case and those 32 (thirty-two) Professors do not stand comparison with the petitioner in any view of the matter.

27. By the impugned order dated 11.06.2012 as evidenced by Annexure-'J-1' to the Writ Petition, we find that a differential treatment has been meted out to the petitioner in relation to his colleague Dr. Md. Jubair Bin Alam who was admittedly made a Personal Professor on 06.11.2004, though his application was subsequent in point of time. What we are driving at boils down to this: the equality clause as contemplated by Article 27 of the Constitution has been hit in the case of the petitioner vis-à-vis the case of Dr. Md. Jubair Bin Alam.

28. Article 27 of our Constitution provides that all citizens are equal before law and are entitled to equal protection of law. Sir Ivor Jennings in his "The Law and the Constitution" stated:

> "Equality before the law means that among equals, the law should be equal and should be equally administered, that like should be treated alike".

29. In the case of Southern Rly Co. V. Greane, 216 U. S. 400, Day-J observed:

> "Equal protection of the law means subjection to equal laws, applying alike to all in the same situation."

30. Chandrachud-J, in the case of Smt. Indira Gandhi V. Raj Narayan, AIR 1975 SC 2279 described his idea of equality in the following words:

> "All who are equal are equal in the eye of law, meaning thereby that it will not accord any favoured treatment to persons within the same class."

31. In the case of the Director-General, NSI….Vs…Md. Sultan Ahmed reported in 1 BLC (AD) 71, our Appellate Division has deprecated double-standard on the part of the executive Government giving a benefit to a particular person and denying the same to another, although they are otherwise equal.

32. Reverting to the case in hand, there is not an iota of doubt that both the petitioner and his colleague Dr. Md. Jubair Bin Alam are similarly situated. So both of them should have been treated alike by the University Authority. Precisely speaking, the University Authority meted out double-standard by way of giving promotion to Dr. Md. Jubair Bin Alam on time and refusing to process the application of the petitioner for promotion on time, though they are otherwise equal. So we highly deprecate this double-standard on the part of the University Authority.

33. From the foregoing discussions and in the facts and circumstances of the case, we have no hesitation in holding that the case of the petitioner ought to have been bracketed with that of Dr. Md. Jubair Bin Alam and the petitioner should have been promoted to the post of Personal Professor at least with effect from 06.11.2004, the date on which Dr. Md. Jubair Bin Alam was promoted to the post of Personal Professor of the self-same Department of Civil Engineering of the BUET. So we are inclined to make the Rule absolute in modified form.

34. Accordingly, the Rule is made absolute in modified form. The impugned Memo No. pwØqi/3H-168/®I-7940 dated 11.06.2012 (Annexure-'J-1' to the writ petition) is hereby declared to be without lawful authority and of no legal effect. The BUET Authority is directed to restore the seniority of the petitioner and promote him to the post of Personal Professor with effect from 06.11.2004, the date on which his colleague Dr. Md. Jubair Bin Alam was promoted thereto. The BUET Authority is also directed to pay all arrear salaries, allowances and other benefits to the petitioner within 90(ninety) days from the date of receipt of a copy of this judgment counting his seniority as a Personal Professor with effect from 06.11.2004.

35. Communicate a copy of this judgment to the respondent nos. 3 and 4 each for information and necessary action.

6 SCOB [2016] HCD 43

High Court Division
(Criminal Appellate Jurisdiction)

Death Reference No. 42 of 2010

The State
Versus
Kalam alias Abul Kalam
- Convict.

Mr.M.A Mannan Mohan,
Deputy Attorney General
with
Mr. Md. Aminur Rahman Chowdhury

with
Mr. Kazi Bazlur Rashid,
Assistant Attorney General
- For the State.

Mr. Begum Ayesha Flora, Advocate,
- State Defence Lawyer.
Heard on 26.07.2015 and
Judgment on 27.07.2015 and 28.07.2015

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

Dying declaration:
A dying declaration, whether written or oral, if accepted by the Court unhesitatingly, can itself provide a strong basis for convicting an accused. ...(Para 48)

Motive when immaterial:
In a murder case like this where the occurrence appears to be proved by the direct evidence of the eye witnesses, the proof of motive is always immaterial. When the proof of any grave offence depends upon the circumstantial evidence, the motive is one of the component to find the accused guilty. ...(Para 53)

Abscondence when material:
From the materials on record we find that soon after the occurrence convict Kalam had fled away and remained absconding during the trial and trial was held in his absentia. Such abscondence of the accused is an incriminating circumstances connecting him in the offence and conduct of a person in aboscondence after commission of crime is an evidence to show that he is concerned in the offence. ...(Para 61)

Judgment

A.N.M. Bashir Ullah, J:

1. This Death Reference being no. 42 of 2010 has been sent by the Additional Sessions Judge, 2nd Court, Kishoreganj under section 374 of the Code of Criminal Procedure (in short, the Code) for confirmation of sentence of death awarded by him upon convict Kalam (who is an absconding convict from the date of occurrence of this case) passed in Sessions case no. 03 of 2003 by his judgment and order dated 21.06.2010 convicting the convict under section 302 of the Penal Code for causing murder of deceased Sohel.

2. The prosecution case as unfurled at trial, in short, is that, Sohel Mia aged about 18 years was a student of class X in the year 2001 having his residential address at village Charfaradi under Pakundia Police Station of Kisoreganj District. On 13.09.2001 at 6.00 pm there was an altercation between the victim Sohel Mia and accused Kalam on a very trifling matter on a bridge 100/150 yards away to the east direction from the house of the victim and at one stage of the said occurrence accused Kalam with an intention to murder victim Sohel Mia had inflicted dagger blow on the throat of the victim causing serious bleeding injury.One Kanak of Kishoreganj and Rabiul, son of Ibrahim, a neighbour of the victim had shifted the victim through a rickshaw to Pakundia Hospital. Md. Azizul Haque, the informant as well as the full brother of the victim being informed of the said occurrence through his cousin Mokhles had accompanied the victim from Pakundia bazaar and on there way on his query the injured victim told the informant that Kalam had inflicted dagger blow on his throat.

3. The doctor of Pakundia Hospital pushing an injection on the victim advised them to shift the victim at Bhagalpur Hospital at Bazitpur and the informant and others without any late started their journey for the said hospital on a microbus but on there way when they reached at Katiadi Upazilla the over all situation of the victim was critical . As a result, they had gone to Katiadi Hospital where the doctor declared the victim Sohel dead.

4. The informant had informed the occurrence to the Katiadi Police Station and the Katiadi Police Station prepared the inquest report on the dead body of the deceased through PW 6 Police Sub Inspector Md. Rabiul Islam and the informant having been at Pakundia Police Station lodged the FIR at 23.05 hours. The occurrence of murder has been witnessed directly among others by Rabi, Mokhles and Rekha Begum.

5. On the basis of the FIR lodged by informant Md. Azizul Haque, Pakundia Police Station case no. 4 dated 13.09.2001 corresponding to G.R case 375(2) 2001 were started under section 302 of the Penal Code and the case was endorsed for investigation to Police Sub Inspector S.I Md. Anower Hossain (PW 8) and ultimately for his transfer to else where the case was investigated by Police Sub Inspector Md. Nawb Ali who on completion of the investigation had submitted Police report recommending the trial of accused Kalam under section 302 of the Penal Code.

6. The Magistrate Court having been received the Police report made the case ready for trial and when the case became ready for trial, the same was sent to the Court of Sessions Judge, Kishoreganj where the case was registered as Sessions case no. 03 of 2003 and the trial of the case was started in the Court of Sessions Judge, Kishoreganj where the charge under section 302 of the Penal Code was framed against the accused Kalam on 10.04.2003. Since the sole accused was an fugitive accused immediate after occurrence his answer on the charge could not be recorded by the Trial Court.

7. At trial the prosecution examined 11 witnesses and their such evidence has been recorded by the Sessions Judge, Kishoreganj. Thereafter on 27.04.2010 the case was transferred in the Court of Additional Judge, 2nd Court who hearing the arguments of the parties pronounced the judgment on 21.06.2010 convicting the convict Kalam under section 302 of the Penal Code and sentenced him to death and also sent the matter to the High Court Division of the Supreme Court of Bangladesh for confirmation of sentence of death as awarded upon the condemned convict Kalam under section 374 of the Penal Code and the same has been registered as Death Reference case no. 42 of 2010.

8. At the time of hearing of this death reference Mr. M.A. Mannan Mohan, the learned Deputy Attorney General (in short, the DAG)appearing along with Mr. Md. Aminur Rahman Chowdhury and Kazi Bazlur Rashid, the learned Assistant Attorney Generals, having taken us through the FIR, charge, post mortem report, evidence, other materials on record and the judgment pronounced by the trial Court submits that it is a case where the innocent victim Sohel Mia was done to death in the hands of the accused Kalam for no fault of him. The accused Kalam happens to be a very notorious and dangerous man in the locality. He for a very trifling matter had murder the deceased Sohel Mia inflicting dagger blow on his throat.

9. He also submits that the occurrence took place at 6.00 pm of the day and the same has been witnessed by eye witnesses Rekha, Mokhles, Rabi and Alamgir who were examined as PWs 2, 3, 4 and 5 in this case at trial. The eye witnesses have given a vivid and smart description of the occurrence as to how the convict Kalam had murdered the deceased inflicting a dagger blow on his throat.

10. The learned DAG also submits that the throat is the most vital and sensitive organ of a human being. Since the accused had the intention to murder the deceased he had inflicted a dagger blow on the vital and at the same time very sensitive part of the deceased like throat. Had the accused no intention to kill the victim by the dagger blow he could have assaulted the victim on any other parts of the deceased. So the very dagger blow on the very sensitive and vital organ of the deceased clearly points out that the accused had assaulted the victim with a total intention to kill him.

11. The learned DAG also submits that the occurrence of this case have been witnessed at least by 03 eye witnesses and apart from those eye witnesses there is a dying declaration of the deceased himself. When the deceased Sohel Mia was taken to Pakundia Hospital he was accompanied among others by the informant Azizul Haque also and on his query, the victim told him in a very clear language that Kalam had inflicted dagger blow on his throat.

12. He also submits that dying declaration whether it is written or oral if the same is proved by the cogent evidence that can be the strong basis to find the accused guilty. The deceased Sohel Mia immediate after occurrence and also immediate before of his last breath made the said dying declaration. It is not usual that a man before his death when he passes a very critical moment of his life would involve any other person leaving the real perpetrator of the crime as such the dying declaration if it is proved can be considered as the solemn and strong basis to find the accused guilty and the dying declaration of the deceased of this case has been proved at trial. The said dying declaration had also been heard by other witnesses namely PWs 3,4, and 5. So the evidence of eye witnesses has been strongly corroborated by the dying declaration of the deceased also.

13. The learned DAG also submits that immediate after occurrence the accused had fled away successfully and thereafter he was never found in the locality, as such, Police could not nab him till now and the accused did not surrender in the Court to face the trial which ultimately indicates about the involvement of the accused with the occurrence of the murder of the deceased. Absconsion of the accused immediate after occurrence with the guilty knowledge is always an incriminating circumstance accessed the accused. So if, the direct evidence of the eye witnesses, the dying declaration of the deceased made immediate before his last breath and the fugitiveness of the convict immediate after occurrence is considered culminatively there would have no alternative but to find that nobody else but the accused

Kalam had murdered the deceased and the trial Court on the right assessment of the evidence and other materials on record found the accused Kalam guilty under section 302 of the Penal Code and considering the gravity of the offence and the direct involvement of the accused and the very nitid and transparent evidence of the prosecution witnesses rightly awarded him the sentence of death. So the same may kindly be upheld and affirmed in this Death Reference.

14. On the other hand, Begum Ayesha Flora, the learned State Defence Advocate appearing for the convict Kalam assailing the judgment and order passed by the trial Court and controverting the argument sofar placed by the learned DAG from the side of the State submits that in a case under section 302 of the Penal Code the motive is all ways important and if it is conceded for a moment that the convict had inflicted a dagger blow on the person of the deceased but the nature of infliction of the dagger blow will go to show that the accused had no any intention to kill the deceased although the deceased died of the said injury and when there appears no motive to cause the murder of the deceased by the accused, the accused should not be held guilty under section 302 of the Penal Code but the trial Court totally failed to consider this important aspect of the present case.

15. She also submits that all the witnesses who were examined by the prosecution are the close relations and the neighbours of the informant party, as such, the trial Court should not have relied upon their such evidence.

16. The learned State Defence lawyer also submits that an accused may abscond for many reasons in our society particularly for the fear of the police torture or to avoid the difficulty of facing the trial but the absconsion is not itself the proof of the guilt of a man. So, the fugitiveness of the convict cannot be considered as an adverse circumstance against him. So, the sentence of death as awarded by the Trial Court should not be affirmed by this Court rather the convict deserves the order of acquittal from this Court in this Death Reference.

17. We have considered the above submissions and arguments given by the learned Advocates of both the parties meticulously and have gone through the materials on record particularly the FIR, the charge, the post mortem examination report, the evidence recorded by the trial Court and the judgment pronounced by the trial Court with profound attention. Now, in order to appreciate the arguments of the learned Advocates of the respective parties, now, let us have a look into the evidence on record.

18. PW 1 Md. Azizul Haque Jaj Mia, the informant of this case admittedly is not an eye witness of the occurrence testified that on 13.09.2001 at 6.00 pm when he had been at Pakundia bazaar, Mokhles informed him that accused Kalam had inflicted a dagger blow on the throat of his younger brother Sohel and also came to know that Rabi, Kanak and Alamgir had started for Pakundia Hospital with the victim Sohel on a rickshaw and he also accompanied with them and on his query Sohel told him that accused Kalam had inflicted dagger blow on his throat. He also stated that the doctor of Pakundia Hospital had advised them to shift the victim at Bhagalpur Hospital and accordingly they were going to Bhagalpur Hospital on a microbu but on there way the condition of victim was critical, as such, they had gone to Katiadi Hospital where the doctor declared his brother dead. He informed the occurrence to the Katiadi Police Station thereafter lodged the FIR with Pakundia Police Station. He proved the FIR and his signature on it, marked exhibits 1 and 1/1. He identified the blood stained shirt of the deceased, marked material exhibit 1 and a napkin which was used to stop the bleeding from the cut injury has been marked as material exhibit II . He also

stated that immediate after occurrence a snap of his injured brother was taken. The photos have been marked as material exhibits IV. He also stated that the occurrence of murder had been witnessed by witnesses Rabi, Kanak and Alamgir.

19. In cross examination of the state defence he has stated that Rekha is his neighbour and Mokhles. Rabi and Alamgir are his cousins. The witness Azaharul Islam Kanak is his distant relative. The FIR was written by the Police Officer of the Police Station. He denied the state defence suggestion that no such occurrence had taken place as stated by him.

20. PW 2 Rekha Begum has testified that both the parties are known to her, She is a neighhour of both the deceased and the accused, the occurrence took place at 6.00 pm on 29th Bhadra, She was infront of her house and the bridge is only 20/25 hands away from her house, She found an altercation between Kalam and Sohel, Kalam uttering a slang language and also shouting that he would kill Kalam had inflicted a dagger blow on the throat of the victim, thereafter he fled away towards east direction, she, Rabi, Alamgir and Kanak had rushed to the victim, Rabi bringing a napkin from his house tried to stop the bleeding from his throat, thereafter they tried to shift the victim to hospital, Mokhles informed the occurrence to the informant at bazar.

21. In cross examination of the state defence she has stated that Mokhles is his full brother and there is no any house between the place of occurrence and her house, the occurrence had been witnessed by also Rabi, Kanak and Alamgir, She had witnessed the occurrence only 10 hands away from the place of occurrence, the bloods were gushing from the throat of the deceased. She denied the defence suggestion that she did not witness the occurrence.

22. PW 3 Mokhles has testified that both the deceased and accused are known to him and both of them are his neighbours, the occurrence took place at 6.00 pm on 29th Bhadra, he was going to Pakundia bazar riding on a motorcycle, there is a bridge adjacent to the east of his house where he found Sohel and Kalam in an altercation, Kalam uttering a very slang language and also shouting that he would kill Sohel had inflicted dagger blow on the throat of the deceased and he found the occurrence 100 hands away from the place of occurrence, Rabi, Alamgir and Kanak also had witnessed the occurrence, Kalam fled away successfully through east direction, Alamgir and Kanak tried to help Sohel, Rabi bringing a napkin from his house tried to stop the bleeding from the throat of the victim. He informed the occurrence to the informant at Pakundia bazaar, Rekha also had witnessed the occurrence like them, on their way to hospital victim Sohel Mia told his brother Jaj Mia that Sohel had inflicted dagger blow on his throat, immediate after occurrence accused Sohel had fled away and thereafter he was never found in the locality. In cross examination of the state defence PW 3 stated that Pakundia bazar is within one kilometer from his house, he tried to save Sohel but could not reach to them as the accused was armed with dagger. He denied the defence suggestion that he did not witness the occurrence.

23. PW 4 Rabi has testified that the occurrence had taken place on 13.09.2001 at 5.45/6.00 pm, he, Alamgir and Kanak had been passing some times at the western side of Charlakkhia bridge, they found Sohel and Kalam in an altercation on the bridge, Kalam rebuked Sohel with the reference of his mother, Sohel was protesting the same and at that juncture of the occurrence Kalam uttering a slang language and also shouting that he would kill Sohel had inflicted dagger blow on the throat of the Sohel, thereafter Kalam fled way through east direction, Kanak and Alamgir tried to help Sohel, he brought a napkin from his

house, thereafter tried to stop the bleeding from the throat of the deceased, the occurrence had been witnessed like them by Rekka and Mokhles, Mokhles informed the occurrence to the informant at Pakundia bazaar, they were going to Pakundia Hospital on a rickshaw with Sohel and on there way on the query of the informant Sohel informed his brother that Kalam had inflicted dagger blow on his throat.

24. He also stated the doctor of Pakundia had advised them to shift the patient at Bhagalpur Hospital but he ultimately did not accompany with them. He also stated that he had deposed before the Magistrate, he proved his deposition before the Magistrate, marked exhibit 4. In cross examination of the state defence he stated that he had been only 15/16 hands away from the place of occurrence, he did not know exactly what was the issue of the altercation between Kalam and Sohel, they did not give much importance of that altercation, he found the accused to inflict dagger blow on the deceased, Kanak and Alamgir also had witnessed the same. He denied the defence suggestion that he did not witness the occurrence.

25. PW 5 Alamgir Hossain testified that on 13.09.2001 at 6.00 pm he, Kanak and Rabi had been roaming in the western side of Charlakkhia bridge when they found Kalam and Sohel in an altercation on the said bridge, Kalam rebuked Sohel with reference to his mother and since Sohel protested the same Kalam uttering a slang language and also shouting that he would kill him had inflicted dagger blow on the throat of Sohel, thereafter he fled away towards the east direction, they tried to help Sohel, Rabi brought a napkin from his house and tried to stop the bleeding, they shifted Sohel at Pakundia Hospital, on there way to hospital Sohel told his brother Jaj Mia that Kalam had inflicted dagger blow on his throat. He further stated that he had deposed before the Magistrate, he proved his deposition before the Magistrate, marked exhibit 5. In cross examination of the state defence he denied the defence suggestion that he did not witness the occurrence.

26. PW 6. Police Sub Inspector Md. Rabiul Awal testified that on 13.09.2001 he had been posted at Katiadi Police Station and he on the basis of a requisition from the Medical Officer of Katiadi Hospital and also on the basis of the G.D no. 846 dated 13.09.2001 had prepared the inquest report on the dead body of Sohel at Katiadi Hospital, he proved the inquest report of Sohel, marked exhibit 1, thereafter he sent the dead body to the Kishoreganj morgue through Police Constable Md. Badiur Rahman for post mortem examination. In cross examination of the state defence he stated that he had found an injury on the left side of the throat and save and except the preparation of the inquest report he did not know anything in connection of this case.

27. PW 7 doctor Md. Israil Hossain testified that on 14.09.2001 he had been posted at Kishoreganj Sadar Hospital, on that day at 3.00 pm he held the post mortem examination on the dead body of Sohel and found the following injuries:

1.One incised wound at the anterior aspect of the neck about 2"X$\frac{1}{2}$"X 1$\frac{1}{2}$" cutting trachea and its adjacent structures. He further stated that in his opinion death was due to shock and haemorrhage as a result of injury which was antemortem and homicidal in nature. He proved the post mortem examination report and his signature on it, marked exhibit 7 and 7/1. In cross examination of the defence he stated that he had found the incised wound on the person of the deceased.

28. PW 8 Md. Anwar Hossain, Police Sub Inspector and the first Investigating Officer of this case testified that on 13.09.2001 he had been posted at Pakundia Police Station, the case

was recorded by the then O.C Nur Ahammad, he proved the FIR columns and signature of Nur Ahammad on it, marked exhibits 8 and 8/1. He further stated that he investigated the case and at the time of investigation he had visited the place of occurrence, prepared the sketch map of the place of occurrence along with its index, he proved the sketch map, marked exhibit 9 and index exhibit 10, recorded the statements of the witnesses under section 161 of the Code, seized the alamats under seizure list, he proved his signature on the seizure list, marked exhibit nos. 3/4, produced 2/3 witnesses before the Magistrate for recording their statements and procured the post mortem examination report and since he was transferred in the district of Tangail he had handed over the case docket to the officer-in-charge. In cross examination of the state defence he stated that the then O.C Nur Ahammad is still alive but he cannot say where he has been serving now, he had gone in the place of occurrence in the night of occurrence at 1.15 hours and he examined 03 witnesses on that day, the occurrence of this case took place on a culvert, he did not mention the length and breadth of the said culvert, since the dagger which was used in causing the murder of the deceased could not be traced out the same had not been seized also, he examined Rabi on 14.09.2001, Rabi did not state anything to him that he was chatting with others on the western side of the bridge, Rekha and Mokhles also did not state anything to him that they had witnessed the occurrence; Alamgir also did not state anything to him that he had witnessed the occurrence. He denied the defence suggestion that he did not investigate the case properly.

29. PW 9 Md. Rais Uddin, the then Magistrate First Class testified that on 16.09.2001 he had been posted as Magistrate First Class at Kishoreganj Collectorate, he on that day had recorded the statements of witnesses Azharul Islam Kanak, Rabi and Alamgir Hossain in connection of the Pakundia Police Station case no. 4 dated 13.09.2001. He proved the statements of witnesses Rabi, Alamgir and Kanak, marked exhibit nos. 4, 5 and 11 respectively. In cross examination of the state defence he stated that the investigating officer Police Sub Inspector Md. Anwar Hossain had produced those witnesses before him for recording their statements. He did not mention the time of the recording of their statements. He also stated that he had recorded the statements of the witnesses which they said to him.

30. PW 10 Nur Ahammad, the then Officer-in-Charge of Pakundia Police Station testified that on 13.09.2001 he had been posted as Officer-in-charge at Pakundia Police Station, he recorded the present case filling up the FIR columns. He further stated that Police Sub Inspector Nowab Ali had submitted the Police report in this case, his signature is known to him as he worked under him, the case was investigated firstly by Police S.I. Anwar and thereafter by Md. Nawab Ali and they have no imformation as to the whereabouts of Police S.I. Nowab Ali, later on he also stated that he heard it that Nowab Ali had been living in America now. In cross examination of the state defence he stated that Police S.I Nowab Ali did not record the statement of any witness, the first I.O had recorded the statements of the witnesses and the second I.O. did not even prepare any fresh sketch map.

31. PW 11 and the last witness Masud Rana testified that in his presence the Police had prepared the inquest report. He found wound on the throat of the deceased which was given by a sharp weapon, he proved the inquest report and his signature in it, marked exhibit nos. 6 and 6/1. In cross examination he stated that the police officer had prepared the inquest report thereafter he signed it.

32. These are the evidence that have been given by the prosecution in this case. From the evidence discussed above it is found that the prosecution examined 11 witnesses out of which PWs 1-5 and 11 (6 in numbers) are the local witnesses while PWs 9 is the Magistrate who

recorded the statements of 03 witnesses, PWs 06 prepared inquest report, PW 8 is the investigating officer, PW 10 is the recording officer and PW 7 is a doctor who held the post mortem examination on the dead body of the deceased.

33. The prosecution case as has been found, in short, is that there took place an altercation between deceased Sohel and accused Kalam on a bridge at village Charlakkhia and at one stage accused had inflicted dagger blow on the throat of the deceased as a result of the said injury within a short period of one or two hours the deceased took his last breath on the way to Bhagalpur Hospital from Pakundia. After the death of the deceased post mortem examination on the dead body of the deceased was held by the PW 7 doctor Md. Israil Hossain who in his evidence stated that he had found one incised wound at the anterior aspect of the neck about 2''X$\frac{1}{2}$X1$\frac{1}{2}$'' cutting the trachea and its adjacent structures and in his opinion the death was due to shock and hemorrhage as a result of the said injury which was antemortem and homicidal in nature.

34. PWs 2, 3, 4 and 5 who are the eye witnesses of the occurrence in a very chorus voice testified that they had found accused Kalam to inflict a dagger blow on the throat of the deceased and immediate after occurrence he (PW 4) bringing a napkin from his house tried to stop the gushing bleeding from the throat of the deceased. Thus the evidence of the ocular witnesses as to the assault on the throat of the victim by accused Kalam is very much consistent with the post mortem examination report.

35. The doctor found cut injury on the anterior aspect of the neck that is infront of the neck and he also found that his trachea at its adjacent structure were also cut. Thus from the very evidence of the ocular witnesses as well as from the medical evidence it has been found that deceased Sohel Mia was done to death in the occurrence of this case.

36. In this case though trial was not faced directly by the accused himself but he was defended by the state defence lawyer. There is no case on the part of the defence that the deceased Sohel Mia had met his death in any other manner than that of the alleged occurrence. Both the evidence of ocular witnesses and the medical evidence is very much harmonical regarding the cause of death of the deceased.

37. Now, let us examine as to who is responsible for the causing murder of the deceased Sohel Mia. PW 2 Rekha Begum testified that she had witnessed the occurrence 20/25 hands away from the place of occurrence. She had found the accused to inflict a dagger blow on the throat of the deceased. PW 3 Mokhles, PW 4 Rabi and PW 5 Alamgir almost in a chorus voice very consistently testified that when the deceased and victim were at logger head on a bridge at village Charlakkhia at one stage of that occurrence accused Kalam had inflicted dagger blow on the throat of the deceased. These witnesses were cross examined by the state defence lawyer but by a such cross examination their evidence have not been shaken away in any way.

38. At the time of hearing of this Death Reference the learned Advocate for the state defence assails the evidence of these 04 witnesses blemishing them as near relatives but in fact none of them are near relative of the deceased rather they are the simply neighbours of the deceased and same phenomenon is also applicable to the accused also. So I find nothing wrong for which the evidence of these 04 witnesses can be disbelieved or discarded from consideration on those flimsy grounds.

39. Over and again in the FIR it has been clearly asserted that Rekha, Mokhlesh and Rabi had witnessed the occurrence, as such, we find that at the very initial stage of the case it was within the knowledge of the informant that the occurrence of the murder had been witnessed by these 03 witnesses and they coming in the Court gave a vivid description of the occurrence as to how the accused Kalam had inflicted dagger blow on the throat of the deceased.

40. In this case though the name of the PW 5 did not appear in the FIR as eye witness but he had deposed in the Court as eye witness and PW 5 Alamgir Hossain stated that he Alamgir and Kanak had been roaming and chatting near the bridge at the time of occurrence. So I find that Alamgir is also another eye witness of this case. The evidence of the eye witnesses namely PWs 2, 3, 4 and 5 appear to be very much unblemished and gorgeous in nature and by their such evidence it has been proved beyond all reasonable doubt that nobody else but Kalam had inflicted the dagger blow on the throat of the deceased Sohel.

41. In this case apart from those eye witnesses there appears a dying declaration of the deceased Sohel. PW 1 Azizul Haque, the full brother of the deceased testified in the following ways:

> ''কয়েক মিনিটের মধ্যেই তাহারা আমার জখমী ভাইকে আনিলে আমিও রিকশার সংগে হাসপাতালের দিকে যাইতে থাকি। আমি ভাই সোহেলকে জিজ্ঞাসা করি যে কে তাহাকে মারিয়াছে। তখন সে আমাকে জানায় যে, আসামী কালাম ছোরা দিয়া তাহার গলার পিছনে পার দিয়াছে।''

42. This evidence relating to the dying declaration of the deceased has been corroborated by PW 3 Mokhles. Mokhles in his evidence testified in the following ways:

> ''হাসপাতালের পথে জজ মিয়া জিজ্ঞাসা করে তোরে কেডা মেরেছে তখন সোহেল বলে কালাম তারে ছুড়ি দিয়ে পাড় দিয়েছে। ''

43. PW 4 Rabi in his evidence regarding the dying declaration stated in the following ways:

> ''**এমন সময়** সোহেলকে নিয়ে আমরা পাকুন্দিয়া পৌছি। জজ মিয়া সোহেলকে জিজ্ঞাসা করলে সোহেল বলে কালাম ছুড়ি দিয়ে তার গলায় পার মোরেছে।''

44. PW 5 Alamgir Hossain on the said subject matter stated in the following ways:

> ''জজ মিয়া বের হলেই দেখে আমরা সোহেলকে হাসপাতালে নিতেছি। জজ **মিয়া তার ভাই** সোহেলকে জিজ্ঞাসা করিলে বলে কালাম ছুরি দিয়ে তার গলায় পার দিয়েছে। ''

45. From the above noted evidence of PW 3 Moksed, PW 4 Rabi and PW 5 Alamgir it appears that they very consistently testified in the trial Court that deceased Sohel Mia in their presence had told the name of accused to PW 1 as striking offender but Rabi and Alamgir were examined by the Magistrate during the investigation and from the said statements it appears that they did not tell anything about the dying declaration of the deceased. So we are not inclined to place any reliance on the evidence of PWs 4 and 5 regarding the dying declaration.

46. However, in the case of Hafiz Uddin Vs. State 42 DLR 397 it has been held by this Court in the following way:

> "Dying Declaration is admitted in evidence under section 32 of the Evidence Act and it stands on the same footing as other evidence on record. Before acting upon any Dying Declaration, it should be looked at from

> several stand points. Firstly, the Court is to see whether the victim had the physical capability of making such declaration. Secondly, whether the witnesses who heard the deceased making the statement, heard it correctly or not and whether they have reproduced the names of the assailants correctly in Court. Thirdly, the Court is to see whether the maker of the Dying Declaration had any opportunity to recognise the assailants."

47. Now From the evidence of PWs 1 and 3 it is found that they heard the name of accused Kalam correctly as assailant and reproduced the same before the Court. It also further appears that immediate after occurrence and immediate before the death of the deceased he had told the name of the accused. So it reveals that he had physical capacity to say the name of the accused at the relevant time.

48. In this particular case the dying declaration of the deceased Sohel was not recorded by any person and the dying declaration appears to be a oral dying declaration. In the case of Salim (Md.) Vs State 54 DLR 359 it has been held by this Court that the law on dying declaration is fairly well settled now as it has been held by consistent judicial pronouncement that a dying declaration, whether written or oral, if accepted by the Court unhesitatingly, can itself provide a strong basis for convicting an accused.

49. As we have found from the case in our hands that dying declaration of the deceased Sohel is very much consistent with the evidence of the eye witnesses. So we are of the opinion that the deceased Sohel Mia had given a real version of the occurrence naming the real perpetrator to his brother PW 1 Azizul Haque. So, the dying declaration of the deceased appears to be very much fair, legal and corroborative along with the evidence of the eye witnesses of this case.

50. Learned state defence lawyer very empathically argued before us that at the time of altercation between deceased and accused, the accused had inflicted a single dagger blow on the throat of the deceased. So the same ultimately reveals that he had no any motive or intention to murder the deceased. She also categorically tried to establish that since the accused had no any motive to murder the deceased, the accused should have not been convicted under section 302 of the Penal Code.

51. In answering the argument of the learned state defence lawyer, the learned DAG submits that this is not a case that during the altercation between the deceased and the accused, the accused had inflicted any wooden blow or hand blow to the deceased rather the facts of the case will go to show that the accused had inflicted a dagger blow on the throat of the deceased and throat is one of the vital organ of human being and the medical evidence will go to show that for the single dagger blow the trachea along with its adjacent structure of the deceased were cut.

52. It is known to us that the life of the human being runs through the trachea and when any creature is forbidden to take breath the ultimate result is death. The accused leaving all the parts of the deceased had inflicted dagger blow on the throat cutting the trachea of the deceased which reveals that he had the only intention to quit the life of the deceased. Had the accused no intention to murder the deceased he could have assaulted the victim on any other parts of the deceased. So it is difficult to hold that the accused had no any intention to murder

the deceased. As such we are unable to accept the arguments of the state defence lawyer that the accused had no intention to murder of the deceased.

53. Over and again, in a murder case like this where the occurrence appears to be proved by the direct evidence of the eye witnesses, the proof of motive is always immaterial. When the proof of any grave offence depends upon the circumstantial evidence, the motive is one of the component to find the accused guilty and the same view has been taken the numerous cases including the case of State Vs Giasuddin 51 DLR (AD) 103. In this reported case Appellate Division held in the following manner:

> "What can we say about the view taken by the High Court Division about the motive of the accused party? The prosecution is not bound to prove motive. Yet the High Court Division insisted on the proof of motive. There are as many as 10 eye witnesses to the murder of 4 persons. Where there is sufficient direct evidence to prove an offence, motive is immaterial and has no vital importance. While trying a case under section 302 of the Penal Code or hearing an appeal involving that section, the Court must not consider first the motive for the murder, which the High Court Division has erringly done in the present case, because motive is a matter of speculation and it rests in the mind and special knowledge of the accused persons. Motive is not a necessary ingredient of an offence under section 302 of the Penal Code. The Court will see if sufficient direct evidence is there or not. If not, motive may be a matter for consideration, specially, when the case is based on circumstantial evidence." (Para 22 of the judgment)

54. In the case of State Vs Lalu Mia 39 DLR (AD)117 the Appellate Division also held in the following manner:

> "It is true that in criminal trial the question of motive is of very little importance when there is direct and reliable evidence to prove the crime. But in a case that depends solely on circumstantial evidence, as in this case, the proof of motive would form one of the links, the first link in the chain of circumstantial evidence, and an absence of reliable proof as to motive itself becomes a relevant factor in considering the evidence relating incriminating circumstances alleged against the accused. "
>
> (Para 52 of the judgment, page-141)

55. Thus it can safely be said relying upon the above decisions of the Appellate Division that in a criminal trial, question of motive has a very little importance when there is direct and reliable evidence to prove the crime. What have been found in this particular case that the occurrence of murder of Sohel was witnessed by at least 04 eye witnesses who have given evidence in the Court as eye witnesses and in their cross examination their such evidence have not been shaken away in any way. So the proof of motive of the accused is immaterial in such a case.

56. In this case the sole accused Kalam appears to be a fugitive accused from the date of occurrence that is after the commission of the offence he was never found in his locality. The trial was held in his absentia and the Death Reference has also been heard in his absence although he has been defended by the state defence lawyer at every stage of the proceeding.

57. In the case of Abul Kashem-vs-State 56 DLR 133 it was held that absconsion of the accused itself is not an incriminating material against an accused inasmuch as even an

innocent person implicated in a serious crime sometimes absconds during the investigation to avoid repression by the police.

58. It is fact that the absconsion of an accused is not the conclusive proof of his guilt and sometimes to avoid the police harassment an accused may abscond. But the record is going to show that immediately after occurrence accused Kalam had fled away and thereafter he was never found in the locality till now The above facts indicate that when the local people had found accused Kalam to inflict dagger blow on the deceased he perceiving the consequence of his involvement with the gruesome murder of Sohel fled away before the recording of the case.

59. Thus, we find that the trial of this case was held in the absentia of convict Kalam from the very early stage of the case and at present there is no whereabouts of him. Such abscondence of convict Kalam is considered to be a corroborating evidence against them (PLD 1969 SC 89, Gul Hassan and another-Vs-the State).

60. In the case of Nizam Hazari-Vs-State, 53 DLR 475 it was held in the following ways:

> "No inflexible rule can be laid down on abscondence. Abscondence of an accused will be judged in the light of the facts and circumstances of the case. Absondence of accused, sometimes furnishes corroboration of prosecution evidence. But abscondence by itself may not afford corroboration to the interested testimony yet in the body of the evidence it has its own significance."(para 23 fo the judgment)

61. From the materials on record we find that soon after the occurrence convict Kalam had fled away and remained absconding during the trial and trial was held in his absentia. Such abscondence of the accused is an incriminating circumstances connecting him in the offence and conduct of a person in aboscondence after commission of crime is an evidence to show that he is concerned in the offence.

62. In the case of Mobrak Hossain-Vs-State, 1981 BLD 286 it was held that absondence of accused is a relevant fact under section 9 of the Evidence Act and unless accused explains his conduct, absondence may indicate guilt of the accused.

63. Taking into account, the absconsion of the convict Kalam soon after the occurrence and before starting of the case furnishes sufficient corroboration in the commission of crime and if all the materials are taken culminatively, points to the only hypothesis of the guilt of the convict and not towards his innocence.

64. In the case of Zakir Hossain and another-Vs-State 55 DLR 137 wherein it is held in the following ways:

> "It is obvious that accused appellant remained absconding with clear cut guilty knowledge about his overt act in the occurrence resulting in murder of the son of informant, PW 1 Moslem and, as such, his absconsion will create adverse opinion against him. It is true that sometimes absconsion takes place due to apprehension of police harassment and threat but when absconsion takes place by anyone with guilty knowledge he cannot take any plea of police harassment."(para 49 of the judgment)

65. The above view has also been reflected in the case of State-Vs-Lalu Miah reported in 39 DLR(AD) 117 wherein it was held that absconsion by itself has no fault as it may be due to apprehension of police harassment, but absconsion with guilty knowledge will be an offence and it will be used against the absconder.

66. From the case in our hands we have found that convicts Kalam had remained absconding during trial of the case being quite aware of the proceeding against him with the guilty knowledge as to his direct participation in the offence about murder of the deceased Sohel. Therefore, in the light of above decisions, the absconsion of Kalam with his above guilty knowledge will operate against him and it was not an absconsion for mere apprehension of police harassment or for any other reason.

67. Having regards to the above decisions, the preponderant views emerged that an accused absconds immediate after occurrence when he did not find any physical and mental courage to face the trial for the allegation of the crime is undoubtly a strong corroboration to his guilt. As it has been found that the eye witnesses found the accused to inflict the dagger blow on the deceased thereafter he had fled away successfully and from then he was never found in the locality as a result police could not even arrest him. So his such absconsion also a strong corroboration to his guilt.

68. Having regards to the facts and discussions made above we are of the view that the convict Kalam had inflicted dagger blow on the throat of the deceased which is considered as most vital part of a human being causing the murder of the deceased and considering the direct evidence and other materials on record the trial Court rightly found Kalam guilty under section 302 of the Penal Code and considering the gravity of the offence and involvement of the accused with the occurrence of the murder of the deceased Sohel sentenced him to death. We find no extenuating circumstances to commute his such sentence from death to any other sentence.

69. In the result, the death reference is accepted and the death sentence of the convict Kalam alias Abul Kalam will be executed whenever he surrenders or being arrested by the law forcing agency in the terms and condition as given by the trial Court.

70. Let a copy of this judgment and order be communicated to the concerned Court for necessary action along with the lower Court's record at once.

6 SCOB [2016] HCD 56

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 3807 of 2009
With
WRIT PETITION NO. 2788 of 2009
With
WRIT PETITION NO. 3272 of 2009
With
WRIT PETITION NO. 2100 of 2009
With
WRIT PETITION NO. 5641 of 2009.

Barakatuallah Electro Dynamics Ltd
…... Petitioner.
-Versus-
Bangladesh Power Development Board and others
.... . Respondents

Mr. Mustafizur Rahman Khan, Advocate
..For the petitioner in all the writ petitions.
Mr. Md. Hefzul Bari with Ms. Khalifa Shamsun Nahar Bari, Advocate
…For the respondent no. 1 and 2 in Writ Petition Nos. 3807 of 2009, 2788 of 2009 .and 3272 of 2009

Mr. Mir Md. Joynal Abedin with
Mr. Mr. Mohammad Al-Amin, Advocates
..for the respondent no. 1-2 in W.P. No. 5641 of 2009.

Mr. Tufailur Rahman, Advocate
..for the respondent nos. 1-2 in W.P. No. 2100 of 2009.

Ms. Israt Jahan, D.A.G. with
Mr. Shams-ud-Doha, A.A.G with
Ms. Nurun Nahar, A.A.G
…..For the respondent no.5 and 3 and 4 in W.P. No. 2788 and 2100 of 2009 respectively.

Heard on: 08.09.2015, 15.11.2015, 17.11.2015,23.11.2015 and 30.11.2015.
Judgment on: 08.12.2015 & 09.12.2015.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice J. N. Deb Choudhury

Bangladesh Power Development Board Order, 1972
Article 2:
It appears from Clause-(d) of Article-2 of P.O. 59 of 1972 that the term "Government" has been specifically defined therein. According to the said provision, "Government" means the Government of the People's of Bangladesh. Clause-(h) of Article-2 further provides that "Power Board" means Bangladesh Power Development Board as constituted by the said PO 59 of 1972. The very definition of these two terms clearly indicates the intention of the Legislature in that the Legislature wanted to keep these two terms separately with separate definitions. ...(Para 12)

Doctrine of estopple:

It is known to all that Bangladesh at a time suffered so many disadvantages because of lack of electricity supply. It is very much understandable that as against such background this kind of facilities or fiscal benefits have been given by the government through the said SRO. Therefore, we do not find any other appropriate word in any dictionary to describe them by any other term than "incentives". The ordinary dictionary meaning of the word "incentive" as given by the Oxford Advanced Learner's Dictionary (new 8th Edition) also supports this view of ours. Thus, it appears that the benefits given by the said SRO were in fact 'incentives' given to such establishments who were willing to establish power generation station in the private sector to generate electricity. The very basic term of the contract does also denote that the same was entered into for establishment of power generation plant on rental basis for generation of electricity, and the BPDB also entered into contract under sub-article (5) of Article 10 of P.O. 59 of 1972 to purchase such electricity from the petitioner company in accordance with the said agreement in order to distribute the same in the country. Therefore, while the petitioner was executing the said contract with BPDB in 2008, the contents of the said SRO issued in 1997 were very much within the knowledge of the petitioner, and knowing very well that it would not be able to get any benefit from the said SRO, it executed the said contract. Therefore, we are of the view that since the petitioner entered into contract with a clear declaration that it would not take any benefit from the fiscal incentives already given or to be given by the government in the private power generation sector of the country, it is now estopped from going back and say that it is entitled to such incentives. ...(Para 23)

Judgment

SHEIKH HASSAN ARIF, J:

1. Since the questions of law and facts involved in the aforesaid five writ petitions are almost same, they have been taken up together for hearing, and are now being disposed of by this common judgment.

2. Rules in the aforesaid writ petitions were issued in similar terms, namely calling upon the respondents to show cause as to why the same Memos, namely Memo No. 50 BIUBO(ShoChi)/Unnayan-175/2005, all dated 21.01.2009 (Annexure-A in all writ petitions), issued by the Bangladesh Power Development Board (respondent no.1), refusing to issue certificate in terms of Table 1, Clause (2) of SRO No. 73-Ain/97/1700/Shulka dated 19.03.1997 (Annexure A-1), should not be declared to be without any lawful authority and are of no legal effect and as to why they should not be directed to allow the petitioner the benefit of exemption from import duty, VAT and supplementary duty as per the said SRO with respect to the plants and equipments etc. imported by the petitioner under Bills of Entry Nos. C-66139 and C-117929, both dated 27.05.2009, Bills of Entry No. C-62928, dated 23.03.2009, C-82720 dated 15.04.2009, C-85603 dated 19.04.2009, C-85619 dated 19.04.2009, C-32621 dated 27.03.2009, C-32822 dated 27.03.2009, C-41811 dated 12.04.2009, C-41817 dated 12.04.2009, C-43400 dated 16.04.2009, C-43401 dated 16.04.2009, C-43952 dated 18.04.2009, C-14591 dated 15.04.2009, C-14593 dated 15.04.2009, C-14599 dated 15.04.2009, C-15065 dated 19.04.2009, Bills of Entry No. C-18261 dated 11.05.2009, C-18255 dated 11.05.2009, C-50518 dated 30.04.2009, C-54658 dated 05.05.2009, C-55272 dated 07.05.2009, C-100746 dated 06.05.2009, C-101566 dated

07.05.2009, Bills of Entry Nos. C-30308, C-30309, C-30310, C-30311 all dated 19.03.2009, C-30573, C-30580, C-30591 all dated 31.03.2009 and Bill of Entry No. C-101134 dated 10.08.2009 for establishing power generation station in Bangladesh.

3. Background Facts:

Short facts, relevant for the disposal of the aforesaid Rules, are that the same petitioner, being a limited company and engaged in the business of Power generation, participated in the tender floated by the Bangladesh Power Development Board (BPDB). Having become successful in the said tender, the petitioner entered into a power supply agreement, being No. 09699 dated 28.04.2008, with BPDB to establish a 51 Megawatt rental power station in Fenjugonj on rental basis for a term of 15 (fifteen) years. Accordingly, before commencement of commercial operation, it started importing different plants and equipments for establishing the said power generation station in order to generate electricity and supply the same under the said contract with BPDB. The said plants and equipments were imported from China and Canada under Letter of Credit Nos. 235908010339 dated 03.12.2008, opened through the trust Bank Ltd, Dhaka, Letter of Credit No. 308509010049 dated 13.01.2009, opened through the BRAC Bank Ltd. Gulshan, Dhaka, Letter of Credit Nos. 235908010338, 235908010340, 2359080103412, all dated 03.12.2008, L/C Nos. 308509010049, 308509010050, both dated 13.01.2009, L/C Nos. 308509010080, 308509010081, both dated 18.01.2009, L/C Nos. 308509010109 dated 29.01.2009, No. 308509010164 dated 17.02.2009, No. 308509010263 dated 15.03.2009, Letter of Credit Nos. 308509010263 dated 15.03.2009, L/C No. 308509010047 dated 13.01.2009, L/C No. 308509010049 dated 13.01.2009, L/C No. 308509010295 dated 23.03.2009, L/C No. 308509010111 dated 01.02.2009, L/C Nos. 235908010338 and 235908010342, both dated 03.12.2008, Letter of Credit No. 308509010021 dated 05.01.2009, L/C No. 308509010048 dated 13.01.2009, L/C No. 308509010049 dated 13.01.2009, L/C No. 308509010080 dated 18.01.2009 and Letter of Credit No. 308509010046 dated 13.01.2009 opened through different banks. Under the said letters of Credit, partial shipments were allowed. Upon arrival of the above equipments and plants, the petitioner submitted Bills of Entry, being Nos. C 66139 and C-117929 both dated 27.05.2009, Bills of Entry No. C-62928 dated 23.03.2009, C-82720 dated 15.04.2009, C-85603 dated 19.04.2009, C-85619 dated 19.04.2009, C-32621 dated 27.03.2009, C-32822 dated 27.03.2009, C-41811 dated 12.04.2009, C-41817 dated 12.04.2009, C-43400 dated 16.04.2009, C-43401 dated 16.04.2009, C-43952 dated 18.04.2009, C-14591 dated 15.04.2009, C-14593 dated 15.04.2009, C-14599 dated 15.04.2009, C-15065 dated 19.04.2009, Bills of Entry No. C-18261 dated 11.05.2009, C-18255 dated 11.05.2009, C-50518 dated 30.04.2009, C-54658 dated 05.05.2009, C-55272 dated 07.05.2009, C-100746 dated 06.05.2009, C- 101566 dated 07.05.2009, Bills of Entry Nos. C-30308, C-30309, C-30310, C-30311 all dated 19.03.2009, C-30573, C-30580, C-30591 all dated 31.03.2009 and Bill of Entry No. C-101134 dated 10.08.2009.

4. It is stated that, the Government issued SRO, being SRO No. 73-Ain/97/1700/Shulka dated 19.03.1997, in exercise of powers under Section 19 of the Customs Act, 1969 and Section 14 (1) of the Value Added Tax Act, 1991 granting exemptions from payment of customs duties, Value Added Tax, supplementary Tax, amongst others, at import and other stages for those plants and equipments to be imported permanently for establishing the said power generation station. In order to get such exemption, the conditions under Table-1 of the said SRO require the petitioner to obtain a certificate from the respondent no. 1 (BPDB) certifying that: (1) the importer is contracted with the government for establishing a power generation station, (2) the importer has not yet commenced commercial production and (3) the imported plants and equipments are directly related to generation of the electricity and

shall be used for the purpose of the contract. As the petitioner started the aforesaid importations of plants and equipments, it applied to the BPDB by its different letters, all dated 14.01.2009, requesting the BPDB to issue the said certificate so that the petitioner could obtain exemption pursuant to the said SRO. In reply to such prayer, respondent No. 1, vide impugned memos, all dated 21.01.2009, declined to issue such certificate holding that as per the terms of the said contract, the petitioner would be entirely responsible for payment of all income tax, other Taxes, VAT and duties imposed or incurred inside and outside Bangladesh and, accordingly, income tax, Vat etc. should be deducted at source and that the fiscal incentives provided in the Private Sector Power Generation Policy of the Bangladesh government would not be applicable in case of the petitioner's such plants and equipments. Being aggrieved by such refusals, the petitioner moved this Court and obtained the aforesaid Rules.

5. The Rules are opposed by the BPDB and concerned Commissioner of Customs by filing affidavits-in-opposition in some writ petitions. The common contention of the respondents are that the contract in question being a commercial contract, writ is not maintainable and that as per the terms of the contract as well as the said SRO, the petitioner is not entitled to get such exemption as claimed and that there being an arbitration clause in the contract, the dispute between the parties should be resolved through arbitration.

6. Submissions:

Mr. Mustafizur Rahman Khan, learned advocate appearing for the petitioner in all the writ petitions, at the outset, has drawn our attention to the very SRO in question, namely SRO No. 73 dated 19.03.1997. Mr. Khan submits that the petitioner having fulfilled all the terms and conditions mentioned under Table-A of the said SRO, the BPDB was legally bound to issue certificate in terms of Appendix-1 thereto in favour of the petitioner thereby enabling the petitioner to get the said tax and duty exemptions. As regards the terms of the contract, in particular the terms therein to the effect that the petitioner would not claim any fiscal incentives provided by the government of Bangladesh in private sector power generation policy, Mr. Khan argues that the word 'incentives' only relates to performance. Therefore, according to him, the benefit which has been given by the said SRO dated 19.03.1997 cannot be called 'incentives' and as such the said benefits can not be regarded to have been waived by the petitioner by executing the said contract with the BPDB. Further drawing our attention to Article 152 of the Constitution, in particular the definition of the word 'law', therein, Mr. Khan submits that since the said SRO No. 73 dated 19.03.1997 comes within the purview of the definition of 'law', even by executing a contract nobody can waive the legal benefits given by such law of the State. When a judgment recently delivered by a Division Bench in Writ Petition No. 513 of 2009 (**Shahjibazar Power Company Limited v. Government of the People's Republic of Bangladesh**, hereinafter called "**Shahjibazar case**") on the similar facts and issues has been brought to his notice, Mr. Khan argues that this Court, upon proper consideration of records as well as relevant laws, should disagree with the points of law decided by that Division Bench and, accordingly, should refer the instant writ petitions to the Hon'ble Chief Justice for constitution of a Full Bench to resolve the issues. Accordingly, referring to the said judgment dated 03.11.2015 in **Shahjibazar case**, learned advocate argues that the said Bench basically discharged the Rule in the said case on the question of maintainability of the writ petition, though some other questions of law were decided as well.

7. As regards the decision of that Bench to the effect that the contract in question was a 'commercial contract' and as such writ was not maintainable, Mr. Khan submits that the petitioner before this Court has not come for enforcement of rights derived from any contract,

but for enforcement rights derived from the said SRO, which is a legal instrument. Further referring to the relevant provisions of Bangladesh Power Development Board Order, 1972 (P.O. 59 of 1972), in particular Articles 10(1) and (3) and sub-article (5) thereof, whereby the BPDB has been vested with the responsibility of power generation, transmission, distribution and purchase of power, learned advocate submits that since the agreement in question is for the purchase of power to be generated by the petitioner company under the said contract, under no circumstances that contract can be called a 'commercial contract' in view of the Sharping Fishery case as decided by our apex court. On the other hand, according to him, since the said contract has been entered into by the BPDB in exercise of the empowerment conferred on it by the said sub-article (5) of Article 10, the same is a statutory contract. As regards the finding of that Bench that because of the arbitration clause the writ petition is not maintainable, learned advocate argues that since the petitioner has come before this Court for enforcement of its right under the SRO and that the writ petitions involve interpretation of different clauses of the said SRO, the Arbitration Tribunal is not empowered under the law to give interpretation of law and it is only the High Court Division which can give such interpretation. Therefore, he submits, this Court should hold that in spite of such arbitration clause, writ petition is maintainable.

8. Again, as regards the finding of that Bench to the effect that the petitioner's agreement with the BPDB is not an agreement with the government, which is the basic condition of Table 1 of the said SRO for issuance of such certificate, learned Advocate has drawn our attention again to different provisions of Articles 3(a), 4(1) and (3), 5 and 6 of the said P.O. 59 of 1972 and has tried to impress upon the Court that by those Articles the entire function of the BPDB and appointment of the members of the Board of BPDB are directly controlled by the government and the shares of BPDB are owned by the government. This being so, he submits, the BPDB can well be regarded as the government since it is owned, controlled and managed by the government. Further, as regards the finding of that Bench that since the application was not made to the Chairman of the BPDB, rather it was made to the Secretary of BPDB and as such the petitioner was not entitled to get such certificate, learned advocate submits that since on that ground the application of the petitioner was not restricted, this issue is immaterial in these writ petitions. In support of his submission that in spite of the existence arbitration clauses in the agreement between the parties writ may be held to be maintainable, Mr. Khan refers to two decisions of the Indian Jurisdiction as downloaded from internet, namely the case of **Jai Balaji Industries Limited vs. Union of India & others (W.P. (C) 5124/2014 & W.P. (C) 5127/2014),** wherein the Delhi High Court has held that alternative remedy is not an absolute bar to writ petition and writ may be held maintainable in appropriate cases for the sake of justice. Learned advocate also refers to another decision of Indian Supreme Court in **Harbanslal Shania and another vs. Indian Oil Corpn. Ltd. and others reported in AIR 2003 SC 2010** wherein the Indian Supreme Court has held that the question of maintainability of writ petition is a Rule of discretion and further held that on three grounds writ may be held maintainable even in case of existence of arbitration clause in the agreement, the three grounds being: (1) where the writ petition seeks enforcement of any fundamental rights; (2) There is failure of principle of natural justice or (3) where the orders of proceedings are wholly without jurisdiction or the vires of an Act is challenged.

9. As against above submissions, Mr. Tofailur Rahman, Mr. Joynul Abedin and Mr. Md. Hefzul Bari, learned advocates appearing for the BPDB in different writ petitions, and Ms. Israt Jahan, learned Deputy Attorney General appearing for the concerned Commissioner of Customs, have made the following common submissions:-

1) In view of the decision of another Division Bench in unreported Writ Petition No, 513 of 2009 (**Shahjibazar case**) determining and resolving all the issues involved in the instant writ petitions, this Court should agree with that decision and, accordingly, discharge the Rules.
2) Since, apparently, the agreement of the petitioner was not with the 'Bangladesh Government' as stipulated by the said SRO as one of the main preconditions for issuance of such certificate, respondent no.1 has rightly refused to issue such certificate.
3) Since the contract in question is a commercial contract and not statutory contract, writ petition is not maintainable.
4) Since, admittedly, there is an arbitration clause in that contract for reference of all disputes arising out of the contract to arbitrator, the writ petition is not maintainable.
5) Since the petitioner's contract with the BPDB is for rental power procurement and since the said SRO No. 73 was meant only for independent power procurement agreement with the independent power producers, the petitioner cannot claim any benefit under the said SRO.
6) Since it has been stipulated in the contract in question that the petitioner would be liable to pay VAT, tax and all duties under the applicable laws of the land and that it would not get benefit of any fiscal incentives to be given by the government through the Private Sector Power Generation Policies, the petitioner is not entitled to get the benefit under the said SRO.
7) Learned advocate for the respondents have referred to various other decision, namely (a) **Mahfizul Hoque & others vs. Collector of Customs, Chittagong and others, reported in 20BLT (AD) 2012-182,** (b) **Bangladesh vs. Excellent Corporation reported in 20 BLC(AD)-255,** (c) **Ananda Builders Ltd. vs. BIWTA, reported in 57 DLR (AD)-31 and** d) **Bangladesh PDB vs. Md. Asaduzzaman Sikder, 9 BLC (AD)-1.** [It may be mentioned that, in Shahjibazar's case, this case of Md. Asaduzzaman was referred to and relied upon by that Division Bench].

10. DELIBERATIONS OF THE COURT:

Extensively rigorous arguments have been made on behalf of the petitioner to disagree with the points of law decided by another Division Bench in **Shahjibazar's** case as mentioned above. According to Mr. Khan, the issue as regards commercial contract and the issue of maintainability of writ petition in spite of the existence of arbitration clause should have been decided otherwise in the said case. However, we have decided to deal with those issues of commercial contract and arbitration clause only if this Bench is convinced that:

(a) the petitioner in fact has entered into a contract with the government and
(b) that the benefits given under the SRO in question are not incentives.

11. After deciding those issues if it is found that the petitioner has good case on merit, only then we need to examine the issues regarding commercial contract and arbitration clause. We have decided to take this course just to avoid any possibility of unnecessary conflict with the decision in the said **Shahjibazar case** and for the sake of preventing ourselves from resorting to unnecessary academic discussions on legal issues.

(a) Whether the petitioner has entered into a contract with the Government:-

12. To address this issue, we have extensively examined the relevant provisions of the Bangladesh Power Development Board Order, 1972 (PO 59 of 1972), in particular the provisions under Articles 2, 3 (a), 4, 5 and 6 thereof. It appears from Clause-(d) of Article-2 of P.O. 59 of 1972 that the term "Government" has been specifically defined therein. According to the said provision, "Government" means the Government of the People's of Bangladesh. Clause-(h) of Article-2 further provides that "Power Board" means Bangladesh Power Development Board as constituted by the said PO 59 of 1972. The very definition of these two terms clearly indicates the intention of the Legislature in that the Legislature wanted to keep these two terms separately with separate definitions.

13. Examination of the provisions under Articles 3, 3(a), 5 and 6 further reveals that the BPDB is a corporate body which is entitled under the law to acquire, hold and dispose of property, both moveable and immovable, and shall, by its name, sue and be sued (see Article-3). Article 3(a) of the said P.O further provides that taka five hundred crores authorized capital of the Board shall be subscribed by the government. Article 4 provides that the Chairman of the Board shall be appointed by the government and sub-article (3) of Article 4 provides that the entire discharging of functions of the Board shall be guided by the directions to be given by the government time to time. Article 5 even given the power to the government to terminate the Chairman of the Board.

14. From the above examination of material provisions, it is evident that though the Board is a corporate body and may sue or may be sued by its own name and may also acquire, hold and dispose of the property on its own, the entire activities of the Board is in fact controlled and guided by the government. The share capital is also owned by the government. Therefore, we can safely say that the BPDB is a body corporate owned and controlled by the government. However, while we say so, we do not find any legal authority or provisions either in any reported cases or in the relevant provisions of the said PO 59 of 1972 by which we can hold that the BPDB is in fact the Government of Bangladesh. Therefore, we are not able to accept the submissions of Mr. Khan that the BPDB should be called or be regarded as the Government.

15. Our view above is strengthened further by the very averments in the said SRO No. 73 dated 19.03.1997. It appears from the said SRO that though the SRO was issued by the Government through its internal resources department in exercise of power under Section 19 of the Customs Act, 1969 read with Section 14(1) of the Value Added Tax Act, 1991, the said SRO deliberately kept the Bangladesh Government, the BPDB and other entities mentioned therein separately. When, by Clause No.1 under Table 1, it provides that the concerned establishment has to be an establishment which entered into contract with the Bangladesh Government, condition No.2 under the same Table provides that the certification in that regard should be issued by the designated persons of some other authorities including BPDB. On the other hand, the prescribed form of the certificate as incorporated in the said SRO under Appendix 1 also specify the words in the following terms:

> "প্রত্যয়ন করা যাইতেছে যে ®jp¡p---------- বেসরকারী খাতে বিদ্যুত উৎপাদন কেন্দ্র স্হাপনের লক্ষে বাংলাদেশ সরকারের p¢qa Q¢J²hÜ HL¢V f¤ù¡ez

16. Therefore, on this point as well, we are not convinced that this SRO had made any indication that the petitioner was entering into a contract with the Bangladesh Government.

17. Further, it appears from the specific definitions as provided in the said contract dated 28.04.2008 that the term BPDB is specifically defined therein in the following terms under Section 1.1:-

> *"BPDB means the Bangladesh Power Development Board constituted under the Bangladesh Water and Power Development Boards Order, 1972 (PO 59 of 1972) and its successors and permitted assignees".*

18. Therefore, from the above definition as well, it appears that, the parties, while entering into contract, did not have even in their imagination that the petitioner was entering into a contract with the Bangladesh Government. Thus, we are of the view that, the petitioner has no case on this point. Therefore, we have no option but to hold that the petitioner has not entered into a contract with the Bangladesh Government.

(b) Whether the benefits under the SRO are incentives:

19. It may be mentioned that the application by the petitioner for issuance of certificate was rejected by the BPDB vide Annexure-A referring to the particular terms and conditions in the contract. Relevant parts of the Annexure-A are quoted below:-

উক্ত চুক্তি পত্রের Page-059, Section-17 অনুযায়ী প্রকল্প বাস্তবায়ন সংস্থা অর্থাৎ মেসার্স বারাকাতুল্লাহ ইলেকট্রো ডাইনামিকস লিঃ কর্তৃক প্রকল্পের জন্য আমদানীতব্য সকল প্রকার Materials, Local and Foreign Services Hl Efl Duty, VAT and Tax পরিশোধের বিধান রহিয়াছে। উক্ত চুক্তিপত্রের Page-322 এ আরো নিম্নরুপ উল্লেখ রহিয়াছে:

> *"The Tenderer shall be entirely responsible for payment of all income taxes, other taxes, VAT, duties, levies, all other charges imposed or incurred inside and outside Bangladesh before COD and throughout the contract period. Applicable income taxes & VAT levied by GOB shall be deducted at source during payment of invoice. Fiscal incentives provided in private Sector Power Generation Policy (PSPGP) of Bangladesh shall not be applicable for this Tender."*

20. It appears from the above referred terms of the contract that by executing the said contract the petitioner itself agreed to pay all applicable duty, VAT and Tax etc. to be levied by the Government of Bangladesh. In this regard, it may be mentioned that the duties, VAT and taxes are levied by the Government of Bangladesh under the authority of the Acts of parliament. Thus, even if the above stipulations regarding payment of tax, vat etc. were not in the contract, the petitioner would still be liable to pay the same as per the prevailing law of the country. The only exception is that the liability of the petitioner to pay such duty, VAT and Tax is exempted either by act of Parliament or through delegated legislation. Nowhere in the four-corners of the writ petitions, the petitioner has made out any such case.

21. It further appears from the said referred terms of the contract that the petitioner also agreed not to take any 'fiscal incentives' provided in private sector power generation policy of Bangladesh. Now, the question is whether the benefits given by the SRO in question, namely SRO No. 73 dated 19.03.1997, may be called fiscal incentives. It appears from the said SRO that the same started with the following preamble or introduction, namely:-

> "Customs Act, 1969 (IV of 1969) Hl section 19 H প্রদত্ত ক্ষমতাবলে সরকার, জাতীয় রাজস্ব বোর্ডের সহিত পরিমর্শক্রমে এবং মূল্য সংযোজন কর আইন, ১৯৯১ (১৯৯১ সনের ২২ নং আইন) এর ধারা ১৪(১) এ প্রদত্ত ক্ষমতাবলে জনস্বার্থে বেসরকারী খাতে বিদ্যুৎ

Evf¡c®el ¢e¢jš ¢hcÉv Evf¡ce ®L¾cÐ(Power Generation Station) স্থাপনের লক্ষে ®V¢hm-১ এ বর্ণিত শর্ত সাপেক্ষে স্থায়ীভাবে আমদানিকৃত প্লান্ট ও ইকুইপমেন্ট এবং টেবিল-২ এ বর্ণিত শর্ত সাপেক্ষে অস্থায়ীভাবে আমদানিকৃত ইরেকশন ম্যাটেরিয়ালস, যন্ত্রপাতি ও যন্ত্রাংশকে উহাদের উপর আরোপনীয় আমদানি শুল্ক, মূল্য সংযোজন কর ও সম্পূরক শুল্ক হইতে অব্যাহতি প্রদান করিলz"

(Underlines supplied)

22. Therefore, the very preamble of the said SRO refers to the policy decision of the Government in that the said SRO was issued for giving fiscal benefits mentioned therein, to encourage establishment of power generation stations in the private sector for the public interest in order to generate electricity in Bangladesh.

23. It is known to all that Bangladesh at a time suffered so many disadvantages because of lack of electricity supply. It is very much understandable that as against such background this kind of facilities or fiscal benefits have been given by the government through the said SRO. Therefore, we do not find any other appropriate word in any dictionary to describe them by any other term than "incentives". The ordinary dictionary meaning of the word "incentive" as given by the Oxford Advanced Learner's Dictionary (new 8th Edition) also supports this view of ours. Thus, it appears that the benefits given by the said SRO were in fact 'incentives' given to such establishments who were willing to establish power generation station in the private sector to generate electricity. The very basic term of the contract does also denote that the same was entered into for establishment of power generation plant on rental basis for generation of electricity, and the BPDB also entered into contract under sub-article (5) of Article 10 of P.O. 59 of 1972 to purchase such electricity from the petitioner company in accordance with the said agreement in order to distribute the same in the country. Therefore, while the petitioner was executing the said contract with BPDB in 2008, the contents of the said SRO issued in 1997 were very much within the knowledge of the petitioner, and knowing very well that it would not be able to get any benefit from the said SRO, it executed the said contract. Therefore, we are of the view that since the petitioner entered into contract with a clear declaration that it would not take any benefit from the fiscal incentives already given or to be given by the government in the private power generation sector of the country, it is now estopped from going back and say that it is entitled to such incentives.

24. In view of above, since on the very basic two points, we are of the view that the petitioner has no case at all, namely that the petitioner has not been able to show that it entered into a contract with the Government of Bangladesh and that the benefits given by the said SRO are not incentives, this Court is of the view that it does not need to examine other issues, namely whether the agreement in question was a commercial agreement or statutory agreement. Because, apparently, the petitioner has not come before this Court for enforcement of any terms of the said contract, rather it has come before this Court for enforcement of the benefits given under the said SRO. Therefore, the issue whether the contract was commercial or statutory is an irrelevant and immaterial issue in the facts and circumstances of the case. For the same reason, since on the main two issues we have already held that the petitioner has no case, we are also not inclined to address the other issue regarding arbitration clause in the said contract inasmuch as that even if on that issue the petitioner succeeds, the Rule in this writ petition will still be discharged.

25. Having regard to the above facts and circumstances of the cases, we find no merit in the Rules and, accordingly, the same should be discharged. In the result, the Rules are discharged without any order as to costs.

26. The ad-interim order, if any, thus stands recalled and vacated. The respondents are at liberty to deal with the Bank Guarantees furnished by the petitioner in accordance with law.

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HIGH COURT DIVISION
(SPECIAL ORIGINAL JURUSDICTION)

WRIT PETITION No. 5853 of 2011

Md. Yousuf Ali Akon and others
.....Petitioners.

-Versus-

Chairman, Bangladesh Inland Water Transport Authority and 11 (eleven) others
..... Respondents.

Mr. Humayun Kabir Sikder, Advocate
.....For the petitioners

Mr. Syed Mafizur Rahman, Advocate
..... For the respondent No. 2 and 3

Heard on: 16.04.2015, 06.05.2015, 24.05.2015, 16.06.2015 and judgment on: 08.07.2015.

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

Legitimate expectation:
In the advertisement dated 19.01.2004, the authority has given an express promise to that effect that the appointee shall be on a probation period of 1 (one) year and after satisfactory completion of the said probationary period, the appointee shall be absorbed and therefore, the petitioners' legitimate expectation arises. The petitioners successfully made out a case of legitimate expectation. The petitioners had a legitimate expectation to be absorbed against the permanent posts on the basis of the advertisement published in the "Daily Observer" on 19.01.2004. In the background of the advertisement dated 19.01.2004, there was reasonable expectation of their being permanently absorbed in the post of Master Pilots. ...(Para 20)

The respondents failed to show any reasons why they did not absorb the petitioners in the post of Master Pilots permanently, though, they have already rendered their service approximately 11 (eleven) years. The inaction of the respondents is found arbitrary, unreasonable, is in gross abuse of power and is in violation of the principles of natural justice. ...(Para 22)

Judgment

Md. Ashraful Kamal, J:

1. This Rule Nisi was issued calling upon the respondent Nos. 1 to 8 to show cause as to why they should not be directed to treat the petitioners as permanent in their post of Master Pilots and allow them to enjoy the benefits of permanent Master Pilots according to law and/or pass such other or further order or order as to this Court may seem fit and proper.

2. Brief facts, necessary for the disposal of this rule, are as follows;

Bangladesh Inland Water Transport Authority (BIWTA) made an advertisement which was published in the "Daily Observer" on 19.01.2004 inviting applications from suitable candidates for appointment to the post of Master Pilots in the National Pay Scale of Tk. 2550-5505/- alongwith several other posts. In the aforementioned advertisement, it was mentioned that in respect of the post of Master Pilots' their probationary period would be 1(one) year and after successful completion of the said probationary period they will be absorbed in due course. According to the aforesaid advertisement published in the Daily Observer dated 19.01.2004, the petitioners applied for the post of Master Pilots.

3. Thereafter, the petitioners sat for the written test and viva voice examination against their posts and on the basis of the result thereof, the authority found them fit, competent and suitable for the posts. Accordingly, the petitioners were appointed by the Bangladesh Inland Water Transport Authority (BIWTA) vide office order No. 167 of 2005, 168 of 2005, 169 of 2005 170 of 2005, 171 of 2005, 172 of 2005 and 174 of 2005 dated 20.12.2005 as Master Pilots and they have been working in the said posts since then.

4. Although, in the advertisement dated 19.01.2004 it has been clearly mentioned that the appointees shall be on a probation for a period of one year and after satisfactory completion of the said probationary period, the appointees shall be absorbed in the posts on permanent basis. But, in the appointment letters, it was stated that the petitioners' appointments are on daily basis and their salary is Tk. 200/- per day per appointee. With a hope to get benefits according to the terms of the advertisement dated 19.01.2004, the petitioners joined the posts of Master Pilots. Thereafter, the petitioners successfully completed their probationary period. But, as per terms of the advertisement dated 19.01.2004, the authority did not make the petitioners permanent in the post of Master Pilots. Then, the petitioners filed representations dated 27.09.2007, 02.10.2007, 09.08.2009, 17.08.2009 and 30.05.2011 respectively before the respondents praying for absorbing them in their jobs on regular basis and to give service benefits to them, but in vain. Though the respondents did not appoint the petitioners in the post of permanent Master Pilots according to the terms of the advertisement dated 19.01.2004, but recently the authority appointed respondent Nos. 9,10,11 and 12 in the post of permanent Master Pilots.

5. Being aggrieved by the 'inaction' of the respondents in appointing the petitioners to the post of permanent Master Pilots, the petitioners filed this writ petition and obtained the present Rule.

6. Mr. Humayun Kabir Sikder, the learned Advocate appearing for the petitioners submits that according to the terms of the advertisement dated 19.01.2004, the petitioners probationary period was one year and after satisfactory completion of the said probationary period, the petitioners ought to have been absorbed in the permanent post of Master Pilots but the respondents did not do so. He further submits the petitioners have been rendering their service in the post of Master Pilots on daily basis for more than 5 years with a hope that the authority will absorb them in the post of Master Pilots on permanent basis. He also submits that according to circular dated 28.03.1969 and 21.04.1972 issued by the government, the petitioners are entitled to be absorbed to the permanent post of the Master Pilots. He further submits that in order to deprive the petitioners, the respondents have already appointed respondent Nos. 9-12 in the permanent post of Master Pilots. Mr. Sikder further submits that on satisfactory completion of probationary period, the petitioners have acquired a vested right to be absorbed in the permanent post of Master Pilots, but the respondents most illegally refrained from doing so. He further submits that as Master Pilots the petitioners have already

completed more than 9½ years service with satisfaction, therefore, they reasonably expect to be absorbed in the permanent post of Master Pilots. In support of his submission, Mr. Sikder cited the case of Bangladesh Biman Corporation, represented by Managing Director Vs. Rabia Bashri Irene and others reported in 55DLR(AD) 2003 page-132 and the case of Government of Bangladesh of Bangladesh and others Vs. Md. Gazi Shafiqul and others reported in 19 BLC (AD) (2004) 163 and an unreported case of Md. Shahidul Islam and others Vs. Bangladesh, represented by the Secretary Ministry of Water Transport, Bangladesh Secretariat, Ramna, Dhaka and others in Writ Petition No. 1652 of 2011.

7. Mr. Md. Mafizur Rahman, the learned Advocate appearing for the respondent Nos. 2 and 3 by filling affidavit-in-opposition submits that the respondents Nos. 2 and 3 appointed the petitioners, only to meet the urgent requirement of Master Pilots, for 3 (three) months, on purely temporary basis at a salary of Tk. 200/- per day. He further submits that after completion of 3 months the petitioners were not found fit for the post, however, the authority being merciful to the petitioners decided to continue them in service in the post of Master Pilots on the same terms and conditions i.e. on daily basis. He further submits that since the authority found no improvement of the efficiency of the petitioners as Master Pilots, they were compelled to invite fresh applications for appointment of efficient Master Pilots offering the scale of Tk. 6400-14255 publishing in 'the Dainik Amader Samay' on 12.03.2010 and accordingly, on due process, appointed the respondent Nos. 9-12 in the permanent post of Master Pilots.

8. We have gone through the writ petition alongwith the annexures annexed thereto, affidavit-in-opposition filed by the respondent Nos.2 and 3 and considered the submissions made by the learned Advocate for the petitioners and the learned Advocate for the respondent Nos. 2 and 3.

9. The doctrine of legitimate expectation is a concept which has been evolved to exercise control over the discretionary power conferred on the executive. This doctrine imposes a duty on public authority taking into consideration the entire relevant factor relating to such expectation. The origin of legitimate expectation can be traced in German concept of *Vertrauenschutz* – the protection of trust. Legitimate expectation includes expectation which goes beyond an enforceable right, provided it has some reasonable basis. Expectation may be based upon some express statement, or undertaking by or on behalf of public authority which has the duty of making the decision or from the existence of regular practice which the claimant can reasonably expect to continue.

10. The basic principle of legitimate expectation was explained by Lord Diplock in **Council of Civil Service Union V/s. Minister for the Civil Service, reported in (1985) AC374(408-409).** It was observed in that case that for legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either

(i) he had in the past been permitted by the decision- maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it and which he has been given an opportunity to comment

or

(ii) he has received assurance from the decision- maker that they will not be withdrawn without giving him first an opportunity of

advancing reason for contending that they should not be withdrawn.

11. In Union of India v. Hindustan Development Corpn.10 reported in (1993) 3 SCC 499, the Supreme Court of India observed thus: (SCC pp. 540-541, para-29).

"It has to be noticed that the concept of legitimate expectation in administrative law has now, undoubtedly, gained sufficient importance. It is stated that 'legitimate expectation is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action and this creation takes its place beside such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and in future, perhaps, the principle of proportionality' A passage in Administrative Law, 6th Edn, by H.W.R. Wade page 424 reads thus:

"These are revealing decisions. They show that the courts now expect government departments to honour their published statements or else to treat the citizen with the fullest personal consideration. Unfairness in the form of unreasonableness here comes to unfairness in the form of violation of natural justice, and the doctrine of legitimate expectation can operate in both contexts. It is obvious, furthermore, that this principle of substantive, as opposed to procedural, fairness may undermine some of the established rules about estoppel and misleading advice, which tend to operate unfairly. Lord Scarman has stated emphatically that unfairness in the purported exercise of a power can amount to an abuse or excess of power, and this seems likely to develop into an important general doctrine.

Another passage at page 522 in the above book reads thus:

"It was in fact for the purpose of restricting the right to be heard that legitimate expectation' was introduced into the law. It made its first appearance in a case where alien students of 'scientology' were refused extension of their entry permits as an act of policy by the Home Secretary, who had announced that no discretionary benefits would be granted to this sect. The Court of Appeal held that they had no legitimate expectation of extension beyond the permitted time, and so no right to a hearing though revocation of their permits within that time would have been contrary to legitimate expectation. Official statements of policy, therefore, may cancel legitimate expectation, just as they may create it, as seen above. In a different context where car-hire drivers had habitually offended against airport bye-laws with many convictions and unpaid fines, it was held that they had no legitimate expectation of being heard before being banned by the airport authority.

There is some ambiguity in the dicta about legitimate expectation, which may mean either expectation of a fair hearing or expectation of the licence or other benefit which is being sought. But the result is the same in either case; absence

of legitimate expectation will absolve the public authority from affording a hearing. (emphasis supplied)

Again, at pages 56-57 it is observed thus: (SCC p. 547, para 33)

"A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil. The protection is limited to that extent and a judicial review can be within those limits. But as discussed above a person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision. In a given case whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the court is satisfied that a case of legitimate expectation is made out then the next question would be whether failure to give an opportunity of hearing before the decision affecting such legitimate expectation is taken, has resulted in failure of justice and whether on that ground the decision should be quashed. If that be so then what should be the relief is again a matter which depends on several factors. "----------(emphasis supplied)

Again at pages 57-58 it is observed thus: (SSC pp 548-49, para 35)

"Legitimate expectations may come in various forms and owe their existence to different kind of circumstances and it is not possible to give an exhaustive list in the context of vast and fast expansion of the governmental activities. They shift and change so fast that the start of our list would be obsolete before we reached the middle. By and large they arise in cases of promotions which are in normal course expected, though not guaranteed by way of a statutory right in cases of contracts, distribution of largess by the Government and in somewhat similar situations. For instance discretionary grant of licences, permits or the like carry with it a reasonable expectation, though not a legal right to renewal or non-revocation, but to summarily, disappoint that expectation may be seen as unfair without the expectant person being heard. But there again the court has to see whether it was done as a policy or in the public interest either by way of GO, rule or by way of a legislation. If that be so, a decision denying a legitimate expectation based on such grounds does not qualify for interference unless in a given case, the decision or action taken amounts to an abuse of power. Therefore the limitation is extremely confined and if the according of natural justice does not condition the exercise of

the power, the concept of legitimate expectation can have no role to play and the court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. For instance if an authority who has full discretion to grant a licence prefers an existing licence-holder to a new applicant, the decision cannot be interfered with on the ground of legitimate expectation entertained by the new applicant applying the principles of natural justice. It can therefore be seen that legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited. It would thus appear that there are stronger reasons as to why the legitimate expectation should not be substantively protected than the reasons as to why it should be protected. In other words such a legal obligation exists whenever the case supporting the same in terms of legal principles of different sorts, is stronger than the case against it. As observed in Attorney General for new South Wales case.

'To strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the courts adrift on a featureless sea of pragmatism. Moreover, the notion of legitimate expectation (falling short of a legal right) is nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law.'

If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles.(emphasis supplied)

From the above it is clear that legitimate expectation may arise-

(a) if there is an express promise given by a public authority; or

(b) because of the existence of a regular practice which the claimant can reasonably expect to continue,

(c) Such an expectation must be reasonable.

However, if there is change in policy or in public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise.

12. In the case of **Madras city Wine Merchants Assn Vs State of Tamil Nadu** reported in (1994) 5 SCC509 circumstances were laid down which may arise legitimate expectation –

1) if there is express promise held out or representation made by a public authority or 2) because of the existence of past practice which the claimant can reasonably expect to continue and 3) such promise or representation is clear and unambiguous.

13. In the case of Chairman Bangladesh Textile Mills Corporation Vs. Nasir Ahmed Chowdhury reported in 22 BLD(AD) 2002, wherein their Lordships observed;

" 21. *Sir William Wade in his book Administrative Law, Seventh Edition has referred to the ratio laid down in some cases to show how cases of legitimate expectation arose herein, "the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty. (1983)2 AC 629), "if the published policy was to be changed, the applicant should be given full and serious consideration whether, there is some overriding public interest justifying the new departure. [(1984) I WLR 1337)], "a public authority has a duty to act with fairness and consistency in its dealings with the public, and that if it makes inconsistent decisions unfairly or unjustly it misuses its powers". In the case reported in (1988) 1 WLR 1482 "it was held that the Home Secretary's published Criteria for regulating this form of espionage created a legitimate expectation that they would be properly observed and that the court might grant relief if they were violated without any published change of policy. In the case of a student from Nigeria who was given oral assurance that she would have no difficulty in returning after going home for Christmas, yet was refused leave to enter on returning, the refusal was quashed on the ground of legitimate expectation and unfairness. Reference has also been made to a case where a committal for trial was quashed where the police broke their promise not to prosecute. (1993) QB769).*

22. *Passage in Administrative Law, 7th Edition, by Sir William Wade reads thus; "These are revealing decisions. They show that the courts now expect government departments to honour their statements of policy or intention or else to treat the cititzen with the fullest personal consideration. Unfairness in the form of unreasonableness is clearly allied to unfairness by violation of natural justice. It was in the latter context that the doctrine of legitimate expectation was invented, but it is now proving to be a source of substantive as well as of procedural rights. Lord Scarman has stated emphatically that unfairness in the purported exercise of power can amount to an*

abuse or excess of power, and this may become an important general doctrine."

***23**. Another passage in the above book reads thus:-*

" It is obvious that his principle of substantive, as opposed to procedural, fairness may undermine some of the established rules about estoppel and misleading advice, which tend to operate unfairly, Claims based on legitimate expectation have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on estoppel. The argument under the label 'estoppel' and the 'legitimate expectation' argument are substantially the same. In this conflict of doctrines the demands of fairness are proving the stronger. But those demands cannot be pressed to the point where they obstruct changes of policy which a government should be at liberty to make within its discretionary powers or legitimate practices such as selective prosecution of tax offenders by the Inland Revenue."

***24.** A passage in Administrative Law (Eighth Edition) by David Foulkes reads thus:*

" The right to a hearing, or to be consulted, or generally to put one's case, may also arise out of the action of the authority itself. This action may take one of two, or both forms: a promise (or a statement or undertaking) or a regular procedure. Both the promise and the procedure are capable of giving rise to what is called a legitimate expectation, that is an expectation of the kind which the courts will enforce. The analogy with estoppel will be apparent." "Existence of a regular practice which could reasonably be expected to continue".

***25.** In the said book upon referring to NG's case (1983)2 All 386=(1983)2 AC629) illustration has been given as to enforceable legitimate expectation can arise from a statement or undertaking and then upon referring to the ratio of the case of Council of Civil Service Unions (1985)AC 374, (1984) 3 All ER 935) has observed therein legitimate expectation arose not out of a promise, but out of the existence of a regular practice which could reasonably be expected to continue.*

***26**. Another passage in the above book reads thus;*

"Some rules about the circumstances in which such promises or practices will be binding must be noticed.

(i) The statement or practice must be sufficiently clear and unambiguous, and expressed or carried out in such a way as to show that it was intended to be binding. Thus a statement will not be binding if it is tentative, or if there was uncertainty as to what was said. Where it was said that a recommendation from X was 'almost invariably' accepted there was no legitimate expectation that it would be accepted.

(ii) The statement or practice must be shown to be applicable and relevant to the present case, and stand

four square with it. Thus where an offer of an interview had been made in 1986, but action was taken in 1988 without an interview, there was no legitimate expectation of an interview in 1988 as the circumstances then were quite different. In North East Thames Regional Health Authority, ex p de Groot it was held that a legitimate expectation to be re-appointed to the Authority on the nomination of the TUC on the expiry of a term of office could not arise from the practice of acting on such nomination. There might be many reasons for non re-appointment, and to allow the argument would fetter the authority's discretion. It followed that there was (that was sought) no right to be heard before the decision not to re-appoint was taken. And an attempt to show that a legitimate expectation that a Lord Mayor would vote in a not-partisan way arose out of (not a practice but) an agreement to that effect, failed when it was shown that the agreement did not cover that point.

(iii) Legitimate expectations are enforced in order to achieve fairness. Thus where it was argued that a previous practice of giving an oral hearing gave rise to a legitimate expectation of a hearing, the House of Lords said that the question was whether the official in question (the district auditor) had acted unfairly: he had not in the circumstances a decision on the papers was fair.

(iv) If the statement said to be binding was given in response to information from the citizen, it will not be binding if that information is less than frank, and if it is not indicated that a binding statement is being sought.

(v) He who seeks to enforce must be a person to whom (or a member of the class to which) the statement was made or the practice applied. Where a department told all health authorities including B that C was amongst those who should be consulted, it was accepted that this gave rise to a legitimate expectation on the part of C that they would be consulted by B. But where a particular practice had operated in relation to one class of taxpayer so that a legitimate expectation arose from it, the benefit of it could not be claimed by taxpayers not in that class.

However certain legitimate expectations may arise in connection with polices and their application, and changes to them.

Where a policy has been published, it must be applied to cases falling within it.

Where it has been the practice to publish a policy, there may be a legitimate expectation that changes to it will be published.

> *It might be unfair to make a change in policy in such circumstances unless the body announces in advance its intention to do so as to allow an affected person to make representations before any change is carried out."*
> ***27.*** *In the context of the authority expresses about the principle of legitimate expectation in the light of the ratio of the cases referred to in the afore mentioned illuminative books let us now go for consideration of the facts placed on record by the respondents how far it can be said they have a case of legitimate expectation for having the enterprise i.e. National Cotton Mills Ltd., denationalized and the facts placed from the side of the Government in refutal of the claim of the respondents for having the mill in question denationalized.*
> ***31.*** *About the situation in the back ground whereof a plea of legitimate expectation may be raised it has been observed in (1994) 1 All E.R.517, (1994) 1 WLR 74 "A public authority may, by an express undertaking or past practice or a combination of the two, have represented to those concerned that it will give them a right to be heard before it makes any change in its policy upon a particular issue which affects them. If so, it will have created a legitimate expectation that it will consult before making changes, and the court will enforce this expectation save where other factors, such as considerations of national security, prevail. This species of legitimate expectation may be termed 'procedural', because the content of the promise or past practice consists only in the holding out of a right to be heard: a procedural right. "*

14. In the case of Bangladesh Biman Corporation Vs. Rabeya Bashri Irene and other reported in (2003) 55 DLR(AD) 132 Para -10, wherein their Lordships observed;

> *"The contention of the learned Counsel for the petitioner as regards maintainability of the writ petition and granting of relief by the High Court Division beyond the relief sought in the writ petition or that relief granted is different from the relief sought in the writ petition appears to be not well founded since the writ petitioners were appointed by the Corporation which has been established by a Statute and that terms and conditions of service of the petitioners are not only governed by the contract by which they have been employed in the service of the Corporation but also by the Rules and regulations made by the Corporation empowered by the Statute. It is also not correct to say that the reliefs granted by the High Court Division or, in other words, directions made by the High Court Division are beyond the reliefs sought for in the writ petitions and the Rules issued by the High Court Division in that reliefs articulated in the manner although not granted by the High Court Division in that form but reliefs that have been granted to the tenor of the writ petition framed and the reliefs sought. <u>The other contention that no case of legitimate expectation was</u>*

made out, or that as the writ petitioners were employed by the contracts between the Corporation and them there cannot be a case of legitimate expectation beyond the contracts or that in the background of the terms of contracts there was no reasonable expectation of their being permanently absorbed in the employment of the Corporation is also of no merit since materials have been brought on record and particularly the resolution of the 174th Board meeting of the Corporation clearly shows that it was the existing practice in the Corporation, when the writ petitioners were employed for absorption permanently the employees of the petitioners category on completion of the initial period of employment made on contract subject to satisfactory performance. In the background of the existing practice of absorbing the employees of the petitioners category on satisfactory completion of the initial period of employment under a contract it can be said that there was reasonable ground for the writ petitioners to expect for being absorbed permanently in the service of the Corporation. The other contention that service in connection with which the writ petitioners by their respective contracts were employed in the service in the Corporation and in the background of the past experience as regard the service the writ petitioners are performing the "Corporation changed the retirement age of the stewards and the stewardesses at different periods and the change so made cannot be considered discriminatory since the matter of fixation of retirement age of employees of the Corporation is within its competency. The matter of fixing the age of retirement of the stewards and stewardesses being gender based the same has rightly been held by the High Court Division discriminatory and further the discrimination so made being violative of the Article 28 of the Constitution is not legal. There is another aspect as regards the matter of discrimination between the writ petitioners and the employees of the Corporation of the writ petitioners category employed immediately before them. It is not disputed that employees of batch Nos. 1-27 of the writ petitioners category although were employed on contract but on satisfactory completion of initial period of employment they have absorbed permanently in the service of the Corporation, but in the case of the writ petitioners that has not been followed, rather on completion of the initial period of employment instead of renewal of their agreement of employment they were given fresh employment. Since some employees of the Corporation inter se standing in the similar situation have not been treated in the similar manner or, in other words have been treated differently from the others the contention of the writ petitioners that they have been discriminated against has rightly been found genuine by the High Court Division. "

15. In the case of LGED Vs Sanjoy Kumar Halder & others reported in 21 BLD (AD)2013 where Mr. Justice Syed Mahmud Hossain held that;

> *" The High Court Division has observed that since the writ petitioners have got the required qualifications and since they have been working in the development projects of LGEd as Sub-Assistant Engineers with reputation for quite a long time they have the legitimate expectation that they would be absorbed in the newly created posts. The High Court Division considered all the relevant aspects relating to absorption of LGED personnel while rendering judgment in Writ Petition 1522 of 2004 heard along with ninety-nine other writ-petitioners. The High Court Division, therefore, concluded that there was no reason for not applying the ratio of the said decision in the present cases. The findings arrived at and the decisions made by the High Court Division having been made an proper appreciation of laws and facts do not call for interference,"*

16. In the case of Dhaka City Corporation Vs. Firoza Begum reported in 65 DLR (AD)2013 where Mr. Justice Syed Mahmud Hossain observed thus;

> *"20. The phrase "legitimate expectation" first emerged in its modern public law context in the judgment of Lord Denning in smith Vs Secretary of State for Home Affairs (1969) 2 Ch.149 170 and it has gained an ever more prominent presence in the case reports. Despite this increasing visibility, however, many of its features remain undefined. In order to establish legitimate expectation there must be a commitment which can be characterized as a promise.*
>
> ***21.** The root of the principle of legitimate expectation is constitutional principle of rule of law which requires regularly, predictability and certainty in Government's dealing with the public.*
>
> ***22.** In the case of Council of Civil Service Union vs Minister for the Civil Service 1985 Ac 374, the House of Lords observed:-*
>
> > *"Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of regular practice which the claimant can reasonably expect to continue."*
>
> *23. In the case in hand not only DCC but also the Government in the Ministry of Local Government have made express promise to absorb the service of respondent Nos. 1-88 in the revenue set –up of the DCC. Because of shifting responsibility on the shoulders of each other by the Government and DCC, respondent Nos. 1 to 88 could not yet be absorbed in the revenue set-up of DCC.*
>
> ***24.** In his book "Constitutional law of Bangladesh", Third Edition, Mr. Mahmudul Islam, having considered a large number of reported cases of English, Indian and our jurisdictions deduced the principles emerged from those cases as under:*

(i) The statement or practice giving rise to the legitimate expectation must be sufficiently clear and unambiguous, and expressed or carried out in such a way as to show that it was intended to be binding. A statement will not be binding if it is tentative, or if there is uncertainty as to what was said. Where it was said that a recommendation from X was 'almost invariably' accepted there was no legitimate expectation that it would be accepted. Legitimate expectation cannot be based on departmental not to which concurrence of the relevant authority has not been obtained.

(ii) Legitimate expectation cannot be pressed in aid when the policy or practice on which the expectation in based is ultra vires.

(iii) Substantive protection of legitimate expectation will generally require that the promise is made to a small group and a general announcement of policy to a large group is unlikely to be presented substantively.

(iv) An expectation to be legitimate must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation and a Minister cannot found an expectation that an independent officer will act in a particular way or an election promise made by a shadow Minister does not bind the responsible Minister after the change of the government.

(v) A person basing his claim on the doctrine of legitimate expectation has to satisfy that he relied on the representation of the authority and the denial of that expectation would work to his detriment. The court can interfere only if the decision taken by the authority is found to be arbitrary, unreasonable or in gross abuse of power or in violation of the principles of natural justice and not taken in public interest.

(vi) The statement or practice must be shown to be applicable and relevant to the case in hand. Thus where an officer of an interview had been made 1986, but action was taken in 1988 without an interview, there was no legitimate expectation of an interview in 1988 as the circumstances then were quite different.

(vii) Legitimate expectations are enforced in order to achieve fairness. Thus where it was argued that a previous practice of giving an oral hearing gave rise to a legitimate expectation of a hearing, the court said that the question was whether the official in question has acted unfairly and in the

circumstances the decision on the papers was held fair. Even if a case of legitimate expectation is made out, the decision or action of the authority will not be interfered with unless it is shown to have resulted in failure of justice. There cannot be any legitimate expectation ignoring a mandatory provision of law requiring permission to be obtained

(viii) Clear words in the statute or in the policy statement override legitimate expectation.

(ix) If the statement said to be binding was given in response to information from the citizen, it will not be binding if that information is less than frank, and if it is not indicated that a binding statement is being sought.

(x) He who seeks to enforce must be a person to whom (or a member of the class to which) the statement was made or the practice applied.

(xi) Even though a case is made out, a legitimate expectation shall not be enforced if there is overriding public interest which requires otherwise.

(xii) A claim based on legitimate expectation cannot be sustained when there is non-compliance with a mandatory provision of law.

***25.** The principles expounded above may be the guiding principles for deciding the cases on legitimate expectation.*

It has been consistent view of this Court that the government is debarred from making discrimination among the same class of employees. As held in Director General NSI vs. Md. Sultan Ahmed reported in 1996 BLD (Ad) 76, their Lordships in the Appellate Division held that "A double standard treatment meted out to different employees by the executive Government is deprecated."

17. It is necessary to quote the schedule of the Bangladesh Inland Water Transport Authority Employee Service Regulations, 1990, which runs thus:-

"বাংলাদেশ অভ্যন্তরীণ নৌ-পরিবহন কর্তৃপক্ষ এর কর্মচারী চাকুরী প্রবিধানমালা, ১৯৯০"

তফসিল

১	২	৩	৪	৫	৬	৭
১	.....	.....	.....	.....	.....	.....
৯৫ মাষ্টার পাইলট	২৫-৪৫ বৎসর	সরাসরি নিয়োগের মাধ্যমে পূরন করিতে হইবে			কর্ণফুলী এন্ডোর্সমেন্টসহ ২য় শ্রেনীর ইনল্যান্ড মাষ্টারে কম্পিটেন্সী সনদপত্র। সরাসরি নিয়োগকৃত প্রার্থীগণের শিক্ষানবিসকাল ১ বৎসর হইবে যাহার সফল সমাপ্তিতে চাকুরীতে আত্মীকরণ করা হইবে।	

18. It is further necessary to quote the advertisement, which was published in "The Daily Observer" dated 19.01.2004, runs thus:

বাংলাদেশ অভ্যন্তরীন নৌ-পরিবহন কর্তৃপক্ষ
১৪১-১৪৩, মতিঝিল বাণিজ্যিক এলাকা, ঢাকা-১০০০।
নিয়োগ বিজ্ঞপ্তি

বাংলাদেশ অভ্যন্তরীন নৌ-পরিবহন কর্তৃপক্ষের নিম্নলিখিত পদগুলি বিধি মোতাবেক প্রদেয় অন্যান্য ভাতাসহ প্রত্যেক পদের পার্শ্বে বর্ণিত বেতনক্রম অনুযায়ী পুরণের নিমিত্তে বাংলাদেশের প্রকৃত নাগরিকদেরনিকট হইতে দরখাস্ত আহবান করা যাইতেছে।

নং	পদের নাম	বেতন স্কেল	বয়সসীমা	শিক্ষাগত যোগ্যতা
১।	.....	.....	.....	.....
১৪	মাষ্টার পাইলট	২৫৫০-৫৫০৫	২৫-৪৫	কর্ণফুলী এন্ডোর্সমেন্টসহ ২য় শ্রেনীর ইনল্যান্ড মাষ্টারের কম্পিটেন্সী সনদপত্র। সরাসরি নিয়োগকৃত প্রার্থীগণের শিক্ষানবিস কাল ১ বৎসর হইবে যাহার সফল সমাপ্তিতে চাকুরীতে আত্মীকরণ করা হইবে।

19. According to the schedule of the Bangladesh Inland Water Transport Authority Employees Service Regulations as well as the advertisement dated 19.01.2004, in respect of the post of Master Pilots, the appointees shall be on a probation for a period of one year and after satisfactory completion of the said probationary period, the appointees shall be absorbed in the said post on permanent basis. But, curiously enough in the appointment letters, it has been stated that the petitioners' appointments as Master Pilots are on daily basis and their salary is Tk. 200/- per day per appointee. So, how could the respondents issue such appointment letters in favour of the petitioners?

20. In the advertisement dated 19.01.2004, the authority has given an express promise to that effect that the appointee shall be on a probation period of 1 (one) year and after satisfactory completion of the said probationary period, the appointee shall be absorbed and therefore, the petitioners' legitimate expectation arises. The petitioners successfully made out

a case of legitimate expectation. The petitioners had a legitimate expectation to be absorbed against the permanent posts on the basis of the advertisement published in the "Daily Observer" on 19.01.2004. In the background of the advertisement dated 19.01.2004, there was reasonable expectation of their being permanently absorbed in the post of Master Pilots.

21. The respondents did not say anything in their affidavit-in-opposition to the effect that the petitioners did not successfully complete their probationary period or the petitioners' services were unsatisfactory. Rather, it appears from the record that the petitioners have been working in the post of Master Pilots, since 2004 to the full satisfaction of the respondents.

22. Apart from that, the respondents failed to show any reasons why they did not absorb the petitioners in the post of Master Pilots permanently, though, they have already rendered their service approximately 11 (eleven) years. The inaction of the respondents is found arbitrary, unreasonable, is in gross abuse of power and is in violation of the principles of natural justice.

23. In light of the aforesaid facts and circumstances of the case and *ratio decidendi* as discussed above, we find substance in the submissions of the learned Advocate for the petitioners.

24. In the result, the Rule is made absolute without any order as to costs.

25. The respondent Nos. 1-8 are, hereby, directed to absorb the petitioners No.1-4 in the vacant posts of permanent Master Pilot in Bangladesh Water Transport Authority (BIWTA) within 2(two) months from the date of receipt of this judgment.

26. Further, respondent Nos. 1-8 are, hereby, directed to absorb the petitioner Nos. 5-7 in the post of Master Pilot in Bangladesh Water Transport Authority (BIWTA) subject to availability of vacant post of Master Pilot in future.

27. Further, without absorbing the petitioners as directed above, no advertisement could be published in respect of the permanent post of Master Pilot.

28. Communicate this judgment at once.

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HIGH COURT DIVISION
(Criminal Appellate Jurisdiction)

Criminal Appeal No. 2126 of 2005

Abdus Salam & others

...Appellants

Versus

The State

....Respondent

Mr. Md. Nurul Islam with
Ms. Nur Jahan Begum
....For the Appellants
Mr. MA Mannan Mohan D.A.G with
Mr. Nizamul Haque Nizam A.A.G and
Mr. Atiqul Haque Salim A.A.G.
…..For the State.

Heard on 13.04.2015, 15.04.2015, 19.04.2015, 20.04.2015
and
Judgment on: 22.04.2015

Present:
Mr. Justice Shahidul Islam
And
Mr. Justice K. M. Kamrul Kader

The evidence of interested, inter-related and partisan witnesses must be closely scrutinized before it is accepted. ...(Para 58)

The ocular evidence of prosecution witnesses supported by post mortem report with regard to the injury no. 1 and 2 cannot be disbelieved. Further, the medical evidence is only corroborative in nature, in that view, the ocular evidence of the eye-witnesses, which substantially corroborates the injuries on the person of the deceased Rokshana, must be accepted. ... (Para 64)

Value of evidence by child witness:
The prosecution witness Nos. 6 and 7 are daughter and son of the victims and these two witnesses lost their parents in the alleged incident, they are most probable and natural witnesses of this alleged incident of murder and they narrated the vivid picture of what had happened on the alleged date of occurrence and how their parents had died by this unfortunate incident, though they are child witnesses, they witnessed the major part of the incident and having testified about the factum of the occurrence. They have not been shaken in cross examination. Their evidence can be relied upon as they are capable of understanding and replied the questions intelligently, which corroborated with the post mortem report and other evidence on record. ... (Para 70)

Judgment

K. M. Kamrul Kader, J:

1. This appeal is directed against the judgment and order of conviction and sentence dated 22.03.2005 passed by the learned Additional Sessions Judge, 2nd Court, Rangpur in Sessions Case No. 283 of 2002 convicting the appellants under sections 302/34 of the Penal Code and sentencing them to suffer rigorous imprisonment for life and to pay a fine of Taka 5,000/- in default to suffer rigorous imprisonment for one year each and also convicting them under section 201 of the Penal Code and sentencing them to suffer rigorous imprisonment for

two years and to pay a fine of Taka 1,000/= in default to suffer rigorous imprisonment for two months each, both the sentences will run concurrently.

2. Prosecution case in short, are that, one Md. Younus Ali as informant lodged an ejahar with the Kotwali Police Station, Rangpur on 28.04.2002 at about 11.45 a.m. alleging *interalia* that his elder brother Golam Mostafa borrowed an amount of Taka 1,000/= from accused Abdus Salam and his sister-in-law and wife of his brother namely Rokshana also borrowed an amount of Taka 420/= only from accused Salina, wife of accused Abdus Salam on condition to repay the loan amount with interest. Last year they paid an amount of Taka 6,000/= only against the said loan. But the accused persons further claimed an amount of Taka 20,000/= and with this regard, an altercation took place between the victims and accused persons. As a result, the accused persons blocked the pathway of his brother. On 24.04.2002, in the morning, accused Abdus Salam alongwith his two wives namely Shally and Rashida and his sons Rafiqul and Rashedul forcibly took the victims into their house, demand the said amount and assaulted them. The accused persons also threaten them, if the victims namely Mostafa and Rokshana failed to repay the said amount within 12 hours, then they have to transfer their land in the name of accused persons. Under such circumstances, the victim Rokshana went to the house one Abdus Salam, the ex-member of the Union Parishad and informed him about this incident, who assured her to hold a *salish* to resolve this matter at the afternoon on that day. On receipt of this information, the accused persons became very angry. While the victim Rokshana was returning home from the house of ex-member Abdus Salam and as she reached near the court-yard of her house, at that time, the accused persons being armed with lathes surrounded her and on the direction of accused Abdus Salam, other accused persons assaulted the victim Rokshana with the lathes in their hand. As a result, she fell down on the ground, at that stage accused Rafiqul and Rashedul indiscriminately kicked and punched her on the back side and she became senseless. The accused persons thought that the victim Rokshana met her death and as such, they carried the body of Rokshana inside her dwelling hut and hanged her body with a bar by her sari to show that the victim Rokshana committed suicide. Thereafter, they accused persons left the place of occurrence. Minor children of the victim namely Robiul and Muslama witnessed the incident and as they started hue and cry the neighbours came to the place of occurrence, but all of them are related to the accused as such, they did not take any step to rescue the victim. At that stage, victim Mostafa came to the place of occurrence; he became angry and shouted at them. At that time, the accused persons assaulted Mostafa and forcibly poured poison into his mouth. The victim tried to save himself and came out from his house but he became senseless and fell down on the road, due to reaction of the poison. Thereafter, the neighbouring people sent the victim Mostafa to the Rangpur Medical College Hospital for treatment, where he met his died. The instant Ejahar was registered as Kotwali Police Station Case No. 68 dated 28.04.2002 under sections 302/201/34 of the Penal Code.

3. In the meantime, 2 (two) G.D. Entry were filed one by Md. Amjad Hossain and the other by S. I. Nivaran Chandra Barman. Police went to the place of occurrence and prepared the inquest report of the victim Rokshana in presence of witnesses. The victim Mostafa died in the hospital and Sub-inspector Nivaran Chandra Barman held inquest over the dead body of the deceased Mostafa and prepared a report. Accordingly, 2 (two) U. D. cases were started being No. 121 dated 24.04.2002 for victim Mostafa and the other being No. 123 dated 24.04.2002 for victim Rokshana. Thereafter, the Police sent both the dead bodies to the morgue for autopsy.

4. Inspector Md. Ohiduzzaman Officer–in–Charge of Kotwali Police Station as Investigating Officer investigated the case alongwith two U.D. cases. During investigation he visited the place of occurrence, prepared the sketch map with separate index, recorded the statements of the prosecution witnesses under section 161 of the Code of Criminal Procedure and collected inquest reports and post mortem reports of both the victims. On conclusion of the investigation and finding *prima facie* case against the accused persons, he submitted the Charge Sheet being No. 669 dated 03.11.2002 under sections 302/201 of the Penal Code.

5. Thereafter, the case was transferred in the Court of Sessions Judge, Rangpur for trial, who took cognizance of the offence and the same was registered as Sessions Case No. 283 of 2002. The case was further transferred in the Court of Additional Sessions Judge, 2nd Court, Rangpur for trial. At the time of commencement of the trial, the learned Additional Sessions Judge framed charge against the accused persons under Sections 302/34/201 of the Penal Code to which they pleaded not guilty and claimed to be tried.

6. During trial prosecution examined as many as 19 (nineteen) witnesses to prove their case and the defence cross examined them but did not adduce any witness on his defence. However, the defence case as it appears from the trend of cross examination are that the appellants are innocent and they did not commit any offence as alleged against them and they were falsely implicated in this case. Their further case is that on the alleged date and place of occurrence there is an altercation took place between the husband and wife namely Rokshana and Golam Mostafa relating to personal loans taken by the victim Rokshana from various persons and she gave the said loan amount to their lodging master and due to the altercation, the victim Rokshana became angry and committed suicide by hanging herself with the bar by a sari and on getting that information her husband victim Golam Mostafa also committed suicide by drinking poison. The accused persons have been falsely implicated in the instant case out of previous enmity.

7. On conclusion of taking evidence, the accused persons were examined under section 342 of the Code of Criminal Procedure to which they reiterated their innocence and refused to adduce any evidence in their defence. After conclusion of the trial, learned Additional Sessions Judge, 2nd Court, Rangpur, by his judgment and order dated 22.03.2005 convicted these appellants as aforesaid.

8. Having aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence dated 22.03.2005, the convict-appellants preferred the instant Appeal being criminal Appeal No. 2126 of 2005 before this court.

9. Mr. Md. Nurul Islam Sujan with Ms. Nur Jahan Begum, the learned advocates appearing on behalf of the convict-appellants at the very outset submits that in passing the impugned judgment and order the learned Additional Sessions Judge, seriously failed to consider that the prosecution totally failed to prove their case by adducing reliable oral and documentary evidence. The learned Additional Sessions Judge also failed to consider the defence case, which more probable that the victims were committed suicide, due to their internal family feud and the appellants were falsely implicated in the instant case. He further submits that the appellants are innocent and they are not involved in the alleged incident of murder. The learned Additional Sessions Judge convicted and sentenced these appellants on the basis of the evidence adduced by the prosecution witnesses Nos. 1, 2, 3, 6, 7, 9, 10, 11 and 12, however, none of these prosecution witnesses witnessed the incident as alleged in the Ejahar. The prosecution witnesses are near relations of the deceased and they failed to

corroborate each other on material points. He also submits that there is no eye witness of the alleged incident but the learned Additional Sessions Judge, relying upon the evidence of near relations and interested witnesses convicted these appellants. Other prosecution witnesses being Nos. 4, 5, 8, 12 and 14 did not support the prosecution case, rather they supported the defence case. As such, the convict-appellants are entitled to get benefit of doubt under section 114 (g) of the Evidence Act.

10. He next submits that the Informant and other prosecution witnesses are near relations of the victims but their belated disclosure that on the alleged date and time of occurrence, the appellants seriously assaulted the victim Rokshana, as a result, she fell down on the ground and became senseless. They thought that the victim Rokshana met her death and as such, they carried the body of Rokshana inside her house and hanged her body with a bar by her sari to show that the victim Rokshana committed suicide; thereafter they left the place of occurrence. On getting information, victim Mostafa came to the place of occurrence; he became angry and shouted at them. At that stage, the appellants assaulted him and forcibly poured poison into his mouth and due to reaction of the poison; he became senseless and fell down on the road. The neighbours sent him to the Hospital for treatment, where he met his died, which makes the prosecution case shaky and doubtful. He then submits that the alleged incident took place on 24.04.2002 and the informant lodged this instant Ejahar to the Officer-in-Charge of Kotwali Police Station on 27.04.2002. There is no explanation in the Ejahar as to the delay of 3 (three) days, which also makes the prosecution case shaky and doubtful. He further submits that before the lodgment of the instant Ejahar, there are 2 (two) G. D. entries were filed one by Amjad Hossain and the other by S. I. Nivaran Chandra Barman. Accordingly, 2 (two) U. D. cases were started. There are serious contradictions between the inquest report and post mortem report but the learned Judge failed to consider these G.D. Entries, inquest reports and the Unnatural Death cases, though these are primary documents of the prosecution case. The Ejahar was filed after a considerable lapse of time, which cast serious doubt on the prosecution story, because it's allowed the prosecution witnesses with ample opportunity for concoction and embellishment of the prosecution story. The learned Additional Sessions Judge most illegally and unlawfully convicted and sentenced the appellants and the same is liable to be set aside. The learned advocate for the appellants in support of his submission referred to the cases of *Zahed Ali Foreman (Driver) and others vs. State 9 BLC (AD) (2001) 122, The State vs. Nasir Ahmed @ Nasiruddin and another 6 MLR (AD) (2001) 194, Mazharul @ Bhulan vs. State 10 BLC (2005) 209, Haji Md. Jamal Uddin and others 14 BLD (1994) 33, Abdul Latif @ Bubu and 6 others vs. The State 44 DLR (1991) 492, Mujibor Rahman vs. The State 13 MLR(HC)88, The State vs. Ershad Ali Sikder and others 12 BLT (HC) 481 and State vs. Liton Joarder and another 19 BLT (HC) 268.*

11. Mr. M. A. Mannan Mohan, the learned Deputy Attorney General alongwith Mr. Atiqul Haque Salim and Mr. Nizamul Haque Nizam, the learned Assistant Attorney Generals appearing for the state having taken us through the judgment and order, F.I.R, charge sheet, depositions of the prosecution witnesses and other materials on record make his submission supporting the conviction and sentence and opposing the appeal. He submits that all facts have been proved by the cogent, credible and reliable evidence of the prosecution witnesses. He also submits that the learned Additional Sessions Judge rightly found the appellants guilty under sections 302/34 and 201 of the Penal Code. So, the judgment and order of conviction and sentence do not call for any interference from this court. He further submits that the prosecution proved their case beyond reasonable doubt. There is no contradiction in their statements on any material point. The evidence of prosecution witnesses Nos. 1, 2, 3, 6, 7, 9, 10, 11 and 12 are material evidence, though they are close relatives of both the victims

Mostafa and Rokshana but cannot be considered as an interested witness. The term (interestedness) was postulates that witness must have some direct interest in having the accused somehow or other connected for some enemies or some other reason. There is no reason that the testimony of prosecution witnesses Nos. 1, 2, 3, 6, 7, 9, 10, 11 and 12 can be discarded or liable to be flung to the wind simply because they happened to be close relatives of both the victims Mostafa and Rokshana. The learned Additional Sessions Judge rightly and correctly put reliance on the testimony of the prosecution witnesses Nos. 1, 2, 3, 6, 7, 9, 10, 11 and 12 and convicted and sentenced these appellants as aforesaid. There is no illegality or irregularity in the said judgment and order of conviction and sentence, the prosecution witnesses corroborated with each other on material points and the judgment and order of conviction and sentence should be upheld by this Court.

12. He further submits that allegations against these accused appellants under section 302 read with section 34 and 201 of the Penal Code has been well proved by the prosecution as the chain of circumstantial evidence connects the convict appellants in killing of both the victims Mostafa and Rokshana and thereby appellants have committed offence under section 302 read with section 34 and 201 of the Penal Code. As there is no break in the chain of causation and chain or circumstances connecting these appellants with the killing of both the victims Mostafa and Rokshana and as circumstantial evidence is more cogent than the evidence of eye witness, the learned Judge after perusing the materials on record rightly convicted these appellants and as such, the appeal preferred by these appellants should be dismissed. The learned Deputy Attorney General in support of his submission referred to the cases of *Forkan @ Farhad and another vs. State 47 DLR 148 and Abdul Quddus vs. The State 43 DLR (AD) 234*.

13. Before entering into the merit of the instant appeal, let us now scrutiny the evidence of the prosecution witnesses one after another.

14. P.W. No. 1 Md. Younus Ali is the informant and brother of the deceased Mostafa deposed that the deceased Golam Mostafa and Rokshana lived in Uttam Baromuda village. Due to their bad economic condition the victim Mostafa borrowed an amount of Taka 1,000/- from the accused No. 1 Salam and victim Rokshana also borrowed an amount of Taka 420/= from accused No. 2 Salina and they promised to pay certain amount of interest for that loan. The victims paid an amount of Taka 6,000/= for the last year. He also deposed that the accused persons demanded a further amount of Taka 20,000/- only. As such, an altercation took place between the victims and the accused persons. As a result, the accused persons blocked their pathway and on 24.04.2002 at about 7.00-7.30 a.m. further altercation took place between the accused and the victim Rokshana and they assaulted the victim Rokshana. At that stage, accused Abdus Salam threatened her that unless they paid the rest amount within 12 hours, then they have to transfer their household in their name. As such, victim Rokshana went to the member Abdus Salam and made complaint to him about this matter. He assured her (Rokshana) to hold a *salish* at the afternoon to resolve this matter. This witness heard that while victim Rokshana was returning home from the house of Abdus Salam at about 10.00 to 11.00 a.m. and as she reached near the courtyard of her house, at that time, accused Salam, Salina, Rashida and their two sons seriously assaulted her and they carried her body into the room of her husband and hanged the body with a bar by her sari. He also deposed that two children of victim Roskshana and others witnessed the incident. Thereafter, her son informed his father the victim Mostafa about the incident; he rushed to his house and protested about this incident. This witness also deposed that the accused persons namely Salam, Salina and Rashida assaulted his brother and forcibly poured poison into his month

and at that time, to save himself he run away towards the road and became senseless. Later, the neighbouring people sent him to Rangpur Medical College Hospital and where he met his death. Thereafter, police sent both the dead bodies for autopsy and next day they received the dead body from the police and after burial of the dead bodies, he lodged this Ejahar on 27.04.2002. He identified the Ejahar, which marked as exhibit-1 and his signature on it marked as exhibit 1/1. He identified the accused persons on dock.

15. During cross examination by the defence this witness admitted that he heard about this incident from his nephew. He came to the place of occurrence at about 10.00-11.00 O-clock, in the morning and he found 50/60 persons were present at the place of occurrence. This witness deposed that he saw his brother Mostafa was in front of Shahida's shop. Thereafter, he went to his mother's house, she lives in Moulabipara, which is situated at about 1 ½ kilometers away from the house of deceased Mostafa. During cross examination he deposed that he saw an injury mark at the right hand of deceased Mostafa. He denied the defence suggestion that his sister-in-law Rokshana has committed suicide and as his brother Mostafa saw that his wife Rokshana committed suicide and as such, his brother also committed suicide by drinking poison**.** This witness also admitted that Amjad is brother-in-law of this witnesses and Rokshana. This witness could not disclose whether or not Amjad informed the Police that his sister-in-law committed suicide by hanging herself. He deposed that he lodged this ejahar after getting information from son of victim Mostafa. He denied the suggestion that he deposed falsely in this case. He also denied that he borrowed an amount of Taka 3200/- from accused Salam and he did not pay the said amount and as such, he lodged this case on false allegations.

16. During cross examination by other accused this witness admitted that he get information about this alleged incident from the witness Ejajul. Thereafter, he came to the place of occurrence. His wife went to the place of occurrence before him and she became senseless. He denied the defence suggestion that he did not hear about this incident from Ejajul and his wife did not go to the place of occurrence and the children of the victim Mostafa were at their grandfather's house at the time of alleged incident and he lodged this case on false allegation to teach accused Salam and his family members.

17. P.W. No. 2 Ulfa Khatun is the wife of informant and sister of victim Rokshana, this witness deposed that the alleged occurrence took place at about 9.00-10.00 a.m. on 24.04.2002. She also deposed that: আসামীরা আমার বোনের বাড়ির খুলি থেকে বের হচ্ছে এবং আসামীদের খুলিতে **গিয়া চিল্লাচিল্লী** করিতেছে এবং আমার বোনকে দেখি বিছানায় শোয়া অবস্থায় **গা ছাড়া অবস্থায় এবং তাহা নেস পেশা বা মৃত** অবস্থায় এবং বোনের বাচ্চা দুটিকে সামনে পাই নাই এবং তখন আমি অজ্ঞান হয়ে যাই। আসামীদের বাড়ি আমার বোনের বাড়ির পাশেই অবস্থিত। পরবর্তীতে ডাক্তারের কাছে নেয় আমাকে এবং আমার বাড়িতে আমার জ্ঞান ফিরে। আমার **স্বামীর (ইউনুছ)** কাছে আমার বাড়িতে **শুনলাম যে, রোক**সানার স্বামীকেও আসামীরা বাড়ির খুলিতে মারডাং করিয়াছে এবং মুখের মধ্যে **কীটনাশক** জোর পূর্বক ঢুকাইয়া দিয়াছে এবং সেমতে তাহার অবস্থা খারাপ হইলে **রোক**সানার স্বামীকে হাসপাতালে নেওয়া হয় এবং পরে **রোকসানার** স্বামীও হাসপাতালে মারা যায়।

18. During cross examination this witness admitted that her house is situated about 2-2 ½ Kilometer away from the place of occurrence. Her brother-in-law namely Ajajul informed her about the alleged incident. During cross examination this witness denied the suggestion that on the alleged date of occurrence Mostafa assaulted Roshana, shortly afterwards, her sister has committed suicide, thereafter her brother-in-law Mostafa came back to their house and saw the incident and as such, he also committed suicide by drinking poison. This witness admitted that she did not see the accused persons assaulted the victim Rokshana. She also denied the defence suggestion that the accused persons did not assault deceased Rokshana

and Mostafa and both the victims committed suicide. During cross examination she deposed that she saw Ejajul, Ahed and Baten at the place of occurrence, thereafter she became senseless. She denied the suggestion that she deposed falsely in this case at the instigation of her husband.

19. P.W. No. 3 Ajajul Haque is a college student and cousin of deceased Mostafa. This witness deposed that the alleged occurrence took place on 24.04.2002 at about 7.30 a.m. at that time, he was taking his breakfast and one Fatema Begum came to the house of deceased Mostafa and she demanded to return her loan amount. Thereafter Fatema Begum went out from the victim's house. He also deposed that: "আমার নিজ রুমে ছিলাম এবং এমন সময় রুম থেকে শুনি রোকসানা ও সালামের ২য় স্ত্রীর মধ্যে ঝগড়া ঝাটি শুরু হয় এবং আমি প্রকৃতির কাছে যাই। (পায়খানাটি ঘর থেকে কিছু দূরে হয়) এবং পায়খানা থেকে রোকসানা ও শেলীর জোরে জোরে কথা কাটাকাটি শুনতে পারি এবং পায়খানা থেকে এসে মোস্তফা ভাইয়ের বাড়িতে আসতে চাইলে রাস্তা বন্ধ থাকাতে মোস্তফার বাড়িতে যেতে পারি নাই কারণ আবদুস সালাম মোস্তফার রাস্তা বাঁশের বেড়া দিয়ে বন্ধ করে দিয়েছিল এবং আমি একটু দূর থেকে দেখলাম রোকসানা ভাবীর গায়ে কাদা ও ব্লাউজ ছেড়া ও শেলীর মাথার চুলের মধ্যে কাদা দেখি" This witness also deposed that thereafter he went to the college and came back home at about 11.25 a.m. as he heard hue and cry he went to the place of occurrence and saw the dead body of Rokshana lying on the bed at that time victim Mostafa sought that accused Salam killed his wife. Thereafter, he heard that both the victim Rokshana and Mostafa had died.

20. During cross examination this witness admitted that as he went to the house of victim Mostafa, he did not see the children of the victims in their house. He could not disclose whether or not the victim Rokshana took loan from several persons and due to these loans altercation took place between them or the victim Mostafa used to assault his wife Rokshana. This witness denied the defence suggestion that both the victims Rokshana and Mostafa have committed suicide. He denied the suggestion that he deposed falsely in this case.

21. P.W. No. 4, Md. Mahbubur Rahman deposed that the occurrence took place on 24.04.2002 and he knew both the victims namely Mostafa and Rokshana as well as the accused persons on the dock. This witness deposed that on the alleged date of occurrence at about 07.30 a.m. in the morning, while he was on his way to the Madrasha at that time, he saw the victim Rokshana was crying by holding legs of member Abdus Salam and told him that the accused Salam put pressure on her to repay the loan amount. Thereafter, he went to his office. He also deposed that he came back home at about 04.30 p.m. and heard that both the victims Roksahna and Mustafa have committed suicide by hanging and drinking poison respectively.

22. During cross examination this witness deposed that he heard that the deceased Mostafa sold out his 19 decimals of land to repay the loan money. He also heard that deceased Mustafa has paid some of loan amount. He denied the suggestion that he deposed falsely in this case.

23. On recall by the prosecution this witness deposed that he does not know how the victim Rokshana and her husband Mostafa had died. He could not disclose the name of the person from whom he heard that both the victims Rokshana and Mostafa have committed suicide.

24. P. W. No.5 Abdul Baten was tendered by the prosecution.

25. During cross examination he deposed that আসামীদের বিরুদ্ধে কোন দোষ নাই **এবং তাহারা কেন** আসামী হয়েছে বলতে পারব না। রো**কসানা** ও স্বামী স্ত্রীর মধ্যে দীর্ঘ দিনের ঝগড়া। ধীরে ধীরে রোখসা**না** ধার দেনা করে এবং **মোস্তফা জানতো না এবং ৯০,০০০/- টাকা ধার দেনা হইয়াছিল রোক**সানার। মোস্তফা আবেদ আলীর কাছে ৬০,০০০/- **টাকা জমি বিক্রয় করিয়াছিল। জমি বিক্রিয়** করিয়া টাকা পরিশোধ করার পরও লোকজন টাকা পয়সা পাইত। ধারের টাকা নিয়া প্রতিদিন **স্বামী**-স্ত্রীর মধ্যে ঝগড়া বিবাদ হইত। **রোক**সানার বাড়ির পাশেই আমার বাড়ি। **সকাল বেলা মোস্তফা রোক**সানাকে মারডাং করিয়াছিল। পূর্বেও মোস্তফা মারডাং করিয়া রো**ক**সানাকে বাহির করিয়া দিয়াছিল ঘর হইতে এবং চেয়া**রম্যান** আপোষ নিষ্পত্তি করিয়া দিয়াছিল এবং সেখানে আমিও ছিলাম। ঘটনার দিন রোখসানাকে কেহ মারডাং করে **নাই জানি। মোস্তফা রোক**সানাকে আলগা করে ধরে এবং আমি ও আহাদ আলীও ধরি এবং তারপর **বিছানায় রোক**সানাকে শোয়ানো হয়। ঘটনার পূর্বের দিন মোস্তফা তাহার স্ত্রীকে কুড়াল **দিয়া মারিয়াছিল**। ঘটনার দিন মোস্তফাকে কেহ মারডাং করে নাই। **রোক**সানার লাশ নামানো হলে এজাজুল আসে ও তারপর মহসিন আসে। মহসিন বলে মোস্তফা তোর বউ কে মারডাং করে মারলি এখন কি করবি। আমি ঘরের মধ্যে যাই এবং মোস্তফা ঘর থেকে বের হয়ে কোথায় কি বিষ খেয়ে মরলো তা আমি **আর জানি না। মোস্তফা**কে মেডিক্যালে আনা হয়েছিল **সলিমুদ্দিন** গোবর গুলায় প্লাস্টিকের বদনায় এবং মোস্তফা দৌড় মারে। **মোস্তফা** Poison খেয়েছিল বিধায় গোবর গুলানো হয়েছিল। উক্ত গোবর আর খাওয়ানো যাই নাই। আসামীরা রো**ক**সানা ও মোস্তফাকে কোন মারডাং করে নাই জানি। আসামীদের **বাড়ি ও রোকসানার বাড়ি পাশাপাশি অবস্থিত হয়**।

26. P.W. No. 6 Muslama Khatun is the daughter of the victim Mostafa and Rokshana in her deposition deposed that: "**এই মামলার মৃত রোকসানা আমার মাতা এবং মৃত মোস্তফা আমার বাবা। ঘটনার তারিখ ২৪/৪/২০০২ ইং এবং সেদিন আমি বাবা**-মায়ের সাথে বাসায় ছিলাম। **সকাল ৭.০০** টার দিকে আসামী সালাম, শেলী রশিদারা আমার মাকে গালাগালি করে কারণ আমরা তাহাদের খুলি দিয়া যাতায়াত করিতাম এবং যেদিক দিয়া আমার যাইতাম সেখানে **বেড়া দিয়া বন্ধ** করে দেয়। আসামীদের এহেন কাজে আমার মা প্রতিবাদ করিলে **উল্লেখিত আসামীরা** আমার মাকে মারধর করে এবং আমার মা মার খেয়ে সালাম মেম্বারের বাড়িতে বিচার দিতে যায় এবং মেম্বার আমার মায়ের সব কথা শুনে এবং বলে যে, তুমি এখন বাড়িতে যাও আমি বিকেলে বিচার করবো। সালাম মেম্বারের কাছ থেকে আমার মা বাড়িতে ফিরিয়া আসে এবং মা যখন আমাদের বাড়ির খুলিতে আসে তখন আসামী সালাম আমার মাকে খুব খারাপ ভাষায় গালাগালি করেছেন আমার মা **সালাম** মেম্বারের বাড়িতে যায় উল্লেখে এবং তারপর আসামী সালাম, শেলী ও রশিদা আমার মাকে খুব মারডাং করে এবং তখন আ**মি** আমার মায়ের কাছে দৌঁড় দিয়া আসিতে চাইলে আসামী সালামের ছেলে রশিদুল আমাকে ধরে রাখে এবং তখন আসামীরা আমার মাকে মারতে মারতে আমাদের বাড়ির ভিতরে নিয়া যায় এবং আমার মাকে বাড়ির ভিতর নিয়া আবার মারধর করে এবং আমি তখন আমার খালাকে ডাকতে খালার বাড়িতে যাই। কিন্তু খালাকে পা**ই নাই এবং খালার** বাড়ি থেকে ফিরে এসে আমার মাকে মৃত অবস্থায় খাটের উপর শোয়া দেখি এবং তারপর আমার আব্বা বাসায় আসে দোকান থেকে আমার আব্বা এসে আসামীদের গালিগালাজ করে ও প্রতিবাদ করে এবং আসামীরা আমার আব্বাকে ঘিরে রাখে এবং বলে যে, তোমার আব্বা বিষপান করেছে। আমাদের বাড়িতে কোন বিষ ছিল না। আমার আব্বা চিল্লাতে চিল্লাতে বাড়ির দক্ষিণ পশ্চিমের দিকে দৌঁড়াতে থাকে এবং পড়ে যায় এবং সেখান থেকে আমার আব্বাকে ধরে হাসপাতালে নেওয়া হয়। আমার মায়ের লাশ পুলিশ নিয়েছিল কিনা স্মরণ নাই। যারা আমার মাকে মারডাং করেছিল তাহারা অদ্য ডকে উপস্থিত এবং আমি তাঁহাদের চিনি। বর্তমানে খালার **ও নানীর** বাড়িতে থাকি। **এই আমার জবানবন্দি**।

27. During cross-examination she deposed that: "গত শক্রবারে আমার বিবাহ হইয়াছে, আমার শশুর বাড়ি রংপুর শহরে C.O. বাজারের কাছে। আমার স্বামী মাংস বিক্রয় করে। জনৈক ছফুর আমার নানার ভাই হয়। ছফুর তেলের ব্যবসা করে ঠিক নহে। আমার নানা তেলের ব্যবসা করে ও ছফুর কাঁচামালের ব্যবসা করে। আমার বাবা মা মারা যাবার অনেক পূর্বে আমার খালা (রীনা) বিবাহ হয়েছিল কিন্তু বিদায় হয় নাই। রীনার এখনও আনুষ্ঠানিক বিদায় হয় নাই। ইহা সত্য নহে যে, রীনা **খালার আনুষ্ঠানিক** বিদায় হইয়া গিয়াছে। গত শক্রবারের পূর্বে নানার বাড়ি, খালার বাড়ি ছিলাম, গত শক্রবারে **আমার খালার** বাড়িতে আমার বিবাহ হইয়াছিল। ইহা সত্য নহে যে, **কথিত ঘটনার ২ (দুই) দিন পূর্ব** থেকে আমি আমার খালার বাড়িতে ছিলাম। কথিক ঘটনার দিন কথিত মতে ঘটনার পূর্ব থেকেই আসামীদের সহিত আমাদের খারাপ সম্পর্ক ছিল কারণ আমরা আসামীদের **খুলি দিয়া যাতায়াত করিতাম**। আমাদের বাসার লজিং মাস্টারের নাম ছিল আশিদুল। আমার মাতা গ্রামে বিভিন্ন লোকজনের নিকট টাকা ধার নিত মর্মে আমি জানি না। এলাকার লোকদের নিকট হইতে টাকা পয়সা ধার করে নিয়ে এসে আমার মা কথিত লজিং মাস্টারকে দিত ইহা সত্য নহে। আমার বাবা-**মা মারা যাবার কয়দিন প**র লজিং মাস্টার আমাদের বাড়ি থেকে চলে যায়। **আমার** বাবা আমার মায়ের সহিত টাকা পয়সা হাওলাত নেবার জন্য রাগারাগি করিত ইহা সত্য নহে। ইহা সত্য নহে যে, আমার বাবা **প্রায়ই** আমার মাকে মারডাং করিত টাকা পয়সা হাওলাত নেবার কারণে। ইহা সত্য নহে, আমার বাবা আমার মাকে মারডাং করিয়া **বাসা** থেকে বের করিয়া দিয়াছিল এবং চেয়ারম্যান আপোষ করিয়া দিয়াছিল। আমাদের বাড়ির আশেপাশে আসামীদের বাড়ি আমাদের বাড়ি ও আ**রও ছয়/সাতটি বাসা** বাড়ি আছে। আসামী সালামের বাড়ি আমাদের বাড়ির পাশাপাশি এবং আর সব বাড়ি ফাঁকে ফাঁকে। মা যখন সালাম মেম্বারের বাড়ি গিয়াছিল তখন আমি সাথে যাই নাই এবং আমি নিজ বাড়িতে ছিলাম এবং আমাদের বাড়ির খুলিতে বসা ছিলাম। কথিত আসামীদের হাতে কি কি ছিল তা আমার স্মরণ নাই এখন। সালাম মেম্বারের বাড়িতে কি কথা

হয়েছিল মায়ের সাথে তা আমি বলিতে পারিব না কারণ মায়ের সাথে আর আমার কথার সুযোগই হয় নাই কারণ সে **মারা যায়**। আমাদের বাসা থেকে খালার বাসায় যাইতে হেঁটে অনুমান ১৫ (পনের) মিনিট লাগে। যেদিন বাবা মারা যায় সেদিন পুলিশ এসেছিল কিনা আমি বলতে পারবো না কারণ আমি কান্নাকাটি করলে খালা আমাকে সেখান থেকে নিয়ে চলে যায়। ইহা সত্য নহে যে, অদ্য আদালতে এসে সত্য গোপন করে মিথ্যা সাক্ষী দি**বার এবং ঘটনার তারি**খের দুই দিন পূর্ব থেকে **আমি আবার খালার** বাড়িতে ছিলাম এবং ঘটনার **দিন আমি আমার** বাড়িতে ছিলাম না। কথিত মতে ..... এজাজুলকে আমি চিনি এবং তাহার বাসা আমাদের বাড়ির পাশে। সাক্ষী এজাজুলের বাড়ি থেকে আমাদের বাড়িতে কথাবার্তা হলে সব শোনা যায় না তবে অল্প **অল্প শোনা যায়**। ঘটনার দিনের পরে পুলিশ আসিয়াছিল এবং আমাকে জিজ্ঞাসাবাদ করিয়াছিল। রশিদুল আমাকে ধরিয়া রাখিয়াছিল এ **কথা** আমি পুলিশকে বলি **নাই** । ইহা সত্য নহে যে, আমার বাবার অত্যাচারের কারণে আমার মা গলায় ফাঁস রাখিয়া মারা যায় এবং আমার মায়ের এই মৃত্যু দেখিয়া আ**মার বাবা বিষ খাইয়া মারা গিয়াছিল**। ইহা সত্য নহে যে, আসামীদের সহিত পূর্ব শত্রুতা থাকায় আমার চাচা মিথ্যা মামলা করিয়াছে। যেদিন মামলার তারিখ থাকে সেদিনই কাচারিতে আসি। প্রত্যেক তারিখে তারিখে আমি আসি ঠিক। কাচারিতে এসে এসে সাক্ষী দিতে শিখে গিয়েছি ইহা ঠিক নহে। পূর্বের দেওয়া সাক্ষীদের কাছ থেকে শুনে শুনে **এই** মিথ্যা সাক্ষী দিলাম। ইহা সত্য নহে।

28. P.W. No. 7, Rabul Islam is the son of victim Mostafa and Rokshana deposed in his deposition that: " **আমি মোঃ রবিউল ইসলাম। পি ডব্লিউ-৬ আমার ছোট বোন। মৃতা রোকসানা আমার মা ও মোস্তফা আমার পিতা হন। ২৪/৪/২০০২ তারিখ ঘটনা এ**বং সকাল বেলা আমি আমার ছোট ভাইকে (ইনসানুল) মাদ্রাসায় দিয়ে আসতে যাই এবং মাদ্রাসায় দিয়ে ফিরে আসার সময় দেখি যে, আমার মা বিচার দিয়ে এসে কাঁদতে কাঁদতে ফিরে আসিতেছিল এবং মায়ের কাছে জিজ্ঞাসা করিলে বলে যে, আসামীদের খুলি দিয়ে হাঁটাকে কেন্দ্র করে মারডাং করে আসামীরা আমার মা**কে এবং তা**ই মেম্বারের কাছে বিচার দিয়ে এসেছে। বাড়ির খুলিতে পৌঁছাতে আসামী সালাম খারাপ বলে যে মেম্বার তোর ভাতার হয় তাই সেখানে বিচার দিতে গিয়েছিলি এবং তখন আসামী সালাম, রশিদা ও শেলী আমার মাকে মার**ধোর** করিতে শুরু করে। মায়ের উক্ত অবস্থায় আব্বাকে সহিদারে**র** দোকানে**র** দিকে ডাক**তে যাই**। আমি আমার আব্বাকে বলি যে, আসামীরা মাকে মারিতেছে এবং বাবাকে নিয়ে বাড়িতে চলে আসি এবং এসে দেখি যে, আমার মাকে আমাদের ঘরের তীরের সাথে পড়নের শাড়ী দিয়ে ঝুলন্ত অবস্থায় মৃত। আমার বাবা নিজে **আমার** মাকে ঝুলন্ত অবস্থা থেকে নামায় এবং আমার বাবা রাগ হয় ও বলে যে পুলিশ কেস করবো ও আসামীদের গালি গালাজ করে এবং আমি আমার খালার বাড়িতে খালাকে ডাকিতে যাই। খালাকে ডাকিয়া আনিয়া দেখি যে বাবাকে বিষ খাওয়া অবস্থায় এবং বাবা বিষ খাওয়া অবস্থায় পশ্চিম পাশের রাস্তার দিকে যাইতেছে এবং তখন কি করে আমার বাবাকে মেডিক্যালে নেয়া হইয়াছিল এবং মেডিক্যালে আমার বাবা মারা গিয়াছে। পুলিশ এসে ঘটনার দিন আমার মায়ের লাশ **নিয়া গিয়াছিল** এই আমার জানা ঘটনা, বর্তমানে চাচা খালারা দেখাশুনা করে। এই আমার জবানবন্দি।

29. During cross-examination he deposed that: " ইহা সত্য নহে যে, কথিত ঘটনার দিন আমি আমার ঘটনার বাড়িতে **ছিলাম সকাল অনুমান ৭.০০** টার দিকে ঘটনার দিন ভাইকে নিয়া মাদ্রাসায় গিয়াছিলাম। ইহা সত্য নহে যে, জবানবন্দির কথামত মাদ্রাসায় যাওয়া আসামীদের কর্তৃক মাতাকে মারডাং করাও সকল বক্তব্য মিথ্যা ও শেখানো মতে অদ্য সাক্ষী **দিলাম মিথ্যা। যখন বাবা-**মা মারা যান তখন ৫ম শ্রেনীতে লেখাপড়া করিতাম এবং এখন লেখাপড়া করি**না**।

30. P. W. No. 8 Sabur Ali, in his deposition he deposed that deceased Rokshana is his sister-in-law and the deceased Golam Mostafa is his full brother. He could not recall the date of occurrence. This witness also deposed that on the alleged date of occurrence, he went to Rangpur town for business purpose and he returned from town at about 11.30-12.00 a.m. at that time, his niece namely Rina told him that Uncle Golam Mostafa has drink poison. On getting that information he started for the house of Mustafa, at that time, he saw 2/3 neighbouring people were carrying him and sent him to the Rangpur Hospital by van. He further deposed that his brother told him that he drink poison because yesterday an altercation took place with his wife and as such she committed suicide. At that stage, he was declared as hostile and cross examined him by the prosecution.

31. During cross examination by the prosecution he admitted that deceased Mostafa is his step brother and he did not see the incident. He denied the suggestion that he deposed falsely in this case, due to previous enmity with the informant relating to a monitory transaction between them. The defence declined to cross examine him.

32. P.W. No.9 Md. Abdur Rouf, deposed that the deceased Rokshana is his sister and he is Assistant Teacher of a High school. This witness deposed that on the alleged date of

occurrence at about 03.00 p.m. his nephew Soibual Alam informed him that accused Abdus Salam and his 2 wives namely Shali and Rashida assaulted his sister and killed her. They also poured poison into mouth of the deceased Mostafa and the neighbours sent him to the Rangpur Medical College Hospital for treatment. On getting information, he went to the place of occurrence. This witness also deposed that police prepared the inquest report in his presence and he put his signature on it however, he did not read the same. He deposed that he heard about this incident from the neighbours and children of the victims that on the alleged date of occurrence at about 8.00 O-clock in the morning, the accused persons assaulted his sister Rokshana, as such, she made complaint to the ex-member Abdus Salam and while she returning home at that time, the accused persons again assaulted her and she became senseless, thereafter, they hanged her body with a bar by her sari, thereafter, the deceased Golam Mostafa came back home and saw the dead body of his wife he protested about this incident, at that time, the accused persons assaulted his brother-in-law and forcibly poured poison into his month and he became senseless. Later, the neighbours sent him to the Hospital and where he met his death. He identified his signature on the inquest report, which marked as exhibit-2/2.

33. During cross examination he deposed that he went to the place of occurrence at about 3.30 p.m. and he saw police at the place of occurrence.

34. P.W. No.10 Md. Abdus Salam is the ex-member of Union Parishad deposed that he knows both the victims. The occurrence took place on 24.04.2002 and on that day, at about 7.30-9.00 a.m. he was at his home. He also deposed that at that time, deceased Rokshan came to his house and made a complaint that the accused Abdus Salam and his two wives namely Shali and Rashida assaulted her for loan amount. He further stated that he assured her to resolve this dispute through a *salish*. Thereafter, at about 1.00 p.m. while he was returning home from work, then he heard that the Rokshana had died in her house and Mostafa died in the hospital. Thereafter, he went to the house of victim and saw the dead body of the victim Rokshana lying on the bed and the police prepared the inquest report in his presence and he put his signature on it. He identified his signature on the inquest report, which marked as exhibit-2/3.

35. During cross examination this witness admitted that he put his signature on the inquest report however, he stated that police took his signature in a blank paper. He also admitted that deceased Rokshana and Mostafa borrowed an amount of Taka 24,000/- from the people of this area. He denied the suggestion that the victim Rokshana did not go to his house on the date of occurrence and he deposed falsely in this case.

36. P.W. No. 11 Jamila is the mother of deceased Mostafa and mother–in-law of deceased Rokshana. This witness deposed that her house is situated half an hour walk away from the house of Mostafa. She deposed that on the alleged date of occurrence, at about 8.00-9.00 a.m. the victim Rokshana was coming towards her house, at that time, she was crying and mud strained as she asked what had happened in reply she told her that the accused Salam, Sheli and Rashida assaulted her. Thereafter, Rokshana went to the house of member and she followed her there and the victim Rokshana made a complaint to the Member against the accused persons. At that time, the member Salam assured her that he will resolve the matter at the evening. Thereafter, her daughter-in-law went to her house. She also deposed that Ejajul informed her about this incident, on getting this information her son Younus went to the house of Mostafa and Rokshana and she followed her there and saw that Rabibul and Moslama were crying and told her that the accused persons killed their mother. She also

deposed that she saw the dead body of Rokshana was lying on the bed and her son Mostafa shouted at them and said he will file a case, after making complaint to the Chairman, then the accused persons caught hold the victim Mostafa and poured poison into his mouth and the neighbours sent her son to the Hospital and where he met his death.

37. During cross examination this witness admitted that on the alleged date of occurrence deceased Rokshana went her house along with her children. This witness went to the house of member along with Roskhana and her children. He denied the defence suggestion that the victim Rokshana committed suicide by hanging herself. He also denied the suggestion that the victim Mostafa committed suicide by taking poison. She denied the suggestion that she deposed falsely in this case.

38. P.W. No.12 Md. Amjad Hossain deposed that on the date of occurrence at about 8.00 / 8.30 a. m. his sister-in-law, the deceased Rokshana came to his house and told him that the accused persons namely Selina, Rashida and Salam assaulted her, due to a dispute arised in respect of the pathway. The deceased Rokshana also stated that she went to the house of Salam member and he assured her to hold a *salish* at the afternoon. This witness deposed that at about 01.30 p.m. his son informed him about the incident and he along with his son went to the house of Rokshana and saw her dead body lying on the bed and the victim's son (Robiul) and daughter (Muslama) told him that the accused persons assaulted her mother in the morning, later on, they again assaulted her, at that time, they went their aunt's house and on return they saw her mother met her death. This witness also deposed that he made a phone call to the local police station and they asked him to go there. Thereafter, at about 02.30 p. m. he went to the police station and informed them about the incident but the police became angry and took his signature on a paper. This witness heard that Golam Mostafa also died in the Hospital and the police took the dead body of Mostafa. He identified his signature in the U.D. case.

39. During cross examination this witness denied the defence suggestion that he made written complaint to the Police that the death of the victim was caused due to hanging. This witness heard that the deceased Mostafa went to the house of accused persons to protest against assaulting of his wife, at that time, the accuseds poured poison into mouth of deceased Mostafa. He denied the suggestion that the deceased Mostafa committed suicide by taking poison and deceased Rokshana committed suicide by hanging herself and he deposed falsely in this case.

40. P.W.13 Ahad Ali in his deposition deposed that the occurrence took place on 24.04.2002 and on that day, in the morning, he went to the shop of one Shahider, which is situated ½ Kilometter away from his house. This witness also deposed that: "দোকান থেকে ফিরে এসে দেখি যে গ্রামের ফতে চাচী রোকসানা করে ডাকছে এবং মোস্তফা বলে যে সে বাসায় নাই এবং ফতে চাচী দেখি যে সালাম মেম্বারের বাড়ির দিকে যাচ্ছে এবং সালামের বাড়িতে ফতে চাচী আসামী সেলীর সাথে কথা বলছে এবং সালামের বাড়িতে সেলী বলে যে রোকসানার কণ্ঠ শোনা যাচ্ছে এবং ফতে চাচী ঘুরিয়া রোকসানার বাড়িতে ফিরে আসে এবং ফতে চাচী রোকসানার সাথে ঝগড়া করে এবং সাথে সেলীও ঝগড়া করে এবং ০৫/০৭ মিনিট পর আমি রিক্সা নিয়ে শহরের দিকে চলে যাই। রিক্সা চালানোর পর ১১.০০/১১.৩০ টার দিকে বাড়িতে ফিরে আসি এবং মোস্তফা ভাই বউ বউ বলে দুই বার চিৎকার দেয় এবং **শুনিয়া মোস্তফার** বাড়িতে যাই এবং গিয়া দেখি যে, রোকসানা ফাঁসিতে লটকানো এবং **মোস্তফা ভাই রোকসানার পা ভাসিয়া ধ**রে আছে এবং আমাকে বাধঁন খুলে দিতে বলে এবং লাশ বিছানায় শুয়াইয়া দেই এবং তখন এজাজুল, মহসিন, ইন্তেজারা আসে এবং এজাজুল বলে যে ডাক্তার ডাকো এবং **আমি** ডাক্তার ডাকিতে যাই এবং ডাক্তারের দেখা না পেয়ে ঘুরে আসি এবং ওয়াহেদ চিৎকার করে যে মোস্তফা এনড্রিন খেয়েছে আগাও এবং বের হয়ে গোবর খাওয়ানোর চেষ্টা হলো এবং সে বলে যে কিছু হয় নাই এবং পুরনো বাড়ির দিকে দৌড়ায় এবং গোবর খেতে চায় না। এবং আফজালের দোকানের সামনে টাকা বের করে এবং তাহার ভাইকে দেয় এবং তারপর হাসপাতালে নেওয়া হয় এবং হাসপাতালে মোস্তফা মারা যায়।"

41. During cross-examination he deposed that: "**মৃতা** রোকসানা ও মৃত মোস্তফার বাড়ির পাশে আমার **বাড়ি**। ফতে চাচী হইল ফাতেমা যিনি এই মামলার সাক্ষী এই আসা**মীরা মৃতা** রোকসানাকে মারডাং করিয়াছিল তাহা আমি দেখি **নাই বা শুনি নাই**।"

42. P.W.14 Sakim Uddin, in his deposition deposed that he lived in the Uttar Gariya village. This witness deposed that on 24.04.2002, both the victims Rokshana and Mostafa had died. This witness also deposed that on that day, in the morning, he saw Fatima called the victim, in reply deceased Mostofa said she was not at home, then Fatima went to the house of accused Shaly and as they heard voice of Rokshana, then they went to the victim's house again and an altercation took place. Thereafter, this witness went to town with his rickshaw and he came back home at about 12.00 O-clock. At this stage, he was declared hostile by the prosecution.

43. During cross examination by the prosecution he denied the suggestion that Fatima did not come to the house of Rokshana and no altercation took place between Fatema and Rokshana. He denied the suggestion that he deposed falsely in this case, at the instigation of the accused persons.

44. During cross examination by the accused this witness admitted that the deceased Mustafa is his brother-in-law and he did not see the incident. He saw the dead body of Rokshana lying on the bed. He saw Moshin, Wahed, Rezaul, Abed Ali, Baten, Sayed Ali and some women were present at the place of occurrence. He did not hear anything from the village that the accused persons assaulted the victims namely Mostafa and Rokshana.

45. P.W. No.15 Sub-Inspector Nibaran Chandra Borman is the Recording Officer of the Unnatural Death Case No. 121 dated 24.04.2002. This witness deposed that "এই মামলা সংক্রান্তে মৃতা রোকসানা এর ভগ্নিপতি আমজাদ হোসেন লিখিত ভাবে থানায় জানান যে, তাহার শ্যালিকা রোকসানা গলায় ফাঁসা দিয়া আত্মহত্যা করিয়াছে এবং লিখিত অবগতিপত্র পেয়ে থানায় (সদর রংপুর) ডিউটি অফিসার থাকাকালে অপমৃত্যু মামলা নং ১২১ **তাং ২৪/৪/২০০২** ইং রুজু করে তদন্তভার এস.আই মোঃ তাহ**ইয়াতুল এর উপর অর্পণ করি**। He identified his signature on U.D. case, which mark as exhibit-3.

46. During cross-examination he deposed that:"আমজাদ হোসেন লিখিত এজাহার **দেন ঠিক** । **মামলা** রুজুর সাথে সাথে I.O. **কে** Endorse **করিয়াছিলাম**। **দুপুর ১২.৪৫ মিনিট তাং ২৪/৪/২০০২** ঘটনার সময় ঠিক এজাহার মতে। এজাহার মতে লাশ নামানো হয়েছে এবং মাটিতে শোয়ানো অবস্থায় আছে দেখা যায় ঠিক। রোকসানার স্বামী মোঃ মোস্তফা কথিত **ঘটনার সময় কোথায় ছিল বা তাঁহার ভুমিকা কি ছিল তাহা** এজাহারে উল্লেখ নাই ঠিক।

47. P.W. No.16, Constable No. 609, Sree Moninranath Borman in his deposition deposed that on 24.04.2002, he along with the Investigating Officer went to the place of occurrence and on completion of inquest report by the Investigating Officer, he carried the dead body of Rokshana to the morgue of Rangpur Medical College Hospital through a Chalan, he identified his signature on it which marked as exhibit-4.

48. During cross examination he admitted that after taking the dead body of Rokshana, the doctor did not give him any paper.

49. P.W. No. 17 Dr. Abdul Jalil in his deposition deposed that that he held autopsy on the dead body of the deceased Rokshana on 25.04.2002 brought and identified by Constable No. 609, Sree Moninranath Borman and found the following injuries:-

1. One large hematoma is situated over the right parietal region 1" away in front of lambdoid suture measuring 2" X 1 ½".

2. One small hematoma is situated over the left parietal region adjacent to the saggital suture and left lambdoid suture measuring 1" X 1 ½".
3. One transverse ligature mark is situated over the thyroid cartilage in front and on each side of the neck which slipped upward with abrasion followed by oblique ligature mark is found. Knot mark is situated near left mandibular angle.

"On dissection parch men titration not found extravasations of blood found to the mounds. Dark clotted blood found under the scalp and extramural space in the right side. Both by brain it's excavated (right hemephra whole brain) found congested. All the injuries mentioned above are ante mortem in nature. In our opinion the cause of death is due to shock and intracranial hemorrhage with asphyxia as a result of head injury and hanging which were ante mortem and homicidal in nature".

50. This witness also held autopsy on the dead body of the deceased Golam Mostafa on 25.04.2002 brought and identified by Constable No. 118, Abdul Gafur and he did not found any external and internal injury on the person of the deceased. On receipt of the chemical analysis report, he opined that "from our P.M. examination report and chemical analysis report, we are in opinion that the cause of death due to asphyxia as a result of intake of O.P.C. (organic phosphorous compound) poisoning which was ante mortem in nature.

51. During cross examination this witness admitted that the injury Nos. 1 and 2 of the post mortem report of deceased Rokshana were not mentioned in the inquest report.

52. P.W. No. 18 Inspector Md. Ohiduzzaman, the Officer-in-Charge of Rangpur Kotwali Police Station as Investigating Officer, investigated the case. This witness also deposed that on receipt of the complaint petition from the informant Md. Younus Ali, he registered the Kotwali Police Station Case No. 68 dated 28.04.2002 under sections 302/201/34 of the Penal Code. He filled up the FIR Form, which marked as exhibit-5 and his two signatures on it marked as exhibit- 5 (Ka) and 5 (Kha). He identified his two signatures in the second page of complaint petition; these are marked as exhibit-1/2 and 1/3. During investigation he visited the place of occurrence, prepared the sketch map with an index, these were marked as Exhibits 6 and 7 and his signatures on those as Exhibit-6/ka and 7/ka respectively. He recorded the statement of the witnesses under section 161 of the Code of Criminal Procedure and collected the post mortem reports, perused the reports of the Investigating officers of two U.D. cases. After conclusion of investigation, finding prima facie case against the accused persons namely Abdus Salam, Salina @ shaly and Rashida, he submitted charge sheet being No. 669 dated 03.11.2002 under sections 302/201 of the Penal Code.

53. During cross examination this witness admitted that Sub-inspector Md. Tahitul Islam prepared the inquest report of deceased Rokshana in presence of witnesses, pursuant to the Unnatural Death Case No. 121 dated 24.04.2002 and witness Md. Amjad Hossain, the brother-in-law of deceased Rokshana is the informant of the said U.D. case, he identified the dead body of deceased Rokshana. This witness admitted that it is stated in the Inquest report of deceased Rokshana, that a crescent shape ligature mark of thin rope is found on the neck and there is no other injury mentioned in the said report. This witness admitted that Sub-inspector Sree Anukul Talukdar prepared the inquest report of the deceased Mostafa, pursuant to the Unnatural Death Case No. 123 dated 24.04.2002 and Abaz Ali, Araz Ali, Abdur Razzaque and Raju were present there, during preparation of inquest report of deceased Mostafa, but they were not cited as witnesses in the Charge sheet. He denied the suggestion that he hastily submitted the charge sheet and his investigation was perfunctory.

54. P.W. No.19 Sub-inspector Md. Tahitul Islam as Investigating Officer of the Kotwali Police Station U.D. case No. 121 of 2002 dated 24.04.2002, visited the place of occurrence and prepared the inquest report of deceased Rokshana in presence of witnesses. This witness deposed that he sent the dead body to the morgue of Rangpur Medical College for autopsy and prepared the seizure list and made conversation with the doctor over telephone, who held autopsy on the dead body of deceased Rokshana. This witness also deposed that he submitted all documents and record of U. D. case No. 121 of 2002 to the Investigating Officer Mr. Wahiduzzaman, the Officer–in-Charge of Kotwali Police Station. He identified the Inquest report of deceased Rokshana, which marked as exhibit-2 and his signature on it marked as exhibit-2/1 and the seizure list marked as exhibit -8 and his signature on it marked as exhibit-8/Ka. These alamots are violet coloured print sari, deep brown coloured petticoat, pink coloured blouse and light violet and white coloured sari, these are marked as material exhibit-1 series. This witness also deposed that in the inquest report, there are no sign of head injury of the deceased Rokshana because he did not see the head of the victim by moving her hair. He denied the suggestion that he did not act transparently at the time of preparing the seizure list and Inquest report of deceased Rokshana.

55. During cross examination this witness deposed that সত্য যে, প্রথম যখন আমি মৃতদেহ দেখিয়াছি তখন মৃতদেহের পড়নে একটি বেগুনি রং এর শাড়ি ছিল। সত্য যে, মৃতদেহের লাশ যখন আমি মর্গে **চালান দেই তখন ও বেগুনী** রং এর ঐ শাড়িটি মৃতার পড়নে ছিল। আমি সে শাড়িটি সিজ করিয়াছি। উহা পরিধেয় শাড়িটি নহে অপর একটি শাড়ি যাহা বেগুনি সাদা রং এর আমি সর্বমোট একটি সিজার লিস্ট তৈরী করিয়াছি যাহা প্রদ**শর্নী-** ৮। এই সিজার লিস্টে ব্লাউজ পেডিকোর্ট ইত্যাদির কোন উল্লেখ নাই। যে **শাড়িটি** আমি প্রদশর্নী ৮ মূলে সিজ করিয়াছি ঐ শাড়িটি আমার সামনে উপস্থাপন করেন মৃতার বোন সাক্ষী **উলফা বেগম**। সিজার লিস্টে সাক্ষী আছে সফুর আলী ও ওয়াস আলী এই ২ জনই মৃতা **রোকসানার স্বামী মৃত মোস্তফার ভাই কিনা আমার জানা নাই**। **প্রদশর্নী** ৮ চিহ্নিত, জব্দ তালিকার ৪ নং কলামে ২য় লা**ইন শাড়ি** যাহার দ্বারা মৃতা রোকসানা বসতঘরের তীরের সহিত ফাঁস দিয়া আত্মহত্যা করিয়াছিল। পর্যন্ত এক কলামের এক ঘরে লেখা সত্য। উক্তি করিয়াছিল এর পরবর্তী বলিয়া জানা যায়। লেখাগুলি ভিন্ন কলম দিয়া লেখা। উক্তি করিয়াছিল **শব্দের** ল অক্ষরের পরে **ঐ নাই**। **প্রদশর্নী ৪ চিহ্নিত চালানটি আমার তৈরী**। **প্রদশর্নী** ৪ এর ৯ নং কলামের ভিতরে লেখা আছে ফাঁসি দিয়া আত্মহত্যা। এই কলামটি সরকারের নির্ধারিত ফরম। আমি সততা এবং নিষ্ঠার সঙ্গে সুরতহাল রিপোর্ট তৈরী করিয়াছি। আমার আচারণে কোন স্বচ্ছতার অভাব ছিল না। মৃতা রোকসানার সুরতহাল প্রতিবেদনে শরীর বলিতে আমি আপাদমস্তক বুঝাইয়াছি। সংবাদদাতা মোঃ আমজাদ হোসেনের লিখিত এজাহারের ভিত্তিতে অস্বাভাবিক মৃত্যু মামলা রুজু হয়। এজাহারের শিরোনাম বিষয় ফাঁসি লটকাইয়া মৃত প্রসঙ্গে। সত্য যে, সংবাদদাতা আমজাদ হোসেন মৃতা রোকসানার দুলাভাই। সত্য যে, এজাহারে আমজাদ হোসেন মৃত রোকসানা ফাঁস লটকাইয়া মৃত্যুবরণ করিয়াছে উল্লেখ করিয়াছেন। সত্য যে, সুরতহাল রিপোর্টে উল্লেখ আছে মৃতার গলায় চিকন রশির অর্ধ চন্দ্রাকৃতির দাগ দেখা গেল। **আমি রশি শব্দটি এই জন্য ব্যবহার করিয়াছি যে, দাগটি খুব চিকন ছিল । সত্য যে,** আমি সুরতহাল লিখিত চিকন রশি আদৌ **অনুসন্ধান করি নাই। মৃতা রোকসানার দেহ মৃতা** রোকসানার বোন সাক্ষী উলফা বেগমের মাধ্যমে ভালভাবে ওলট পালট করিয়া **দেখিয়াছি, মৃতা রোকসানার সমস্ত শরীর ওলট পালট করিয়া দেখিয়াছি। মৃতার গলায় চিকন রশির অর্ধচন্দ্রাকৃতির দাগ ছাড়া** শরীরের আর কোথাও কোন প্রকার জখম পাই নাই। মৃতা রোকসানার সুরতহাল যে ৬ জন সাক্ষীর সাক্ষর রহিয়াছি তাহাদের নাম যথাক্রমে ১। আঃ সা**লাম, পিতা -মৃত নাছিম উদ্দিন** ২। **মোঃ আঃ রউফ, পিতা- সবুর আলী** ৩। **নাম অস্পষ্ট** ৪। **নাম অস্পষ্ট** ৫। মোঃ আনোয়ারুল হক ৬। আঃ বাতেন, পিতা- ছোলেমান আলী। আমি সুরতহালের কার্বন কপি দেখিয়া সাক্ষ্য দিতেছি। **মূল** সুরতহাল রিপোর্ট কোথায় বলিতে পারিব না। সত্য যে, আমি ডাক্তার যিনি ময়না তদন্ত করিয়াছেন তার সাথে টেলিফোনে যোগাযোগ করিয়াছি। ঐ ডাক্তার তার নাম ডাঃ আ**ব্দুল** জলিল। তাহার টেলিফোন নম্বর এই মুহূর্তে মনে নাই। **গত ২৫-৪-২০০২ ইং তারিখ বিকাল ৩.০০ ঘটিকায় ময়না তদন্তকারী ডাঃ আব্দুল** জলিল আমাকে টেলিফোনে জানাইলেন পোস্ট মর্টেম রিপোর্ট প্রস্তুত করা হইয়াছে। আমি ২৯-৪-২০০২ ইং তারিখে ঐ পোস্ট মর্টেম রিপোর্ট পাইয়াছি। আমি ডাঃ আব্দুল জলিলের সাথে শারীরিক ভাবে দেখা করি নাই।

56. These are the depositions of the prosecution witnesses.

57. We have gone through the first information report, inquest report, charge sheet, deposition of the witnesses, impugned judgment and order and other materials on record. We have given our anxious consideration to the submissions advanced by the learned Advocates

for both the sides. Learned Advocate appearing for the appellants argued that the appellants were convicted and sentenced on the basis of the evidence adduced by the prosecution witness Nos. 1, 2, 3, 6, 7, 9, 10, 11, 12, 17 and 18. Except the Police personnel and Medical Officer, all other prosecution witnesses mentioned above are near relatives of the informant and both the deceased and their belated disclosure that on the alleged date and time of occurrence, the appellants seriously assaulted the victim Rokshana and as a result, she became senseless. The appellants thought that the victim Rokshana met her death and as such, they carried the body of Rokshana inside her house and hanged her body with a bar by her sari to show that the victim committed suicide; thereafter they left the place of occurrence. On getting information, victim Mostafa came to the place of occurrence; he became angry and shouted at them. At that stage, the appellants assaulted him and forcibly poured poison into his mouth and due to the reaction of poison; he met his death at the Hospital, which could be regarded as subsequent embellishments. The learned Judge relying on the evidence of near relatives and interested witnesses convicted these appellants.

58. **First** question raised by learned Advocate for the Appellants that whether or not all the prosecution witnesses are near relatives of the informant or victim and judgment and order of conviction and sentence passed by the trial Court against these appellants on the basis of the evidence of interested, inter-related and partisan witnesses is sustainable in law. The evidence of interested, inter-related and partisan witnesses must be closely scrutinized before it is accepted. We find support of this contention in the case of ***Nawabul Alam and ors. Vs. The State, 15 BLD (AD) 61*** wherein it is held:

> "*The principle that is to be followed is that the evidence of persons falling in the category of interested, interrelated and partisan witnesses, must be closely and critically scrutinized. They should not be accepted on their face value. Their evidence cannot be rejected outright simply because they are interested witnesses for that will result in a failure of justice, but their evidence is liable to be scrutinized with more care and caution than is necessary in the case of disinterested and unrelated witnesses. An interested witness is one who has a motive for falsely implication an accused person and that is the reason why his evidence is initially suspect. His evidence has to cross the hurdle of critical appreciation. As his evidence cannot be thrown out mechanically because of his interestedness, so his evidence cannot be accepted mechanically without a critical examination. As Hamoodur Rahman, J. (as his Lordship then was) observed in the case of* ***Ali Ahmed vs. State (14 DLR (SC) 81):***
>
> *"Prudence, of Course, requires that the evidence of an interested witness should be scrutinized with care and conviction should not be based upon such evidence alone unless the Court can place implicit reliance thereon" (Para - 10).*
>
> *……..The rule that, the evidence of interested witnesses requires corroboration is not an inflexible one it is a rule of caution rather than an ordinary rule of appreciation of evidence. The Supreme Court of Pakistan spelt out the rule in the case of* ***Nazir Vs. The State, 14 DLR (SC) 159****, as follows:*
>
> *"……..we had no intention of laying down an inflexible rule that the statement of an interested witness (by which expression is meant a witness who has a motive for falsely implicating an accused person) can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely, implicating an innocent person. But he will be an exceptional witness and, so far as an ordinary interested witness is*

concerned, it cannot be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order, therefore, to be satisfied that no innocent persons are being implicated alongwith the guilty the Court will in the case of an ordinary interested witness look for same circumstances that gives sufficient support to his statement so as to create that degree of probability which can be made the basis of conviction. That is what is meant by saying that the statement of an interested witness ordinarily needs corroboration.

…..…The High court Division was obviously in the wrong in holding that no corroboration was necessary in this case. It failed to scrutinize the evidence of interested eye- witnesses and totally ignored the fact that the evidence of P.Ws. 3-5 having so many infirmities is by itself insufficient and unsafe to sustain any conviction on a capital charge and requires corroboration by either circumstantial or ocular corroborative evidence."

59. In the instant case, we find that the P.W.-1 Md. Younus Ali is the informant and brother of the deceased Mostafa, P.W. No. 2 Ulfa Khatun is the wife of informant and sister of victim Rokshana, P.W. No. 3 Ajajul Haque is a cousin of deceased Mostafa, P.W. No. 6 Muslama Khatun and P.W. No. 7, Rabiul Islam are daughter and son of the deceased Mostafa and Rokshana, P. W. No. 8 Sabur Ali, step brother of the deceased Golam Mostafa. P.W. No.9 Md. Abdur Rouf, brother of the deceased Rokshana and P.W. No.12 Md. Amjad Hossain, brother-in-law of the deceased Rokshana, these prosecution witnesses are near relation of both the deceased. The prosecution witness Nos. 6 and 7 are son and daughter of both the victims, they lost their parents on the alleged date of occurrence. They are probable and natural witnesses of the alleged incident of murder and they narrated vivid picture of the alleged occurrence, how their parents met their death. The prosecution witness Nos. 2, 3, 10, 11 and 12 witnessed part of the incident and supported the prosecution case. There is no major contradiction or discrepancy in their statements on any material point. Prosecution Witnesses Nos.1 2, 3, 6, 7, 10, 11 and 12 are material witnesses, though they are close relatives of both the victim, but they cannot be considered as interested witness. There is no reason that the testimony of P.W. Nos. 2, 3, 6, 7, 10, 11 and 12 can be discarded or liable to be flung to the wind simply because they happened to be close relative of the deceased Golam Mostafa and Rokshana. They are most natural, probable and competent witnesses in the present case. The prosecution witness Nos. 6 and 7 are inmates of the house and saw the major part incident. They have given details of the entire occurrence and even in their cross-examination the defence could not show any material contradiction or discrepancy, for which their ocular testimonies should be disbelieved. We find support of this contention in the case of ***State vs. Moslem reported in 55 DLR (2003) 116*** wherein this Division held that:

"A close relative who is a material witness cannot be regarded as an interested witness. The terms 'interestedness' postulates that the witness must have some direct interest in having the accused somehow or the other connected for some animus or some other reasons. 'Interestedness' has been defined by Supreme Court of Pakistan in the case of Nazir and others vs. State, PLD 1962 (SC)269 in the following words. "Interested witness is one who has a motive for falsely implicating an accused person."

There is no law that the statement of a particular witness is liable be flung to the wind simply because he happens to be a close relative of the victim. However, the court while putting reliance on the statement of a close relation and so-called interested witness would be on its tiptoe and guard and would scrutinize the statement more carefully. Evidence of close relative has only to

be scrutinized with greater care in order to find out whether the same suffer from internal marks of falsehood due to interestedness."

60. **Second** question raised by learned Advocate for the Appellants that whether or not delay in lodging the Ejahar and belated statements of prosecution witnesses makes the prosecution case shaky and doubtful.

61. Learned Advocates appearing for the Appellants argued that the alleged incident took place on 24.04.2002 and the informant lodged this instant Ejahar to the Officer-in-Charge of Kotwali Police Station on 27.04.2002. There is no explanation in the Ejahar as to the delay of 3 (three) days, which cast serious doubt on the prosecution story, because it's allowed the prosecution witnesses with ample opportunity for concoction and embellishment of the prosecution story.

62. In the Instant case, we find that the incident took place in the morning of 24.04.2002 and the P.W. No. 1 lodged this instant Ejahar to the Officer-in-Charge of Kotwali Police Station at about 11.45 on 27.04.2002, the cause of delay as explained by the informant in lodgment of the Ejahar is that due to terrible shock, he lodged the same after a short delay. P.W. No. 1 Md. Younus Ali is the informant and brother of the deceased Mostafa, he did not witness the incident of murder and he heard about the incident from two children of the deceased Golam Mostafa and Rokshana and lodged this instant Ejahar. The informant's house is situated 1 ½ Kilometer away from the place of occurrence. P.W. 4 deposed that the accused Salam is very strong in men and materials. From the beginning to end, the accused persons and others tried to suppress the incident of murder and published widespread rumour in the neighbourhood that both the victims committed suicide. The informant at first heard the death of his sister-in-law and thereafter, he heard about the death of his elder brother, two bad news one after another shocked the children as well as the family members, as such, we are of the view that the cause of delay as explained in the Ejahar is found to satisfactory.

63. **Third** question raised by learned Advocate for the Appellants that there are serious contradictions between the inquest report and post mortem report relating to the injuries on the person of the deceased Rokshana but the learned Judge failed to consider the inquest report and the Unnatural Death cases though these are primary documents of the prosecution case. The learned Advocate for the appellants argued that the inquest report disclosed that the deceased Rokshana sustained one injury on the neck due to hanging. Whereas the medical officer P.W. No. 17 Dr. Abdul Jalil found three injuries on the person of the deceased and as such according to him two injuries remained unexplained and it is a material contradiction, so no reliance can be placed in the testimony of the prosecution witnesses.

64. It appears from the record, the prosecution witnesses Nos. 6 and 7 in one voice have testified that while the victim Rokshana was returning home from the house of Abdus Salam at about 10.00 to 11.00 a.m. and as she reached near the courtyard of her house, at that time, accused persons indiscriminately assaulted her and they carried her body to her room and hanged the body with a bar by a sari. P.W. No.19 Sub-inspector Md. Tahitul Islam, who went to the place of occurrence and prepared the inquest report found the aforesaid one injury on the neck. P.W. No. 17 Dr. Abdul Jalil, held autopsy on the dead body of the deceased Rokshana on 25.04.2002 and found 3 (three) injuries 2 (two) injuries on the head and one on the neck. P.W. No.19 Sub-Inspector Md. Tahitul Islam deposed that in the inquest report, there are no sign of head injury of the deceased Rokshana because he did not see the head of victim by moving her hair. He denied the suggestion that he did not act transparently at the

time of preparing the seizure list and inquest report of deceased Rokshana. Thus, the ocular evidence of prosecution witnesses supported by post mortem report with regard to the injury no. 1 and 2 cannot be disbelieved. Further, the medical evidence is only corroborative in nature, in that view, the ocular evidence of the eye-witnesses, which substantially corroborates the injuries on the person of the deceased Rokshana, must be accepted.

65. **Fourth,** question raised by learned Advocate for the Appellants that whether or not the defence case is more probable than the prosecution case. The defence case as it appears from the trend of cross examination is that the appellants are innocent and they did not commit any offence as alleged against them. Their further case is that on the alleged date and place of occurrence there is an altercation took place between the victim Rokshana and Golam Mostafa relating to the loan and due to the said altercation the victim Rokshana became angry and committed suicide by hanging herself with the bar by a sari and on getting that information her husband victim Golam Mostafa also committed suicide by drinking poison. The learned Advocate for the appellants argued that the prosecution witnesses being Nos. 4, 5, 8, 12 and 14 did not support the prosecution case, rather they supported the defence case.

66. We have perused the evidence on record, wherefrom it transpires that these witnesses did not witness the incident, they heard about this incident from the neighbour, their evidence are hearsay, however, P. W. No.5 Abdul Baten during cross examination he deposed that আসামীদের বিরুদ্ধে কোন দোষ নাই তাহারা কেন আসামী হয়েছে বলতে পারব না। রোখসানা ও স্বামী স্ত্রীর মধ্যে দীর্ঘ দিনের ঝগড়া।------ ঘটনার পুর্বের দিন মোস্তফা তাহার স্ত্রীকে কুড়াল মারিয়াছিল। This witness did not witness the incident and his evidence does not corroborate with the post mortem report or any other evidence adduced by the prosecution.

67. **Final** question is whether and the prosecution proved their case beyond reasonable doubt.

68. This is a double murder case. We have perused the evidence on record, wherefrom it transpires that P.W. No. 1 Md. Younus Ali, the informant and brother of the deceased Mostafa, he did not witness the incident of murder, he heard about incident from two children (P.W. Nos. 6 and 7) of the deceased Golam Mostafa and Rokshana and lodged this instant Ejahar to the Officer-in-Charge of Kotwali Police Station on 27.04.2002 and alleged that due to bad economic condition of the victim Mostafa and Rokshana borrowed some money from the accused No. 1 Salam and accused No. 2 Salina and they promised to pay certain amount of interest for that amount, with this regard a dispute arise with the accused persons and they blocked the pathway of the deceased. On 24.04.2002 at about 7.00-7.30 a.m. there is an altercation took place between the accused persons and the victim Rokshana and they assaulted the victim Rokshana. At that stage, accused Abdus Salam threatened her that unless they paid the rest amount within 12 hours, then they have to transfer their household in their name. As such, victim Rokshana went to the house of Abdus Salam, ex-member of Union Parishad and made a complaint to him. He assured her (Rokshana) to hold a *salish* with this regard at the afternoon. While she was returning home from the house of Abdus Salam at about 10.00 to 11.00 a.m. and as she reached near the courtyard of her house, at that time, accused Salam, Salina, Rashida seriously assaulted her and they carried her body into her room and hanged the body with a bar by a sari to show that she committed suicide. The deceased Rokshana's son, P.W. No. 7, Rabiul Islam informed his father about this incident; he came back home and protested about the incident. At this stage, the accused persons namely Salam, Salina and Rashida assaulted the deceased Golam Mostafa and forcibly

poured poison into his month and the victim to save himself run away towards the road and became senseless. Later, the neighbours sent him to Rangpur Medical College Hospital and where he met his death. The Prosecution Witnesses Nos. 6 and 7 in one voice have testified that while the victim Rokshana was returning home from the house of Abdus Salam at about 10.00 to 11.00 a.m. and as she reached near the courtyard of her house, at that time, accused persons indiscriminately assaulted her and they carried her body to her room. There after they saw the dead body of their mother. Before the lodgment of the instant Ejahar, there are 2 (two) G. D. entries were filed one by P.W. No. 12 Amjad Hossain and the other by P.W. No. 15 Sub-Inspector Nivaran Chandra Barman. Accordingly, 2 (two) U. D. cases were started. P.W. No.15 Sub-Inspector Nibaran Chandra Borman is the Recording Officer of the Unnatural Death Case No. 121 dated 24.04.2002. P.W. No.19 Sub-inspector Md. Tahitul Islam as Investigating Officer of the Kotwali Police Station U.D. case No. 121 of 2002 dated 24.04.2002, visited the place of occurrence and prepared the inquest report of deceased Rokshana in presence of witnesses. He sent the dead body of deceased Rokshana to the morgue of Rangpur Medical College for autopsy. P.W. No. 17 Dr. Abdul Jalil held autopsy on the dead body of the deceased Rokshana on 25.04.2002 and found following injuries:-

1. One large hematoma is situated over the right parietal region 1" away in front of lambdoid suture measuring 2" X 1 ½".
2. One small hematoma is situated over the left parietal region adjacent to the saggital suture and left lambdoid suture measuring 1" X 1 ½".
3. One transverse ligature mark is situated over the thyroid cartilage in front and on each side of the neck which slipped upward with abrasion followed by oblique ligature mark is found. Knot mark is situated near left mandibular angle.

69. He opined that the cause of death is due to shock and intracranial hemorrhage with asphyxia as a result of head injury and hanging which were ante mortem and homicidal in nature". P.W. No. 17 Dr. Abdul Jalil also held autopsy on the dead body of the deceased Golam Mostafa on 25.04.2002 and he did not found any external and internal injury on the person of the deceased. On receipt of the chemical analysis report, he opined that "from our P.M. examination report and chemical analysis report, we are in opinion that the cause of death due to asphyxia as a result of intake of O.P.C. (organic phosphorous compound) poisoning, which was ante mortem in nature.

70. In the instant case, we find that the learned Additional Sessions Judge, 2nd Court, Rangpur convicted and sentenced these appellants relying on the evidence of P.W. No. 3 Ajajul Haque, P.W. No. 6 Muslama Khatun, P.W. No. 7, Rabul Islam P.W. No.10 Md. Abdus Salam, P.W. No. 11 Jamila, P.W. No.12 Md. Amjad Hossain, P.W. No. 17 Dr. Abdul Jalil and circumstantial evidence. The prosecution witness Nos. 6 and 7 are daughter and son of the victims and these two witnesses lost their parents in the alleged incident, they are most probable and natural witnesses of this alleged incident of murder and they narrated the vivid picture of what had happened on the alleged date of occurrence and how their parents had died by this unfortunate incident, though they are child witnesses, they witnessed the major part of the incident and having testified about the factum of the occurrence. They have not been shaken in cross examination. Their evidence can be relied upon as they are capable of understanding and replied the questions intelligently, which corroborated with the post mortem report and other evidence on record. We find support of this contention in the cases of *Forkan @ Farhad and another vs. State 47 DLR 148 and Abdul Quddus vs. The state 43 DLR (AD)234.* The learned Additional Sessions Judge relying on their evidence as well as

circumstantial evidence, passed this judgment and order of conviction and sentence against these appellants. Their evidence also corroborated by other prosecution witnesses.

71. We also find that there is no ocular evidence witnessing the commission of entire offence committed by convict appellants at the place of occurrence. Prosecution also relied upon circumstantial evidence to proof of its case. Commission of crime can also be proved by circumstantial evidence. Circumstantial evidence is more cogent and convincing than the ocular evidence. It is correctly said that witnesses may tell a lie and it is not difficult to procure false tutored and biased witnesses but it is very much difficult to procure circumstantial evidence. As there is no break in the chain of causation and chain or circumstances connecting these appellants with the killing of both the victims Mostafa and Rokshana and as circumstantial evidence is more cogent than the evidence of eye witness. The learned Additional Sessions Judge, after considering the evidence on record convicted and sentenced these appellants there is no irregularity or illegality in the aforesaid conviction and sentence and the prosecution proved their case beyond reasonable doubt and the prosecution witnesses corroborated with each other on material point as such, there is no reason to interfere by this Court to the conviction and sentence passed by the trial court. The allegations against these appellants under Sections 302 / 34 and 201 of the Penal Code has been well proved by the prosecution as the chain of oral and circumstantial evidence connects the convict appellants in killing of both the victims Mostafa and Rokshana and thereby appellants have committed offence under Sections 302 / 34 and 201 of the Penal Code, as such, we are of the view that the prosecution proved their case beyond reasonable doubt.

72. **Accordingly, the appeal is dismissed** and the conviction and sentence passed by the learned Additional Sessions Judge, 2nd Court, Rangpur in Sessions Case No. 283 of 2002 is hereby upheld. The appellants are directed to surrender before the trial Court within 30 (thirty) days from the date of receipt of this order failing which the Court below shall secure their arrest as per law.

73. Send down the lower court records along with the judgment and order of this court at once.

6 SCOB [2016] HCD 102

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition no. 6572 of 2012.

Mahbub Ali
…Petitioner.
Versus

The Judge, Artha Rin Adalat-1, Chittagong and others
….Respondents

Mr. Lokman Karim, Advocate,
....For the Petitioner.

Mr. A.S.M. Nazmul Haque, Advocate
…. For respondent no.3

Heard on : The 25th May, 2014
Judgment on: The 2nd June, 2014.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Mohammad Ullah

Necessary parties in an Artha Rin Suit:
A company incorporated under the companies Act is a juristic person. A share holder is not the owner of the company or its assets. The company itself owns its property. A share-holder is only entitled to the dividends, if declared. On winding up, however, after payment of its debts, he is entitled to participate in the distribution of its assets. It is no doubt, the liability of a share-holder, whether he is the Chairman of the Board of Directors, or a director, is only to the extent of the face value of the shares he holds, nothing more than that. But a share-holder of a company is not a necessary party in the Artha Rin Suit. The chairman or the directors or any other guarantor who executed the charge document in respect of payment of loan are liable and are necessary parties in the Artha Rin Suit for the purpose of effectual adjudication of the matter between the loanee- company and the financial institutions. Chairman or director, if he did not execute any charge document, he or she shall not be liable for the loan save and except their liability to the extent of the face value of the shares he/she holds. ...(Para 10)

Artha Rin Adalat Ain, 2003
Section 6:
It appears that, admittedly, defendant no. 3-petitioner was neither a borrower nor guarantor and even nor a mortgagor relating to the loan liability and, therefore, he is not liable for repayment of the loan inasmuch as the petitioner does not come within the purview of sub-section (5) of section 6 of the Ain, 2003, wherein who will be the necessary party in the Artha Rin suit has been provided, and hence the suit ought to have been dismissed as against this defendant no. 3- petitioner. ...(Para 11)

It is settled principle that jurisdiction of a Court cannot be conferred upon consent of the parties, it is the statute only which can confer the jurisdiction of the Court.
...(Para 13)

Judgment

Mohammad Ullah, J:

1. Rule Nisi was issued calling upon the respondents to show cause as to why the order No. 67 dated 01.04.2012(Annexure-G) as well as the judgment and decree dated 27.04.2011 (decree signed on 03.05.2011) (Annexure-E) passed by the Artha Rin Adalat-1, Chittagong in Artha Rin Suit No. 252 of 2004 should not be declared to have been passed without lawful authority and is of no legal effect.

2. Short facts, for the disposal of the Rule, are that the respondent no.2-Sonali Bank Limited, K.C. Dey Road, Corporate Branch, Police Station Kotwali, District Chittagong (hereinafter referred to as the Bank) as plaintiff, on 28.4.2004, instituted Artha Rin Suit No. 252 of 2004 before the Artha Rin Adalat, 1st Court, Chittagong (in short, the Adalat) for recovery of loan amounting to Tk. 5,42,27,515.18 along with interest thereon till realization impleading respondent no. 4, M/S. Mukta Apparels Limited (hereinafter referred to as the respondent-company) and others including the petitioner-Mahbub Ali as defendants of the suit. The defendants entered appearance and filed a joint written statement on 26.7.2005 denying the material averments made in the plaint. Thereafter, the defendant no. 3- petitioner filed an amended written statement on 23.2.2010 stating, *inter alia*, that he is mere a Director of the borrower-company and he never executed any personal guarantee for the loan and became a Director of the company long after the sanction and disbursement of loan on 14.12.1996. The defendant no.3-petitioner purchased 100 shares from one of the Director of the borrower-company, Md. Nurul Huda, on 11.12.1996 and the plaintiff –Bank approved this defendant no.3-petitioner as Director of the borrower-company on 13.05.1998 according to the decision of its 58th Board Meeting. The previous Director Md. Nurul Huda resigned from the borrower-company on 18.03.1997. Therefore, the petitioner is not liable for the loan availed by the respondent-company. The petitioner, on 23.2.2010, filed two separate applications, one for accepting the amended written statement and other under section 6(5) read with section 57 of the Ain, 2003 (in short the Ain, 2003), for striking out of his name from the plaint of Artha Rin Suit No. 252 of 2004 but the learned Judge of the Adalat continued the proceeding of the suit without disposal of the said two applications. Therefore, the petitioner filed a Writ Petition being No. 3520 of 2010 before this Court seeking a direction upon the Artha Rin Adalat for disposed of the applications filed by the petitioner on 23.2.2010 before further proceeding of the suit and the said writ petition was disposed of summarily on 09.05.2010 with a direction to the learned Judge of the Adalat to consider and dispose of the applications dated 23.02.2010 filed by the defendant no. 3-petitioner before further proceeding of the Artha Rin Suit. Thereafter, Adalat upon hearing the parties, rejected the said applications filed by the respondent no. 3-petitioner vide its order no. 50 dated 13.05.2010. Then the petitioner filed another Writ Petition being No. 4010 of 2010 challenging the decision dated 13.05.2010 passed by the Artha Rin Adalat No.1, Chittagong in Artha Rin Suit No. 252 of 2004 and Rule was issued, but subsequently the same was discharged on 01.02.2011 with certain observations. Then the Adalat framed Additional issues to the effect whether the defendant no. 3 executed any personal guarantee, whether the defendant no. 3 is liable for the loan, and whether the share of the defendant no. 3 would be liable for repayment of the loan liability. Thereafter, the Artha Rin Adalat by its judgment and order dated 27.4.2011 decreed the suit (decree signed on 3.5.2011) against all the defendants including the petitioner for claimed amount of Tk. 5,42,27,515.18 to be paid by the defendant Nos. 1-4 jointly within 60 days failing which the decree holder bank would realize the same with 12% interest till realization thereof. Thereafter, on 20.2.2012, the

petitioner filed an application under section 57 of the Ain, 2003 for deleting the name of the petitioner from the judgment and decree of the Artha Rin Suit dated 27.4.2011 and 3.5.2011 respectively by way of correction of the same and the Adalat, by one of the impugned order dated 01.04.2012, rejected the said application of the petitioner holding that since against the judgment of the Artha Rin Adalat alternative remedy for preferring an appeal is available, the application under section 57 of the Ain, 2003 for correction of the judgment and decree is not maintainable. Therefore, the petitioner approached this Court and obtained the present Rule as stated above.

3. Mr. Lokman Karim, learned Advocate, drawing our attention to the case of Md. Arfan Uddin Akand vs. Joint District Judge and Artha Rin Adalat No. 1 Gazipur and another, heard and disposed of along with Writ Petition No. 6930 of 2004, reported in 15 BLT(2007) 343, and Fariduddin Mahmud Vs. Md. Saidur Rahman and others, reported in 63 DLR(AD) 93, submits that if the Adalat passes any order which is wholly without jurisdiction, in other words in excess of jurisdiction, then despite the fact that the law provided forum for appeal, the petitioner cannot be debarred from availing the writ jurisdiction under Article 102 of the Constitution and as such the instant Writ Petition is maintainable since the Adalat acted without jurisdiction in passing the impugned judgment and decree so far against the petitioner is concerned as the Adalat found that the petitioner never executed personal guarantee and signed any charge document for the loan availed by the respondent-company.

4. Mr. Karim submits further that prior to sanction of the loan dated 22.11.1995 in favour of the respondent-company, the petitioner was neither Director nor guarantor and even nor a share-holder of the company and in that admitted situation the petitioner ought not to have been made a party in the Artha Rin Suit in view of the provision of sub-section(5) of Section 6 of the Ain, 2003 and as such the impugned judgment and decree, so far the petitioner is concerned, is liable to be declared to have been passed without lawful authority and is of no legal effect.

5. Mr. A.S.M. Nazmul Haque, learned Advocate appearing on behalf of respondent no. 3-Sonali Bank, by filing an affidavit-in-opposition, on the other hand, submits that the petitioner is not competent to challenge the legality and propriety of the impugned judgment and decree passed by the Artha Rin Adalat under writ jurisdiction and the remedy, if any, lies for the petitioner to prefer an appeal in an appropriate Court. In such view of the matter, the Rule bears no merit and it should be discharged, he submits. Mr. Haque, learned Advocate, submits further that the writ petition involving the disputed question of facts, cannot be decided in writ jurisdiction and as such the Rule should be discharged. Mr. Haque, lastly submits that the defendant no.3-petitoner filed joint written statement with other defendants and thereby assumed the jurisdiction of the Artha Rin Adalat and as such he cannot escape himself from the jurisdiction of the Adalat at this stage.

6. We have heard the learned Advocates from both the parties, perused the materials on record including the writ petition, annexures thereto, affidavit-in-opposition filed by the respondent no.3 Sonali Bank and have gone through the decisions as referred to.

7. It appears that the loan was sanctioned on 22.11.1995 in favour of the respondent–company while petitioner purchased 100 share from one of the Director of the borrower company, S.M. Nurul Huda, on 11.12.1996 and the respondent no. 2 lender Bank approved this petitioner as Director of the borrower-company on 13.05.1998 by its 58th Board Meeting. It further appears that the Adalat found that the petitioner did not execute any

charge document for the purpose of taking liability of loan availed by the respondent-company. The findings of the Adalat about the execution of charge document, so far the petitioner is concerned, is as follows:

"চার্জ ডকুমেন্টে ৩ নং বিবাদীর স্বাক্ষর না থাকিলেও পরবর্তীতে কোম্পানীর পরিচালক নিযুক্ত হওয়ায় তিনি বাদী ব্যাংকের দেনার জন্য ১০০ শেয়ারের মালিক হিসাবে ২০% দেনা পরিশোধ করিতে বাধ্য।"

8. Although the petitioner without understanding the situation filed joint written statement with other defendants denying the material allegation of the plaint, but, subsequently, he filed two applications, one was for amendment of the written statement and other for striking out the name of the petitioner from the plaint of Artha Rin Suit. When the Adalat proceeded with the suit without disposing of those applications, the petitioner obtained an order of this Court invoking writ jurisdiction for disposal of the said applications at first. When the Adalat rejected those applications of the petitioner, he further moved this Court and filed Writ Petition No. 4010 of 2010 whereupon Rule was issued and subsequently was discharged with the following observations:

> "However, while disposing the suit on merit the learned Judge of the Artha Rin Adalat should examine as to whether defendant No. 3-petitoner executed any personal guarantee for the loan or his loan liability is limited to his shares of the Company as well as the property owned by the Company."

9. The High Court Division by its aforesaid observations firstly observed that the Adalat should ascertain whether the defendant no. 3 petitioner executed any personal guarantee for the loan availed by the respondent-company and if it is found negative, the petitioner was required to be discharged or released from the alleged liability brought by the respondent-Bank in the suit against the petitioner. But if it is found that the petitioner executed any letter of guarantee, he will never be discharged from the liability of the loan taken by the respondent-company. The Adalat on consideration of the evidence on record found that the defendant no. 3 petitioner did not execute any personal guarantee for taking liability of the loan at any point of time. This being so, Adalat ought to have dismissed the suit against the petitioner is concerned.

10. A company incorporated under the companies Act is a juristic person. A share holder is not the owner of the company or its assets. The company itself owns its property. A share-holder is only entitled to the dividends, if declared. On winding up, however, after payment of its debts, he is entitled to participate in the distribution of its assets. It is no doubt, the liability of a share-holder, whether he is the Chairman of the Board of Directors, or a director, is only to the extent of the face value of the shares he holds, nothing more than that. But a share-holder of a company is not a necessary party in the Artha Rin Suit. The chairman or the directors or any other guarantor who executed the charge document in respect of payment of loan are liable and are necessary parties in the Artha Rin Suit for the purpose of effectual adjudication of the matter between the loanee- company and the financial institutions. Chairman or director, if he did not execute any charge document, he or she shall not be liable for the loan save and except their liability to the extent of the face value of the shares he/she holds.

11. It appears that, admittedly, defendant no. 3-petitioner was neither a borrower nor guarantor and even nor a mortgagor relating to the loan liability and, therefore, he is not liable for repayment of the loan inasmuch as the petitioner does not come within the purview of sub-section (5) of section 6 of the Ain, 2003, wherein who will be the necessary party in the Artha Rin suit has been provided, and hence the suit ought to have been dismissed as

against this defendant no. 3- petitioner. For better understanding sub-section (5) of section 6 of the Artha Rin Adalat Ain, 2003 is quoted below :

"৬। (১) .....

(২) .....

(৩) .....

(৪) .....

(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 কতৃক প্রদত্ত রায়, আদেশ বা ডিক্রী সকল বিবাদীর বিবাদীর বিরুদ্ধে যৌথভাবে ও পৃথক পৃথকভাবে (Jointly and severally) কার্যকর হইবে এবং ডিক্রী জারীর মামলা সকল বিবাদী-দায়িকের বিরুদ্ধে একই সাথে পরিচালিত হইবে ঃ

তবে শর্ত থাকে যে, ডিক্রী জারীর মাধ্যমে দাবী আদায় হওয়ার ক্ষেত্রে আদালত প্রথমে মূল ঋণগ্রহীতা-বিবাদীর এবং অতঃপর যথাক্রমে তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) ও তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) এর সম্পত্তি যতদূর সম্ভব আকৃষ্ট করিবে ঃ

আরো শর্ত থাকে যে, বাদীর অনুকূলে প্রদত্ত ডিক্রীর দাবী তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) অথবা তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) পরিশোধ করিয়া থাকিলে উক্ত ডিক্রী যথাক্রমে তাহাদের অনুকূলে স্থানান্তরিত হইবে এবং তাহারা মূল ঋণগ্রহীতার (Principal debtor) বিরুদ্ধে উহা প্রয়োগ বা জারী করিতে পারিবেন।"

(underlined by us)

12. The Adalat at the time of passing any judgment or finally disposing of the suit should have to take into consideration of the facts as to whether the plaintiff-financial institution made the defendant/defendants in the Artha Rin Suit in view of the statutory provision of sub-section(5) of section 6 of the Ain, 2003 and also to determine whether the defendant in the Artha Rin Suit is a borrower or mortgagor or guarantor for the purpose of fixing the liability of the loan taken by a company, for different business purpose, from the plaintiff-financial institution. When the Adalat passed the impugned judgment beyond the scope of law as provided for in section 6(5) of the Ain, 2003, then it can be said that the same is without jurisdiction.

13. However, the learned Advocate for the respondent-Bank, drawing our attention to the joint written statement filed by the defendants including the petitioner, submits that the petitioner assumed the jurisdiction of the Artha Rin Adalat, so at a later stage he cannot escape or say he was not a necessary party in the Artha Rin Suit. It is settled principle that jurisdiction of a Court cannot be conferred upon consent of the parties, it is the statute only which can confer the jurisdiction of the Court. When the petitioner filed written statement without understanding the legal consequence with the other defendants it does not mean that he assumed the jurisdiction of the Artha Rin Adalat unless and until it is found that he is a necessary party in the Artha Rin Suit in view of the provision of sub-section (5) of Section 6 of the Ain, 2003.

14. Further, when the defendant no.3 petitioner was in no way connected with the loan in question, as the loan was taken before his joining to the loanee company and that the petitioner never executed any letter of guarantee to secure the loan, in this situation the judgment and decree of the Adalat directing the petitioner with other defendants jointly to pay Tk.5,42,27,515.18 is liable to be declared to have been passed without lawful authority and is of no legal effect so far the petitioner is concerned. We cannot shut our eyes when there is error apparent on the face of the record or where the decision of the Adalat is vitiated by malafide or the Adalat acted in excess of jurisdiction or acted contrary to the fundamental

principles or acted with malice in law. In that case, despite the alternative remedy, writ jurisdiction can be invoked under Article 102 of the Constitution.

15. Regard being had to the above discussions of law and facts, we are of the view that the Rule has substance and as such the same should succeed.

16. In the result, the Rule is made absolute in part, however without any order as to costs.

17. Accordingly, the judgment and decree dated 27.4.2011 (decree signed on 03.05.2011) passed by the learned Artha Rin Adalat No. 1, Chittagong in Artha Rin Suit No. 252 of 2004 is hereby declared to have been passed without lawful authority and is of no legal effect so far the petitioner is concerned only.

18. Let a copy of this judgment be sent to the learned Judge, Artha Rin Adalat No. 1, Chittagong.

6 SCOB [2016] HCD 108

HIGH COURT DIVISION
(Criminal Miscellaneous Jurisdiction)

Criminal Miscellaneous Case No. 40890 of 2012

Rashid and others
… Accused-Petitioners
Versus
The State, represented by the Deputy Commissioner, Sunamganj and others.
…Opposite-parties.

Mr. Pankaj Kumar Kundu, Advocate
… For the petitioners.
Mr. Sk. Md. Morshed, Advocate
For opposite party no. 2.
Heard on 03.11.15, 09.11.15 and 10.11.2015
Judgment on 17.11.2015

Present:
Mr. Justice Md. Emdadul Huq
And
Mr. Justice Muhammad Khurshid Alam Sarkar

Code of Criminal Procedure, 1898
Section 436:
The learned Sessions Judge, Sunamgonj appears to have fallen in error in law in directing the learned Judicial Magistrate to take cognizance directly inasmuch as from a mere reading of Section 436 of the CrPC, it appears that the learned Sessions Judge is not empowered to directly ask any Judicial Magistrate to take cognizance. ...(Para 9)

Judgment

Muhammad Khurshid Alam Sarkar, J.

1. By invoking the extraordinary jurisdiction of this Court under Section 561A of the Code of Criminal Procedure, 1898 (CrPC), the accused-petitioners sought to quash the judgment and order dated 06.08.2012 passed by the learned Sessions Judge, Sunamganj in Criminal Revision No. 56 of 2012 allowing the revision of the judgment and order dated 14.06.2012 passed by the Judicial Magistrate, Jagannathpur Zone, Sunamganj in GR Case no. 286 of 2011 (Jagannathpur) and thereby directing the latter to take cognizance against the accused-petitioners, who were not sent-up in the charge sheet.

2. The relevant facts necessary for disposal of this Rule are that the petitioners have been named as the accused in the First Information Report (FIR) filed with the Jagannathpur Police Station under the Sunamgonj District. The FIR goes on to state that there was a gun-fight between two rival groups of village Sonatanpur under Jagannathpur Upazilla, District-Sunamganj. The group consisting of the people namely, Lutfor Rahman, Rumen, Sumen, Anis Mia, Ashique Mia, Golabur Rahman, Mehbub Rahman, Azizur Rahman, Khalikur Rahman and Khalilur Rahman fought against the other group of the people namely, Haji Asab Mia, Swapan Mia, Ripon, Shahin, Asadur, Badrul Islam alias A. Rouf, Mohibur Rahman and A. Rashid. The victim is the informant's brother, who was a student of the Sonatanpur Islamia Hafizia Madrasha of Jagannathpur and, at that relevant point in time, the

victim was standing on the first floor of the Madrasha and incidentally his left eye was hit by a bullet. Also a teacher of the said Madrasha namely Hafij Badrul Alam, and another student namely, Salman Siddik received bullet injury in their heads. When the clash was over, the teachers and students of the Madrasha took the injured persons to the Sylhet Osmani Medical College Hospital, but the informant's brother died on the way to Hospital. The informant received the information about the alleged occurrence at the midnight of 23.11.2011 over mobile from a student of the said Madrasha and he rushed to the Hospital on the following morning, when he found the dead body of his brother. Thereafter, he lodged the FIR with the Jagannathpur Police Station against 18 people, including the accused-petitioners, under Sections 143/144/149/326/307/302 of the Penal Code.

3. The said FIR having been registered as Jagannathpur Police Station Case No. 19 dated 24.11.2011 under Sections 143/144/149/326/307/302 of the Penal Code turned into the G.R. Case No. 286 of 2011 in the Court of Judicial Magistrate Jagannathpur under the District of Sunamgonj. Based on the allegations made in the FIR the police investigated into the incident and submitted police report being charge sheet no. 20 dated 10.02.2012 wherein the accused-petitioners' names were dropped from the list of the accused-persons. It prompted the informant to file an application on 04.03.2012 before the concerned Court for inclusion of the names of these petitioners in the charge-sheet, which in common parlance is known as 'Naraji Petition'. The learned Judicial Magistrate after hearing both the sides, perusing the papers and considering the materials on record rejected the said Naraji Petition and accepted the charge sheet by discharging these accused-petitioners by his order dated 14.06.2012. Against the said order the informant filed a revisional application before the learned Sessions Judge, Sunamganj on 11.07.2012 which, having been registered as Criminal Revision No. 56 of 2012 and being heard by the learned Sessions Judge, Sunamganj in presence of both the sides, was allowed upon setting aside the above order dated 14.06.2012 passed by the learned Judicial Magistrate and directing the learned Judicial Magistrate to take cognizance of the offence against the not-sent up accused-persons. The accused-petitioners being aggrieved by the said order passed by the learned Sessions Judge, Sunamganj approached this Court and hence this Rule.

4. Mr. Pankaj Kumar Kundu, the learned Advocate appearing for the petitioners, takes us through the FIR, charge sheet, Naraji Petition and the orders passed by the Courts below and submits that the learned Sessions Judge, Sunamganj has committed serious illegality in directing the learned Magistrate to take cognizance of the offence against the not-sent up petitioners inasmuch as the law does not empower the learned Sessions Judge to make such direction upon the cognizing Magistrate. In continuation of the aforesaid submission, the learned Advocate for the petitioners argues that the learned Sessions Judge at best could have directed the concerned Magistrate to conduct further inquiry about the allegation of the informant. By placing the provision of Section 436 of the CrPC, the learned Advocate for the petitioners canvasses that the cognizance-taking Magistrate or any other Magistrate may carry out further inquiry upon affording an opportunity to the not-sent up accused-persons and, thereafter, the concerned Magistrate will be in a position to pass an appropriate order as to inclusion or exclusion of the names of the petitioners in the list of the accused. The learned Advocate for the petitioners next submits that if the charge sheet and the order of the learned Magistrate is minutely read side-by-side, it would appear that there was no illegality in rejecting the Naraji Petition by the learned Judicial Magistrate, Jagannathpur, Sunamgonj and, thus, the same ought not to have been interfered with by the learned Sessions Judge in exercising his revisional power. By making the aforesaid submissions by the learned Advocate for the accused-petitioners, he prays for making the Rule absolute.

5. Per contra, Mr. Sk. Md. Morshed, the learned Advocate appearing for the informant places the provision of Sections 156(3), 173(1), 173(3), 173(3B), 190(1), 200, 202 and 203 of the CrPC and submits that the concerned Judicial Magistrate utterly failed to understand the true meaning of the said provision and, consequently, he failed to make the appropriate decision in dealing with the Naraji Petition. He refers to the statements made by the 3 (three) eye-witnesses in the form of affidavit which were produced before the concerned Magistrate and submits that the learned Magistrate ignored their categorical statements as to the involvement of these petitioners in the occurrence. He submits that out of 3 (three) victims while one has died within a few hours of the incident, the two victims of the said incident are still suffering from the injuries received in that incident and, particularly, the condition of the student, who was hit by a bullet at his head, is very vulnerable as the bullet damaged the neurological functions of the said student. He forcefully submits that the names of these petitioners ought to have been included in the charge sheet with an aim to place them before the trial Court by way of taking cognizance. However, the learned Advocate for the informant concedes that it would have been an appropriate order if the learned Sessions Judge, Sunamganj would have directed the concerned Judicial Magistrate to conduct further inquiry, instead of asking the learned Judicial Magistrate to take cognizance of the offence against these petitioners. By making the above submissions, the learned Advocate for the informant prays for discharging the Rule.

6. The first issue to be examined by this Court is whether there were sufficient prosecution materials before the learned Judicial Magistrate to take cognisance against these petitioners and, if it is answered in the affirmative, the second issue would come up for consideration is whether the learned Session Judge, Sunamgonj was competent to direct the learned Judicial Magistrate to take cognisance directly.

7. We have perused the Lower Courts' Record (LCR) containing the FIR, statements recorded under Section 161 of the CrPC, Charge sheet, Naraji Application with its annexures, the impugned order dated 06.08.2012 passed by the learned Sessions Judge, Sunamganj in Criminal Revision No. 56 of 2012 in tandem with the order dated 14.06.2012 passed by the learned Judicial Magistrate, Sunamganj rejecting the Naraji application.

8. It appears that the learned Sessions Judge has rightly found out the error committed by the learned Judicial Magistrate who rejected the Naraji petition without taking into consideration the statements made by 3 (three) eye witnesses in the form of affidavit and without recording the statements of the wounded teacher and student who received their injuries in the said gun-fight. We have also noticed that the statement of Mrs Akli Bibi, the wife of a not-sent up accused Abdur Rashid, from whom the gun has been seized, has not been recorded by the investigating officer. Furthermore, in the order of the learned Judicial Magistrate there should have been comprehensive discussions on the ballistic report detailing the reason and basis of ignoring the contents of the said report.

9. However, the learned Sessions Judge, Sunamgonj appears to have fallen in error in law in directing the learned Judicial Magistrate to take cognizance directly inasmuch as from a mere reading of Section 436 of the CrPC, it appears that the learned Sessions Judge is not empowered to directly ask any Judicial Magistrate to take cognizance.

10. In the light of the fact that the gun owned by Adbur Rashid has been seized, a further investigation as to use or non-use of the said gun in the clash between the groups may be carried out.

11. The above discussions lead us to hold that while the learned Judicial Magistrate failed to apply his judicial mind resulting in error of decision in rejecting the Naraji Petition, the learned Session Judge, Sunamgonj appears to have misread and misconstrued the extent of his jurisdiction and power to revise an order on Naraji application by directing the concerned Judicial Magistrate to take cognizance against these petitioners.

12. Accordingly, this Rule is disposed of with a direction upon the learned Judicial Magistrate, Jagannathpur, Sunamganj to conduct further inquiry taking into consideration of the statements of 3 (three) eye-witnesses that have been made in 3 (three) separate affidavits. After accomplishing the above further inquiry, the concerned Judicial Magistrate shall be at liberty to pass necessary order with regard to taking cognizance and to proceed with their case.

13. In the result, the Rule is disposed of with the above observation and direction. The order dated 06.08.2012 passed by the learned Sessions Judge, Jagannathpur, Sunamganj in Criminal Revision No. 56 of 2012 is modified to the extent that the learned Judicial Magistrate, Jagannathpur, Sunamganj is directed to make further inquiry and to decide whether to take cognizance against these petitioners.

14. If the learned Judicial Magistrate, Jagannathpur Zone, Sunamganj is of the view that further investigation is to be conducted by the police, in that event, he may ask the police to file a supplementary police report. The learned Judicial Magistrate, Jagannathpur, Sunamganj is directed to complete the entire process within 3(three) months from the date of receipt of this order.

15. The order of stay granted at the time of issuance of the Rule is hereby vacated.

16. Send down the Lower Courts' Record at once.

6 SCOB [2016] HCD 112

High Court Division
F.A. No. 112 of 2011 with
Civil Rule 362(F)/2011

Md. Sadek Hossain and others.
..... Defendant-appellants.

Versus

Most. Azmeri Begum and others.
..... Respondents.

Mr. A.J. Mohammad Ali with
Mr. Md. Muniruzzaman with
Mr. Md. Nuruzzaman with
Md. Ashikur Reza Chowdhury and
Ms. Bilkis Jahan, Advocates.
..... For the defendant-appellants.
Mr. Md. Khalilur Rahman with
Mr. Md. Mizanur Rahman, Advocates.
.....For the respondents.

Heard on 22.10.2014, 23.10.2014,
27.10.2014 and
Judgment on 29.10.2014 and 09.11.2014.

Present:
Mr. Justice Nozrul Islam Chowdhury
And
Madam Justice Kashefa Hussain

Evidence Act, 1872
Section 115:
From a close reading of Section 115 of the Evidence Act ..., it is quite clear that the legislature does not allow a person from retracting or denying anything that which he might intentionally have said or done either verbally or by action or by omission and the consequence of which might have led some other person to rely on such as true or act upon such belief. This is as we find is clearly barred under the law. It is also significant to note that the bar is not confined to a particular type or class of suits but it applies to 'any' suit or proceeding be it Civil or Criminal whatever may be the nature, class or category of the suit or proceeding. It is evident from perusal of the same that Section 115 in no way distinguishes or otherwise makes any distinction between Civil and Criminal Proceedings. From the language of Section 115 itself it is evident that it applies to all proceedings. ...(Para 20)

Judgment

Kashefa Hussain, J:

1. This appeal is directed at the instance of the defendant-appellants against judgment and decree dated 11.01.2011 passed by the learned Joint District Judge, 5th Court, Dhaka in Title Suit No.284 of 2009 decreeing the suit.

2. The facts relevant for disposal of the appeal in brief are that, the plaintiff-respondents filed Title Suit No.164 of 2001 subsequently renumbered as Title Suit No.284 of 2009 seeking (a) declaration for Title to the effect that in the 'ka' schedule property they are owners of kha(1) and kha(2) of the schedule, (b) that they are in possession of kha(1) and

kha(2) of the schedule property and the ga schedule be partitioned from kha(1) and kha(2) of the 'ka' schedule (C) give a preliminary decree to the effect, that if the kha(1) and kha(2) from the 'ka' schedule property is not partitioned from out of amicable settlement then that an Advocate Commissioner be appointed for the purpose of preparing saham in their favour in accordance with law and the preliminary decree and subsequently the final decree and (D) to give declaration to the effect that the deed as described in the 'gha' schedule was fraudulently, collusively, unlawfully changed and the 'gha' schedule deed be corrected and that the plaintiff's father's name be added as purchaser No.2 in the said deed and that the defendant No.37 be directed to amend the said volume.

3. That the plaintiff's case in short inter alia, is that the 'ka' schedule property comprising of kha(1), kha(2) and 'ga' was purchased by the plaintiff's father Amir Hossain and his brother Sheikh Siraj Miah through a registered sub-kabala deed No.2881 dated 22.06.1945. That though the property was bought by the plaintiff's father Amir Hossain and his uncle Siraj Miah, but the S.A. record was prepared in the name of their grandfather Abdul Gafur, the reason being that they were a joint family living together. That the entire property comprising of 0.0468 acres was jointly in equal proportions owned and possessed by Amir Hossain and Siraj Miah. In such circumstances, the plaintiff's uncle Siraj Miah died a bachelor. That after his death, his portion of the property was inherited by his father Abdur Gafur and mother Rehatun Bibi and after their death the property in accordance with the Muslim Farayez Law devolved upon the plaintiff's father Amir Hossain and their other brother Mokter Hossain and others. That the plaintiff's father by purchase owned 0.0234 acres and by inheritance as warish of his father owned 0.006824 amounting to total of 0.03024 acres of land and that subsequently an amicable partition was reached between the co-sharers, that is the father of the plaintiffs and the other co-sharers and out of the total of the 'ka' schedule land the kha(1) schedule comprising of 0.0219 acres of land on the west side and the kha(2) property situated in the schedule of east side consisting of 0.0093 acres comprising a total of 0.0312 acres of land were owned and possessed by the plaintiff's father and the land comprising Schedule 'ga' which is situated between kha(1) and kha(2) came to the share of the defendant's father Mokter Hossain, that is the younger brother of Amir Hossain and the deceased brother Siraj Miah. Subsequently after the death of Amir Hossain, the plaintiffs inherited the property of Amir Hossain in the kha(1) and kha(2) schedule of the property described in the 'ka' schedule and accordingly in pursuance of Namjari in the Government Revenue Office they also duly paid taxes and were in possession of the property. That they are in possession of the entire property comprising of 'kha'(1) and kha(2), but Namjari was done only of 0.028 acres of land. In the kha(1) schedule they constructed building and also obtained necessary utilities like electricity, gas line etc and has partly rented out the property and been living there ever since. That in the 'kha' schedule land the plaintiffs put up a boundary wall and are in possession thereof with the objective of construction there in future. That though the S.A. record and municipal holding mistakenly remained in the name of Abdul Gafur it did not cast any cloud upon the Title of the plaintiffs. That while the plaintiffs were in peaceful possession of kha(1) and the suit land comprising of kha(2) of the land, the defendants upon wrong and misinformation to the authorities and without any knowledge of the plaintiffs recorded 0.0078 acres of land in the kha(2) schedule in the D.P. khatian No.69 in present dag No.522 and thereby added it up with the 'Ga' schedule land belonging to the defendants and consequently got recorded the same in the name of the defendants through collusion, fraud and illegality. That after the wrong recording subsequently the plaintiffs filed Objection Case No.19 in 1999 and on 15.04.1999 during hearing of the objection case the defendants collusively produced a forged, void certified copy of the deed No.2881 of 1945 described in the schedule 'gha' and for the first time

claimed that in the said deed described in the schedule 'gha', Sheikh Siraj Miah was the only purchaser of the suit land and the name of the plaintiff's father Amir Hossain was not there. On the other hand, the plaintiffs by dint of inheritance produced the original copy of the said deed and upon review and scrutiny into both the deeds the settlement Court decided that the deed was actually executed in the name of two persons and brought the here to before baseless and unlawfully recorded land in the name of the plaintiffs bringing it within the D.P. khatian No.44 of the plaintiffs. Against this order the defendants filed Appeal No.1480 of 1999 before the appeal officer and the appeal officer affirmed the earlier decision by the settlement office. That after loosing their case in the settlement cases the defendants filed review case under Sections 42 and 44 and against the decision under Section 42 and 44 the plaintiffs filed Writ Petition No.2175 of 2002 before the High Court Division and pursuant to filing of the Writ Petition further hearing of the petition was stayed and the writ petition was pending in the High Court Division. That the plaintiffs for the first time on 15.04.1999 came to know that the name of Siraj Miah only appeared in the certified copy of the deed as described in the 'gha' schedule and which has resulted through collusion, fraud and illegality. That upon examination into the copy of the deed it appeared that in several places of the deed it is written "Bfe¡l¡ c¢mm Nq£a¡ " meaning that not one person but more than one person had purchased the land and were parties to the deed. That actually the names of both the brothers i.e. the plaintiff's father Amir Hossain and Sheikh Siraj Miah were in the deed described in the 'gha' schedule and the property was equally divided between the two brothers as being in possession and ownership thereof, but due to collusion with the concerned officer in the office of the defendant No.37, the defendants had resorting to fraudulence and illegality changed, altered and enlisted the names in the deed and thus obtained certified copy of the deed through utter illegality and the said certified copy are therefore not binding upon the plaintiffs. That the defendants had tried to take advantage of the fact that the property had not been partitioned by metes and bounds. But that the plaintiffs had repeatedly requested the defendants for partition of the 'ka' schedule property according to their respective saham, but the defendants refused to do so and hence owing to the facts and circumstances inter alia others compelled the plaintiffs to file the Title Suit.

4. The defendants in the Title Suit filed a written statement where in they inter alia stated that the suit land was correctly recorded in the name of Abdul Gafur in the S.A. record. They contended in the written statement that the suit land was actually purchased by the grandfather of the plaintiffs and the defendants namely Abdul Gafur, but that he had purchased the land in Benami in the name of his two sons Amir Hossain and Siraj Miah. That the subsequent S.A. record only proves that the suit land was actually purchased by Abdul Gafur with his own money and in his own interests. That though the sub-kabala deed No.2881 dated 22.06.1945 was executed, but it was never acted upon and in the S.A. record the name of Abdul Gafur was correctly recorded. That Siraj Miah had subsequently died a bachelor and while Abdul Gafur was still alive he had equally divided the property described in the deed between his two surviving sons, the predecessor of the plaintiffs Amir Hossain and the predecessors of the defendants Mokter Hossain and subsequently their heirs have been residing there accordingly by constructing building being in possession of the their respective properties. That the defendants apart from the property in the 'Ga' schedule are also in possession of the property in schedule 'kha'2 and to that effect they erected a boundary wall and also put up a signboard. The plaintiff's claim that they are in possession of 'kha'2 schedule of the property by erecting boundary wall is untrue. That the defendants themselves are in possession of both 'kha'2 and 'ga' schedules of the property. That the plaintiffs claimed that in the R.S. record the name of Amir Hossain was enlisted in accordance with law being in possession of 0.0238 acres in khatian No.15 dag No.345. That

in the Dhaka City Survey the R.S. was wrongly recorded in the name of one Bashir Miah and as a result 0.0130 acres of land was recorded in the name of Mokter Hossain in khatian No.69 in dag No.345. That if the R.S. record was correctly prepared then a total of 0.0483 acres of land would have been recorded in the dag No.345 and the defendant's share in khatian No.69 dag No.345 would have been recorded as 0.0322. That in the D.P. khatian the shares of the plaintiffs and the defendants were equally divided and recorded showing 0.0234 acres of land for each property as per their possession. That in the year 1994, one Sirajul Islam upon trespassing into the vacant land in possession of the defendants constructed a 'Ww 01' and that pursuant to such unlawful trespassing the defendants as petitioners filed Case No.1277 of 1994 under Section 145 of the Code of Criminal Procedure before the C.M.M. Court, Dhaka. In that criminal proceeding the possession of the defendants-petitioners was established and the law enforcing agencies also evicted the trespassers from the property. That the plaintiff No. 2, being also P.W.1 in the Title Suit Abul Hossain had deposed before the C.M.M. Court on 17.09.1995 admitting title and possession of the defendants in the disputed land that is the kha(2) schedule and therefore the plaintiffs are now barred by the doctrine of estoppel being barred from claiming any title or possession over the said land. That the plaintiff's father Amir Hossain had never raised any objection to the fact that the S.A. record was prepared in the name of his father Abdul Gafur. That although the sub-kabala deed No.2881 of 1945 was executed in the year 1945, yet no namjari was ever done and neither the S.A. record, R.S. record nor the D.P. khatian was prepared in the name of the purchasers named in the deed. That the plaintiffs of the present suit were never in possession of the 'kha'(2) property in the 'ka' schedule. That the defendants have upon equal proportion of the property been in possession of their share for over the last 37 years as successors of their predecessors. That the plaintiffs had never before claimed any title on the basis of the sub-kabala deed No.2881 of 1945 nor have they ever raised any objection to the S.A. record or the R.S. record. That even when the 'kha'2 schedule property was illegally occupied by a trespasser named Sirajul Islam, even then the plaintiffs themselves had never taken any steps to dispossess them. Rather the plaintiff No.2 who is also P.W.1 in the Title Suit had deposed in favour of the defendants in the Criminal Case No.1277 of 1994 in the C.M.M Court and the deposition of plaintiff No.2 in that proceeding and by dint of the D.P. khatian and following the report and the observation of the Appeal Officer under Section 42 admitted the possession of the defendants. That although the settlement officer upheld the decision given by the officer under Rule 31 yet the Settlement Officer in the application made by the defendants under Rule 42 admitted the possession of the defendants. That being aggrieved by the judgment under Rule 42, the defendants made an application under Rule 44, for fresh hearing and in pursuance the designated Appeal Officer gave judgment in favour of the defendants establishing their possession and Title to the disputed kha(2) of the schedule land. That the plaintiff's filed a Writ Petition before the High Court Division but since against the application under Section 44, but since the judgment in the application under Section 44 was passed before the Order of High Court Division, consequently the judgment by the Appeal Officer in still in force and persuaded that therefore the defendant's, Title and Position in the suit land in the 'kha'2 schedule has been established and prayed for dismissal of the suit.

5. Having taken up the suit for hearing for disposal of the suit, the Trial Court framed 6(six) issues 3(three) witnesses on behalf of the plaintiffs gave their deposition while 3 witnesses deposed on behalf of the defendants. Exhibit Nos.1-10 series was produced by the plaintiffs-respondents while Exbt. L--a was produced as exhibits by the defendant-appellants.

6. Mr. A.J. Mohammad Ali with Mr. Md. Muniruzzaman, Learned Advocates appeared on behalf of the defendant-appellants while Mr. Md. Khalilur Rahman with Mr. Md. Mizanur Rahman, learned Advocates appeared on behalf of the respondents to resist the appeal.

7. Mr. A.J. Mohammad Ali, the learned Advocate appearing on behalf of the defendant-appellants submits that the sub-kabala deed No.2881 of 1945 was a 'Benami' transaction and Abdul Gafur had purchased the property in Benami in the name of his two sons Amir Hossain and Siraj Miah. The learned Advocate submits that apart from the sub-kabala deed of 1945, there is nothing else on subsequent records to show that the property was actually bought by Amir Hossain and Siraj Miah in their own interest and out of their own money. He argues that this is more palpable from the subsequent S.A. record, R.S. record and the D.P. khatian since none of the records can show Title of the plaintiffs and considering that no 'Namgari' was ever done and that even the municipal holding is in the name of Abdul Gafur. He contends that the plaintiffs are barred by the Doctrine of estoppel given that P.W. in the Title Suit that is plaintiff No.2 had earlier deposed in a criminal miscellaneous proceeding that the appellants were in possession of the suit land and that they were also the owners of the suit land. The learned Advocate further persuades that the plaintiffs even after the criminal miscellaneous case or while the suit land was illegally occupied by a third person never took any initiative or steps to file a suit nor did they claim their title in any other way and that the defendant-appellants have been in continuous possession for over 37 years to which possession the plaintiffs had never objected to and therefore the suit land rightfully belongs to the appellants and that they are the lawful owners of the property. He persists that since no objection was ever raised by them for so many years, they are therefore completely barred by the Doctrine of Estoppel from bringing the present suit and barred from claiming any title to the disputed land and he asserts that being in possession for 37 years, the defendant-appellant can also claim their right by way of adverse possession since the plaintiffs never objected to their possession till long after the lapse of the 12 years of statutory time prescribed for raising any objections against such possession. He further argues that the defendant-appellants are also supported by the Municipal Tax receipts, rent-receipts etc. produced by them in Court and marked as exhibits thereto. The learned Advocate for the defendant-appellants in support of his assertion of the suf-kabala deed No. 2881 dated 22.06.1945 being a 'Benami' transaction placed his reliance upon a decision of our Apex Court in the case of Bina Rani and another –Vs- Shantosh Chandra Dey reported in 21 BLD (AD) 2001 where certain criteria's have been laid out as determinant ingredients of a Benami Transaction and which is quoted below:-

> "Benami Transaction- considerations in determining benami transactions (i) the source from which the purchase money came, (2) the nature and possession of the disputed property, after the purchase, (3) the motive for giving the transaction a benami colour, (4) the position of the parties and the relationships between the claimant and the alleged benamder, (5) the custody of the title deeds and (6) the conduct of the parties concerned in dealing with the property after the purchase."

8. The learned Advocate insisted that at least a few of the determinants as prescribed in this decision are applicable in their case with particular reference to No.2, No.3 and No.6 of the six determinants.

9. On the other hand, Mr. Md. Khalilur Rahman, the learned Advocate appearing on behalf of the respondents asserts that the sub-kabala deed No.2881 of 1945 was purchased by two brothers Amir Hossain and Siraj Miah and it was not a benami transaction made by

Abdul Gafur. He stressed on the point that Amir Hossain and Siraj Miah had purchased the property out of their own money from their own earnings. He also submits that at the time of purchase they were grown men having attained the age of majority, the subsequent S.A. record was named after Abdul Gafur, only since the property was not divided by metes and bounds because of the fact that they were an 'joint undivided' family. He also tries to persuade that a registered kabala is a stronger evidence of Title and shall prevail over all records of rights. In this context he refers to a decision of this Court reported in 32 DLR page 252 in the case of Sultanuddin Chowdhury –Vs- Government of the People's Republic of Bangladesh and others and extract from which is quoted below:-

> "A registered kabala is an evidence of title which will prevail over the other records of rights as such until and unless such kabala is cancelled on a specific allegation of fraud by any civil court in an appropriate civil suit."

10. Regarding the D.P. khatian, the learned Advocate for the respondent submits that the appellants had done it in collusion with some of the concerned officials belonging to the authorities. He also contends that the plaintiffs are not at all barred by the Doctrine of estoppel and asserts that P.W.1 in the Title Suit had never deposed in favour of the appellants in any Criminal proceedings in 1994 of 1945 and therefore the plaintiffs being barred by the Doctrine of estoppel, does not arise at all. He persists that the claim of deposition by P.W.2 in the criminal proceeding is false and concocted, devoid of any factual basis. The learned Advocate for the respondent also contends that the appellants cannot claim Title by way of adverse possession since claim of adverse possession cannot be brought is not maintainable in a partition Suit. In this context he cited a decision of our Apex Court reported in 14 MLR (AD) 2009 in the case of Probir Kumar Rakshit –Vs- Abdus Sabur and others.

11. He further persuades that the property being not divided by "metes and bounds" it was not a partition as such and the "aposh bonthonnama" "আপোষ বন্টননামা " does not bear much relevance since the property was not legally partitioned by metes and bounds. Drawing attention to the appellant's claim of the execution of the deed No.2881 of 1945 being a Benami Transaction by Abdul Gafur in the name of his two sons Amir Hossain and the subsequently deceased son Seraj Miah he submits that Abdul Gafur was an "ordinary villager only", living in his village who could not afford to buy property and therefore the question of him buying any property in the city could not even arise. Furthermore, against the claim of the transaction being a 'Benami' one and the two sons of Abdul Gafur namely Amir Hossain and Seraj Miah being Benamders only, the learned Advocate for the respondents asserts that it is an absurd story conjured up by the defendants and which also led them to conjure up a fake and fraudulent deed in the name of Seraj Miah only. He tries to reason out that to create a Benami Transaction certain ingredients have to be present to constitute actually such a transaction. In this context the learned Advocate for the respondents cited a decision of our Apex Court in the case of Mosharraf Hossain Chowdhury and others –Vs- Md. Jahurul Islam Chowdury and others reported in 61 DLR (AD) 2009 where the ingredients constituting a Benami Transaction has been laid out and is reproduced below:-

> "Benami Transaction-Circumstances that constitute benami-In deciding question of benami in respect of a transaction matters or factors generally taken into consideration are source of the purchase money, custody of the deed, possession of the property, motive for benami transaction, subsequent conduct of the person who said to have made the benami transaction and the intention of the person as regard the transfer claimed to be benami and subsequent dealing with the property by the person who is claiming transaction as benami."

12. The learned Advocate assails that none of these determinants as set in the decision cited above are applicable in the defendant's case, since the defendants failed to satisfy the determinant ingredients necessary to constitute a Benami Transaction.

13. Regarding the defendant-appellant's assertion that the respondents are barred by the Doctrine of estoppel from bringing any suit since they had earlier in a Criminal proceeding in the year 1994 under Section 145 of the Criminal Procedure Code deposed in favour of the appellant-respondents, as such deposing that the appellants were in possession of the suit land, the learned Advocate asserted that the claim of deposition given by P.W.1 is false and also argues that given that if P.W.1 had deposed in the appellant's favour yet such deposition in a Criminal case shall bear no relevance or applicability in a Civil Suit. In this context he cited a decision of the Appellate Division reported in 1983 BLD (AD) 334 in the case of Akhtar Hossain Sharif and others –Vs- V. Munshi Akkas Hossain and others.

14. We have heard the learned Advocates from both sides, perused the documents and other materials on record including the judgment of the Trial Court (Upon examination it appears that apart from the sub-kabala deed of 1945, the subsequent S.A. record, R.S. record and D.P. khatian do not speak of any Title in the plaintiff's favour and to their claim in the Suit land).

15. We have carefully considered the submissions and argument regarding the 'Benami 'transaction and we have perused the judgments which have been relied upon by both the appellants and the respondents respectively. We have read two judgments one in the case of reported in 21 BLD(AD) 2000 relied upon by the appellants and we have also perused the judgment in the case of reported in 61 DLR(AD) 2009 page-137 and which has been relied upon the by the respondents. After perusal of both the judgments which have set out some common principles for determination of the ingredients of a Benami transaction we have found that at least some of the ingredients of a benami transaction are discernible in the case before us.

16. Our considered view is that in the present case to find out whether the transaction was Benami or not, we cannot consider the sub-kabala deed of 1945 in an isolated manner, rather we feel it imperative to take subsequent events and documents on record into consideration including the conduct of the parties. In this context it is quite obvious that apart from and except for the sub-kabala deed of 1945 and some documents evidencing payment of some taxes and utility bills etc being paid by the plaintiff-respondents, the subsequent S.A. record, D.P. khatian and municipal holdings all being recorded in the name of Abdul Gafur, we do not find much tangible evidence in support of the plaintiff-respondents claim that Amir Hossain and Siraj Miah had purchased the property out of their own money. Therefore, taxes having been paid by both parties, under the circumstances these documents cannot lend much support in favour of the plaintiffs claim to possession and Title of the Suit land and it is also revealed from the records that taxes like municipal holdings etc produced as exhibits by the appellants were also paid by the appellants. Therefore, under the circumstances it is only logical and reasonable to hold that if Amir Hossain and Siraj Miah had actually purchased the property from their own money it is highly improbable that they allowed the S.A. record to remain in their father's name and given that the subsequent R.S. record and the D.P. khatian also do not show or help much to prove the plaintiff's claim. Further there is nothing much on record to show that the plaintiff-respondents had ever taken any initiative to rectify any these above mentioned records particularly the S.A. Record. Regarding the deposition in the

criminal proceeding of 1994 made by the plaintiff No.2 that is P.W. 1 in Title Suit, we cannot rely on the deposition of the P.W.1, nor can we accept the submission of the learned Advocate for the respondents that P.W.1 had 'never' deposed in favour of the appellants, given that we have found from exhibit 'ত' that he had actually deposed in the Criminal proceeding and as is revealed upon scrutiny into the records apart from exhibit 'ত' there are also other exhibits which bear direct relevance to the issue before us and appear as documentary evidences in support of the defendant-appellant's claim. Those are the exhibit 'চ'(cha) that is the report of the Motijheel Police Station dated 24.10.1995 and exhibit 'gha' (ঘ) the judgment and order passed in the Petition Case No.1277 of 1994 wherefrom we have quoted from the third line of the 'আদেশ নামা' which is as follows :- 'স্বাক্ষীগণ প্রত্যেকেই জানাইয়াছেন বিরোধীয় সম্পত্তি বাদী পক্ষের দখলে .' The বাদী that is plaintiffs in the Petition Case No.1277 of 1994 is of course the defendant-appellants in the case before us. These exhibits only corroborate and validate the defendant-appellant's claim that they are in possession of the disputed kha(2) schedule land and also establish the fact that plaintiff No.2 had actually deposed in the criminal proceeding in 1994. Besides, there is also exhibit Uma (ঙ) that is the judgment and order in Criminal Revision Case passed by the Magistrate upholding the order passed in Petition Case No.1277 of 1994. These above mentioned exhibits are relevant so far in relation to their claim of 'possession' is concerned.

17. Taking all the documents including the exhibits and the facts and circumstances into consideration, we cannot ignore a vital fact and which fact the defendant-appellants had repeatedly asserted before us and which we also are in agreement that even after the alleged trespassing and illegal occupation by a third person the plaintiffs had never tried to make any attempt or had never taken any initiative or interest to file a suit or to do anything else to establish their claim to Title, ownership and possession over the suit land and therefore their case falls under the Doctrine of estoppel, since the plaintiff-respondents are now barred and estopped from making any further claims over the suit property. Therefore the plaintiffs trying to come up after a lapse of so many years is a futile exercise on their part not having any legal basis and their case definitely falls under the Doctrine of estoppel.

18. Upon going back to the arguments, we ponder over the assertion of the learned Advocate for the respondents that "findings" of a Criminal Court are not binding upon a Civil Court and therefore the question of being estopped does not arise. In support of his assertion, the learned Advocate for the respondent had also cited a decision of our Appellate Division in the case of Aktar Hossain Sharif and others –Vs- V. Munshi Aktar Hossain and others reported in 1983 BLD (AD) where the principle cited from para 20 of the judgment is as quoted underneath :-

> (b) "Findings of the criminal court are not binding on the civil courts-An order under section 145 Cr.P.C. cannot be treated as substantive evidence of possession."

19. Well, it is a general principle of law that findings of a Criminal Court are not binding as such upon Civil Courts and we are in respectful agreement with the principle laid down by our Apex Court. But it is significant to the note that in the case cited by the respondents, as is evident from the judgment their Lordships in that case there were dealing with the question of "findings" of a Criminal Court and furthermore, the issue of estoppel was not involved in that case. But in the case before us, we are concerned about the "deposition" given by the P.W.2 and not with 'findings' of any Court. Upon distinguishing there two aspects we are able to determine that "deposition" belongs to the category of evidence and not findings and the legal implications of the two are distinct from each other. Their Lordships in the Appellate

Division in the case referred to above, were not dealing and did not consider the issue of evidence at any stage of the judgment. In that case they were concerned with the 'findings' only. Here we are concerned with an evidence given in a Criminal Case. Upon the issue of deciding whether 'evidence' of a person in a Criminal proceeding may be taken into consideration in a Civil Suit and whether a person may be estopped in a later Civil suit we must scrutinize the relevant law and that is the Evidence Act, 1872 from which for our purpose Section 115 of the Evidence Act is applicable and which is quoted below:-

> 115. Estoppel—When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thins."

20. From a close reading of Section 115 of the Evidence Act as quoted above, it is quite clear that the legislature does not allow a person from retracting or denying anything that which he might intentionally have said or done either verbally or by action or by omission and the consequence of which might have led some other person to rely on such as true or act upon such belief. This is as we find is clearly barred under the law. It is also significant to note that the bar is not confined to a particular type or class of suits but it applies to 'any' suit or proceeding be it Civil or Criminal whatever may be the nature, class or category of the suit or proceeding. It is evident from perusal of the same that Section 115 in no way distinguishes or otherwise makes any distinction between Civil and Criminal Proceedings. From the language of Section 115 itself it is evident that it applies to all proceedings.

21. Regarding the plaintiff-respondent's assertion that the appellants cannot claim 'adverse possession' in a partition suit since the property is not yet divided by 'metes and bounds' and by drawing our attention to the decision of our Apex Court in this context cited by them in the case of Probir Kumar Rakshit –Vs- Abdus Salam and others reported in 14 MLR AD (2009) where the principle set out in para 120 of the judgment is reported below :-

> "It is in conformity with the well settled principle of law that possession of one co-sharer is in point of law the possession of all co-sharers. Similar view is also taken in the case of Rajenda Nath Saha –Vs- Sonaullah, 42 DLR 393 that an amicable arrangement for separate possession of joint lands amongst the co-sharers by itself does not amount to partition by metes and bounds so as to convert the joint title and possession of the co-sharers into exclusive title and possession. In other words, possession of any co-sharer in any joint land will not confer any title by adverse possession. When the property belongs to several co-sharers, possession of one co-sharer in such property cannot confer exclusive title inasmuch as such possession by one co-sharer cannot be taken to be adverse possession. "

22. While we are in respectful agreement with the principle of the above decision of our Apex Court and which is binding upon us that in a partition suit possession by itself or a plea of adverse possession by itself does not say much in favour of the party claiming such adverse possession, but at the same time we would like to remind the learned Advocate that in the instant case, the claim is accompanied inter alia by the Doctrine of Estoppel and which factor we have considered above and we are in no position to depart from the statutory provision of law as provided under Section 115 of the Evidence Act, 1872. Here in this case, it is not only the claim of adverse possession in an isolated manner, but other factors

including the depositions of the witnesses, the documents and materials on record which need our attention and scrutiny for arriving at our findings.

23. The respondents had also submitted and also cited a decision to support their assertion that the suf-kabala deed shall prevail over the S.A. record. Our view it that generally the suf-kabala deed would prevail over the S.A. record but we have to distinguish the fact that in the case in hand the execution and the existence of the suf-kabala deed is not in question. The appellants have not denied the fact that the suf-kabala deed was executed. There is no dispute as to the existence of the suf-kabala deed. Our anxiety here is the intention behind the execution of the deed and this 'intention' we cannot decipher by looking into the sub-kabala deed alone and therefore to find whether the Transaction in the Deed No.2881 of 1995 was a "Benami" Transaction we cannot look into the sub-kabala deed in an isolated manner, rather we have to take all other relevant factors into our consideration and which we have already discussed above.

24. We have take the depositions of the witnesses including the other exhibits and the other documents and materials on record into our reckoning and which is a vital aspect in aid of arriving at our decision. Upon examination, it transpires that the plaintiff's witnesses could not at any stage of the case actually show any material document or proof as to who had actually paid the consideration for the purchase of the suit land in 1945, given that the plaintiff's claim is that the money was paid by their father Amir Hossain and their deceased uncle Siraj Miah who had purchased the land for their interest only. While the defendants' claim is that Abdul Gafur, the common grandfather of the plaintiffs and defendants had paid the money and executed a 'Benami' transaction only in the name of his two sons, but that in reality the purchase was for his own interest. But regarding the contention of paying taxes, from the documents we find that both parties had paid municipal holding taxes, rent receipts etc. exhibited before the Court therefore, we have tried to deduce actual facts from the depositions of the witnesses.

25. It appears from the records that P.W.1 has upon cross-examination admitted at one stage that his grandfather Abdul Gafur while alive used to pay taxes in his own name. P.W.1 at one stage in his deposition stated " আমার দাদার জীবনকালে এই ভূমির খাজনা আমার দাদার নামে আদায় হয়েছে। " He also stated elsewhere " **আব্দুল গফুর নালিশা ভূমির পৌর** কর দিতেন। " This statement appears not at all in conformity with their, that is, the plaintiff's persistent claim that their father Amir Hossain and Seraj Miah had purchased the land by themselves and for themselves. Because our anxiety arises from the fact that it is very unconvincing that if they Amir Hossain and Siraj Miah did purchase the land for themselves with their own money, then we can hardly find any reason for Abdul Gafur paying any taxes and being an undivided joint family is hardly a reasonable explanation for it. Regarding the R.S. record the P.W.1 admits in his re-examination " আমাদের প্রাপ্য অংশ অনুযায়ী আর,এস, রেকর্ড হয়েছে। " This admission also bears direct relevance to the case. P.W.1 also in his deposition denies having entered into any partition agreement at all. There appears to be in discrepancies and inconsistencies in this assertion considering that upon perusal of the plaint we find that in several places in the plaint, the plaintiffs have admitted to an " আপোষ বন্টন " an amicable partition between the parties. Further P.W.1 at one stage in his deposition stated "তবে শুনেছি আমার দাদা দুধ বেচাকেনা করতো । জায়গা-জমি বেচাকেনা করে খেত " Now this statement of the P.W.1particularly the second part is quite significant and revealing that Abdul Gafur, the grandfather of the plaintiffs and defendants was himself engaged in the business of sale and purchase of land and is an interesting revelation particularly with regard to the plaintiffs submissions where they have

been persistently claiming that Abdul Gafur was an ordinary villager only, without any means to purchase property.

26. Taking the above depositions and upon consideration of other factors placed before us, we can safely arrive upon the conclusion that Abdul Gafur himself was actually also involved in the sale and purchase of land. We feel that contrary to the respondent's submission that Abdul Gafur was only an ordinary villager and could not afford to buy property, it may be reasonably concluded that any person engaged in a business that involves buying and selling of land can also afford to buy land and that is actually the case in the present case. We have also found discrepancies in the plaint itself, at the beginning of the plaint the plaintiffs had stated that the S.A. khatian was 'mistakenly' recorded in Abdul Gafur's name while elsewhere they have stated that since they were an "ejmaily joint family", the S.A. record was consequently recorded in their grandfather Abdul Gafur's name.

27. As is apparent P.W.1 in his deposition had outright denied having been a witness in the Criminal proceedings of 1994 in favour of the plaintiffs. We regret to hold that this denial of his is not acceptable at all, considering the other documents which have been produced as exhibits in the Title Suit; namely the police report, judgment and order of the Court which we have discussed elsewhere in this judgment and therefore it is unnecessary and superfluous to dwell upon this issue any more, Keeping in view all the documents on record our finding is that P.W.1 had actually deposed in the Criminal case and his denial of being a witness tantamounts to a blatantly untrue statement to which he is now taking resort to achieve his own objective.

28. On the other hand, the D.W.1 deposed upon cross-examination that the certified copy of the deed of 1945 carries the name of Siraj Miah only, but simultaneously he also admits that the original deed bears the names of two persons. Therefore from his deposition, we may adduce that he is speaking the truth and that his deposition may be safely relied upon.

29. Regarding the depositions of the other D.Ws though they may not be as crystal clear as daylight yet over-all we did not find any major discrepancies which could adversely affect the case of the defendant-appellants.

30. The plaintiffs had claimed that their father Amir Hossain and their uncle Siraj Miah had attained the age of 'majority' in the year 1945 while the defendant-appellants claimed that Amir Hossain and Siraj Miah were minors at that time. As is apparent from the records, on this issue neither parties have been able to produce any substantial proof. Our view is that to prove age by any document was not possible in that era, given that the date goes back to the year 1945 when documents like birth certificates etc where unknown to people of these parts at the relevant time and we shall leave it at that.

31. From our perusal of the judgment of the Trial Court it transpires that the Trial Court did not frame any issues on the plaintiff's claim and prayer in the plaint for declaration inter alia that the deed in the 'gha' schedule is fraudulent, collusive and unlawfully changed. It appears from the records and from the submissions of the plaintiff that they had at every juncture of the case quite vehemently raised the allegation of 'fraud' including praying for a declaration in prayer 'gha' of their plaint that the volume of the deed was changed fraudulently and collusively etc inter alia other prayer.

32. We find that the Trial Court ought to have engaged itself upon this issue and whether the name was actually 'fraudulently' erased from the deed being essentially a disputed matter of fact; the proof or disproof of such depends upon adducing of evidence. But the Trial Court in this case did not frame it as an issue and no depositions were made or evidence adduced upon this particular issue at all in the Title Suit. It is also revealed from the judgment of the Trial Court that the Trial Court could not at any point in its findings arrive at any definite conclusion as to how the name of Amir Hossain got erased. The Trial Court observes in its judgment " উপরোক্ত ঘটনার পর্যালোচনায় দেখা যায়, নাঃ দলিলের ভলিউমে কৌশলে আমির হোসেন এর নাম বাদ গিয়াছে বা মুছিয়া ফেলিয়াছে. " From this particular observation. In the judgment it is obvious that the Trial Court could not arrive at a definite conclusion as to how the name got erased from the deed. " নাম বাদ গিয়াছে বা মুছিয়া ফেলিয়াছে " this observation itself speaks of the Trial Court's uncertainty and inconclusiveness regarding the claim of forgery and collusion in respect of the volume of the deed and left it at that. Therefore, since the Trial Court for reasons best known to itself did not frame any issue at all on this prayer of the plaintiff-respondents, we do not feel necessary to dwell upon it.

33. Upon summing up the whole case, it is our considered view that the plaintiffs have at every juncture raised allegations of fraud and collusion against the defendant-appellant starting from challenging the certified copy of the suf-kabala deed itself, the D.P. khatian and even the Criminal Case of 1994. But as is obvious from the records, they have hopelessly failed to prove any of these allegations. As the old Latin maxim goes *"Actori incumbit onus probandi"*, the English translation of which stands thus :-

The burden of proof lies on the plaintiff. But in the instant case the plaintiffs have hopelessly failed to prove their allegations and therefore our finding is that having failed to establish their claim they are not legally entitled to any relief of any sort whatsoever. But the Trial Court however, has upon inter alia, misconception and mis-reading of evidences arrived at an incorrect finding and fallaciously decreed the suit in favour of the plaintiff-respondent and which resulted in an unlawful judgment and decree.

34. Consequently taking all the facts and circumstances into consideration and after perusal of the records and the materials placed before us, we are inclined to conclude that the suf-kabala deed No.2881 dated 22.06.45 executed by the predecessors of the plaintiffs was actually a Benami Transaction in favour of Abdul Gafur and the defendant-appellant are in lawful possession of the schedule property. Therefore, we find substance in this appeal and the appeal is hereby allowed.

35. In the result, the appeal is allowed and the impugned judgment and decree dated 11.01.2011 passed by the learned Joint District Judge, 5th Court, Dhaka in Title Suit No.284 of 2009 decreeing the suit is hereby set-aside.

36. The connected Rule being Civil Rule No.362(F)/11 is also hereby disposed of accordingly without any order as to costs.

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

38. Send down the Lower Court's Record along with a copy of this judgment to the Court below immediately for information and necessary action.

6 SCOB [2016] HCD 124

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 7469 of 2003

Musa Kalimullah
……..Petitioner.
-Versus-
Secretary, Water Resources, Ministry of Water Development and others.
.....Respondents.

Mr. Sarder Abul Hossain, Advocate,
.....For the Petitioner.
Mr. Md. Sayed Alom Tipu, Advocate.
..For the Respondent Nos. 2-8.

Heard on 25.08.2015, 03.11.2015, 17.11.2015
Judgment on: 23.11.2015

Present:
Justice Tariq ul Hakim
and
Justice Md. Farid Ahmed Shibli

It transpires that for a Steno-Typist of the Board the post of Stenographer is a promotion post and the decision of promotion is to be made on the basis of merit through open competition in which serving Steno-Typists and outsiders may take part. It is true that the Petitioner had earlier drawn the benefits of 3 time-scales as a Steno-Typist. So, on being promoted as Stenographer he has become entitled again to get the benefits of a new-slot of time-scales subject to fulfilling essential conditions like-satisfactory service of 8, 12 or 15 years. ...(Para 9)

Judgment

Md. Farid Ahmed Shibli, J:

1. This Rule Nisi has been issued calling upon the respondents to show cause as to why the impugned memo. No. ms¯vcb/PaUBo(Hi)315 dated 07.05.2003 refusing the Petitioner to pay the benefits of 03 (three) Time Scales shall not be declared to be without any lawful authority and is of no legal effect and/or pass such other order or orders as to this Court may seem fit and proper.

2. Factual scores relevant for disposal of this Writ Petition are as follows:- On 19.03.1969 the Writ Petitioner was appointed as a Steno-Typist in the Water Development Board (hereinafter termed as "the Board") and on 11.10.1987 he was promoted to the post of Stenographer. According to the Government Order dated 21.05.1984, on completion of 8 & 12 years' satisfactory service on 11.10.1995 and 11.10.1999 respectively the Writ Petitioner were allowed to draw the benefits of 02 (two) time-scales vide the Office Order dated 17.04.2001 (Annexure-C). On 12.10.2001 the Petitioner went on L.P.R. and he retired from the service on 11.10.2002. On completion of 15 years' service he became entitled to draw the 3rd time-scale w.e.f. 11.10.2001. After granting the aforesaid 02 (two) time-scales eventually the Respondents arbitrarily and without any lawful authority deducted and adjusted Tk. 44,602/- from the Petitioners' claim of pension issuing the impugned memo. No. ms¯vcb/Pa U B(Hi)315 dated 07.05.2003 (Annexure-E). As no other efficacious and equitable remedy is

available to the Writ Petitioner, he has thus filed the instant Writ Petition under article 102 of the Constitution.

3. Respondent nos. 2-8 have contested filing the Affidavit-in-Opposition contending that being a Steno-Typist the Writ Petitioner had earlier drawn 03 (three) time-scales on completion of 8,12 & 15 years of service and after changing his designation as a Stenographer on 11.10.1987 he drew 02 (two) more time-scales on completion of 8 and 12 years w.e.f. 11.10.1995 and 11.10.1999 respectively. As per Para- 3(2)(b) of the Ministry of Finance's Notification no. MF(ID)-I-5/78/1186 dated 31.10.1978 any change of designation of a Steno-Typist to Stenographer is not tantamount to promotion of the post, so the Writ Petitioner had no such entitlement to draw any time-scale as a Stenographer. It has been alleged that the Board granted the Writ Petitioner 2 (two) time-scales wrongly w.e.f. 11.10.1995 and 11.10.1999 respectively, but during the final calculation of his pension claims having those mistakes detected the concerned authority of the Board asked for adjustment of the amount drawn in excess on account of 02 (two) time-scales and issued the impugned Office Order (Annexure-E) to that effect. Since the Respondents did not violate the existing rules or orders of the Government, the Rule is liable to be dismissed with costs.

4. Mr. Sarder Abul Hossain, learned Advocate for the Petitioner and Mr. Md. Sayed Alom Tipu, learned Advocate for the Respondents have entered appearance and participated in the hearing.

5. According to the Government's Order and the Circulars from time to time issued, any employee of the Board shall be entitled to draw maximum three time-scales on completion of 8, 12 & 15 years satisfactory service at the same post. Admittedly the Petitioner being a Steno-Typist of the Board got the benefits of 3(three) time-scales on completion of 8, 12 & 15 years' satisfactory service. On 11.10.1987 the Petitioner's designation was changed, as claimed, by way of promotion because of the result secured in the Speed Test Examination arranged by the Board. Being a Stenographer the Writ Petitioner subsequently drew 2 (two) time-scales on completion of 8 & 12 years' service w.e.f. 11.10.1995 & 11.10.1999 respectively vide the Office Order at Annexure-C.

6. Mr. Sarder Abul Hossain, learned Advocate for the Writ Petitioner submits that the Petitioner was entitled to draw the benefits of 02 (two) more time-scales counting his service from the date of promotion as a Stenographer. Mr. Hossain alleges that after allowing the Petitioner to draw the benefits of 2 time-scales w.e.f. 11.10.1995 and 11.10.1999 the Board had no lawful authority to issue the impugned letter dated 07.05.2003 (Annexure-E) directing the Writ Petitioner to adjust or deduct the amount drawn as the benefits of the said 2 time-scales from his pension claims.

7. Mr. Md. Sayed Alom Tipu, learned Advocate for the Respondents contends that the Petitioner's change of post from Steno-Typist to the Stenographer should not be tantamount to promotion of the post, because the pay-scales of both those posts are the same. The learned Advocate further contends that in view of Para- 3(2)(b) of the Ministry of Finance's Notification no. MF(ID)-I-5/78/1186 dated 31.10.1978 there was no scope at all for the Writ Petitioner to become Stenographer from Steno-Typist by way of promotion and the Board merely changed his designation on 11.10.1987 evaluating the result secured in the Speed Test Examination.

8. Crux of the problem to be determined is- whether on 11.10.1987 the Petitioner's change of post from Steno-Typist to Stenographer was a promotion or not. In this context Mr. Tipu has drawn our attention to the Notification dated 30.10.1978 issued by the Ministry of Finance (Annexure-X). For proper appreciation of the facts in dispute relevant part of Para-3(2)(b) of the Notification is stated below in verbatim-

> "Appointment of Stenographer and Personal Assistants on the New Scale of TK. 400-825 will be made on the basis of merit through open competition in which serving Steno-Typists and outsiders may take part. There will be no reserved quota for promotion of Steno-Typists as Stenographers."

9. On careful reading of the Notification above, it transpires that for a Steno-Typist of the Board the post of Stenographer is a promotion post and the decision of promotion is to be made on the basis of merit through open competition in which serving Steno-Typists and outsiders may take part. It is true that the Petitioner had earlier drawn the benefits of 3 time-scales as a Steno-Typist. So, on being promoted as Stenographer he has become entitled again to get the benefits of a new-slot of time-scales subject to fulfilling essential conditions like- satisfactory service of 8, 12 or 15 years. Besides, Para- (Ka) of the audit-opinion bearing no. *cwmWDi(Dtwbt)/199/633 ZwiL- 01.08.1990* circulated by the Office of the Accountant General, Bangladesh provides us that even after drawing 03 (three) time-scales in a lower post, an employee may be given the same benefit again at his promoted post. In such a situation, it is not understood as to how and on what basis the Respondents decided to deprive the Writ Petitioner from the benefit of the time-scales and issued the impugned Office Order to that effect.

10. Mr. Sarder Abul Hossain, learned Advocate for the Writ Petitioner submits that being a Stenographer the Writ Petitioner drew the benefits and during his service period the concerned authority did not raise any objection in that score. He further submits that the Board took an unkind decision against the Writ Petitioner deducting the benefits from his pension claim which clearly violates the principles of equity. Mr. Hossain contends that once an employee be allowed to draw a financial benefit rightly or wrongly cannot be taken away afterwards in an abrupt manner without assigning any valid cause or reason. We find strong substance in the said submission of the learned Advocate for the Writ Petitioner and inclined to hold that on promotion to the post of Stenographer, the Writ Petitioner acquired a fresh entitlement to draw the benefits of time-scales and the Board by allowing him to draw 2 time-scales (Annexure-C) has not committed any error or unlawful act.

11. Writ Petitioner was promoted as Stenographer on 11.10.1987. So, his 3rd time-scale supposed to be due on completion of 15 years' service i.e. on 11.10.2002. Since the Writ Petitioner retired on 11.10.2002, he therefore cannot claim any benefit of the 3rd time-scale. However, the Respondents have no legal scope to realize the benefits of the 1st and 2nd time-scale, which had already been drawn by the Writ Petitioner as a Stenographer. We are therefore inclined to hold that being a Stenographer of the Board, the Writ Petitioner is legally entitled to get the benefits of 02 (two) time-scales and the impugned order dated 07.05.2003 (Annexure-E) issued to that effect is of without any lawful authority. The Respondents are directed to allow the Writ Petitioner to draw the benefits which have already deducted or adjusted from his pension claim and take further steps if any as per law.

12. Consequently, the Rule is made absolute. Parties are directed to bear the respective costs.