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Justice Moyeenul Islam Chowdhury
Justice Sheikh Hassan Arif

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7 SCOB [2016] AD
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Supreme Court of Bangladesh

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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
7. Mr. Justice Mirza Hussain Haider
8. Mr. Justice Md. Nizamul Huq
9. Mr. Justice Mohammad Bazlur Rahman

Judges of the High Court Division

1. Mr. Justice Syed Muhammad Dastagir Husain
2. Mr. Justice Md. Mizanur Rahman Bhuiyan
3. Mr. Justice Syed A.B. Mahmudul Huq
4. Mr. Justice Tariq ul Hakim
5. Madam Justice Salma Masud Chowdhury
6. Mr. Justice Farid Ahmed
7. Mr. Justice Shamim Hasnain

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

9. Mr. Justice Md. Abu Tariq

10. Madam Justice Zinat Ara

11. Mr. Justice Muhammad Abdul Hafiz

12. Mr. Justice Syed Refaat Ahmed

13. Mr. Justice Md. Miftah Uddin Choudhury

14. Mr. Justice A.K.M. Asaduzzaman

15. Mr. Justice Md. Ashfaqul Islam

16. Mr. Justice Zubayer Rahman Chowdhury

17. Mr. Justice Quamrul Islam Siddique

18. Mr. Justice Md. Fazlur Rahman

19. Mr. Justice Moyeenul Islam Chowdhury

20. Mr. Justice Md. Emdadul Huq

21. Mr. Justice Md. Rais Uddin

22. Mr. Justice Md. Emdadul Haque Azad

23. Mr. Justice Md. Ataur Rahman Khan

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39. Madam Justice Naima Haider

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53. Mr. Justice Gobinda Chandra Tagore

54. Mr. Justice Sheikh Hassan Arif

55. Mr. Justice J.B.M. Hassan

56. Mr. Justice Md. Ruhul Quddus

57. Mr. Justice Md. Khasruzzaman

58. Mr. Justice Farid Ahmed

59. Mr. Justice Md. Nazrul Islam Talukder

60. Mr. Justice Bhabani Prasad Singha

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

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73. Mr. Justice Abu Taher Md. Saifur Rahman

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79. Mr. Justice Md. Shahinur Islam

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83. Mr. Justice Amir Hossain

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Cases of the Appellate Division

Sl. No	Name of the Parties and Citation	Key Words	Short Ratio
1.	Idrisur Rahman & ors Vs Syed Shahidur Rahman & ors (*Surendra Kumar Sinha,C.J*) 7 SCOB [2016] AD 1	Constitution of Bangladesh, Article 152; Article 96; Article 102; Supreme Judicial Council; Misconduct of a Judge; Code of Conduct; Judicial review; *audi alteram partem*	It is to be borne in mind that in adjudicating a disciplinary proceeding against a Judge of the highest court and holding trial of an offender in a criminal case, one cannot claim similar principle to be followed. For proving an offence against an offender, the prosecution must prove the offence against him beyond reasonable doubt but this doctrine cannot be applicable in respect of a Judge while hearing a disciplinary proceeding for removal of a Judge on the ground of gross misconduct. In the alternative, it may be said that an ordinary offender and a Judge cannot be equated at par while finding them guilty of the charges.
2.	Karim Khan & ors Vs Kala Chand & ors *(Md. Abdul Wahhab Miah, J)* 7 SCOB [2016] AD 32	Code of Civil Procedure, 1908, Section 115; Order VII, Rule 3; Permanent Injunction;	It is a well settled legal proposition that the Appellate Court is the last Court of fact and if the Appellate Court comes to a finding of fact on consideration of the evidence on record that cannot be disturbed or reversed by the High Court Division in exercising jurisdiction under section 115(1) of the Code of Civil Procedure, unless it can be shown that the finding of the Appellate Court is perverse or contrary to the evidence on record or based on misreading of the evidence on record or on misconception of law. It is also a settled legal principle that in a suit for permanent injunction title can be looked into incidentally and the prime consideration is whether the plaintiff has got exclusive possession in the suit land.
3.	Shantipada Shil Vs Sunil Kumar Sarker and others *(Nazmun Ara Sultana, J)* 7 SCOB [2016] AD 37	Pre-emption; date of knowledge	On scrutiny of the deposition of this preemptor-petitioner we find that the preemptor-petitioner while deposing before court, though denied this alleged fact that he obtained the certified copy of the case kabala in the year 1982 for the opposite party No.2, but he did not deny the fact that he was the engaged lawyer of the opposite party No.2. The opposite party No.2 filed Other Suit No.70 of 1982 challenging the genuineness of the impugned kabala. In the circumstances it is not believable at all that

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			the preemptor-petitioner could not know about the case kabala before his alleged date of knowledge. From the facts and circumstances stated above it is rather proved beyond any doubt that the preemptor-petitioner knew about the case transfer in the year 1982. In the circumstances the trial court rightly dismissed the case for preemption.
4.	BLAST & anr Vs Bangladesh & ors *(Syed Mahmud Hossain, J)* 7 SCOB [2016] AD 42	Commutation of death sentence	The petitioner has no significant history of prior criminal activity and that he was aged 14 years at the time of commission of the offence and 16 years at the time of framing of charge. The petitioner has been in the condemned cell since 12.07.2001, that is, more than 14 years. Considering all aspects of the case, we are of the view that the death sentence of the petitioner be commuted to imprisonment for life.
5.	Md. Imtiaz Faruque Vs Afsarunnessa Khatun Chowdhury & ors *(Muhammad Imman Ali, J)* 7 SCOB [2016] AD 46	(Emergency) Requisition of Property Act, 1948; Section 5 (7)	It is an admitted fact that the suit land was acquired in L.A. Case No. 06 of 1948-49 and although steps have been taken for release of the land from acquisition, the applicants have not succeeded in getting the land released. According to section 5 (7) of the (Emergency) Requisition of Property Act, 1948 the land having been duly acquired and compensation paid, it vests absolutely in the Government free from all encumbrances. Hence, the title in the property is no longer with the petitioner. We note from the plaint that the petitioner has not included any prayer for declaration of title and hence, in any event, the prayer for temporary injunction is not sustainable.
6.	Bo-Sun Park Vs State & another *(Hasan Foez Siddique, J)* 7 SCOB [2016] AD 50	Code of Criminal Procedure, 1898 Section 247 read with section 403	Since the order passed under section 247 of the Code of Criminal Procedure is one of acquittal the second complaint on the same allegation is not maintainable. At whatever stage of the proceeding the acquittal order section 247 is ordered, such order will operate as a bar the fresh trial, in the same way as are acquittal after trial on merits.

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Cases of the High Court Division

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1.	Ahmed Service Ltd Vs Commissioner of Taxes *(A.F.M Abdur Rahman, J)* 7 SCOB [2016] HCD 1	Income Tax Ordinance, 1984 Section 35(4); method of accounting; computation of income profit and gains of company	Since the DCT concern did not raise any dissatisfaction as to the method of accounting and did not pin point any of the defect in the accounts, the two lower appellate authorities were required to consider the said question and decide the appeals before them in its true perspective. But that has not been done by the two lower appellate authorities and as such the questions as have been formulated in the instant three Income Tax Reference Applications are required to be answered in negative and in favour of the Assessee-applicant.
2.	Z. I. Khan Panna Vs Bangladesh & ors *(Moyeenul Islam Chowdhury, J)* And *(Md. Ashraful Kamal, J)* 7 SCOB [2016] HCD 7	®kvb Avi kvie c¡uj vš² আইন, ২০০৩ (২০০৩ সনের 1 ew BCe); Article 46 of the Constitution; indemnity; torture on the victims in the custody of the joint forces; Supremacy of the Constitution; Essence of the rule of law; Compensation	There cannot be any blanket indemnity of the persons accused of perpetration of crimes on the victims in their custody in view of the clear and unequivocal language of Article 46. Precisely speaking, indemnity can be given to the persons concerned for the maintenance or restoration of order in any area meaning thereby in any specific area in Bangladesh as provided by Article 46 of the Constitution. In fact, there is no scope for wholesale indemnity of the members of the joint forces for the maintenance or restoration of order throughout the length and breadth of the country in terms of Article 46 of the Constitution. On this count, the impugned Act No. 1 of 2003 cannot be upheld.
3.	State Vs Md. Nurul Amin Baitha & anr *(Syed Md. Ziaul Karim, J)* 7 SCOB [2016] HCD 40	Evidence Act,1872, Section 106; Nari-O-Shishu Nirjatan Daman Ain, 2000, Section 11(ka); Penal Code, 1860, Section 302: Fundamental principles of criminal jurisprudence and justice delivery system; Wife killing case	Presence of the accused Baitha at the material time is supported by the evidence on record. Thus the death of the deceased was in the special knowledge of the accused Baitha. He knew how she met with death. Ordinarily an accused has no obligation to account for the death for which he is placed on trial. But in a case like the present one where the accused has special knowledge of the death of the deceased, under section 106 of the Evidence Act, he is under obligation to explain how the deceased died. If he fails to explain the death of the deceased or if his explanation is found false the

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			irresistible inference would be that none besides him caused the death of the deceased.
4.	Md. Bazlur Rahman Vs Shamsun Nahar & ors. *(S. M. Emdadul Hoque, J)* 7 SCOB [2016] HCD 61	Family Courts Ordinances, 1985, Section 9(6); The code of civil procedure, 1908, Section 115(1)	It appears that both the courts after proper consideration of the evidence on record rightly opined that since the petitioner himself received the summons so without filing any appeal against the experte judgment and decree he cannot get any relief.
5.	Sree Paresh Chandra Pramanik vs Md. Mokbul Hossain & ors *(Borhanuddin, J)* 7 SCOB [2016] HCD 64	State Acquisition and Tenancy Act, 1950, Sub-section 10 of section 96; Succession Act, 1925, Section 28; computing of degrees of kindred; three degrees by consanguinity; Pre-emption Case	Section 28 of the Indian Succession Act, 1925, provides mode of computing of degrees of kindred in the manner set forth in the table of kindred set out in schedule 1. From the table of schedule 1, annexed with the counter affidavit, it is evident that brother-in-law is not a relation within three degrees by consanguinity. Pre-emptee opposite party no.1 being not a relation within three degrees by consanguinity of the donor is not entitled to get protection of Sub-section 10 of section 96 of the State Acquisition and Tenancy Act.
6.	Mst. Anjuara Khanam @ Anju Vs State *(M. Moazzam Husain, J)* 7 SCOB [2016] HCD 67	Nari-o-Shishu Nirjaton Damon Ain, 2000; Section 18 and 27; Power of tribunal to entertain naraji;	The Tribunal has been clothed with power wide enough to cover all the power of a Magistrate and of the Sessions judge rolled together in ignoring investigation-report with concomitant power to entertain naraji and sending back the case for further investigation or, (where practicable) judicial inquiry. Sub-section (1) and (1Ga) of section 27 read with section 18 goes to show that the Tribunal is further equipped with power more robust than that of an ordinary criminal court in taking cognizance absolutely on its own satisfaction, albeit by assigning reason, gathered from any materials, irrespective of naraji, or information received in disregard of the final report submitted by police or the person authorized by the Government in this behalf. The enormously unqualified power of the Tribunal to take cognizance of offences on its own satisfaction in total disregard of everything means by necessary implication that the Tribunal

SL No.	Name of the Parties and Citation	Key Words	Ratio
			enjoys power to take into consideration anything including the naraji-petition for its satisfaction without any formality attached to it in general law.
7.	State & ors Vs Julhash & ors *(Soumendra Sarker, J)* 7 SCOB [2016] HCD 84	Code of Criminal Procedure, 1898; Section 164; Confessional Statement;	The spirit of law on confession under section 164 of the Code of Criminal Procedure with regard to the confessional statement of a accused is such that a confession is a direct piece of evidence which is substantial and such statement of any accused can be relied upon for the purpose of conviction and no further corroboration is necessary if it relates to the confessing accused himself; provided it is voluntary and also free. A free and voluntary confession under the purview of this section deserves highest credit, because it is presumed to flow from highest sense of guilt. If the court believes that the confession is voluntary and free, there is no legal embargo on the court for ordering conviction. If it is found that the Magistrate appears to have recorded his satisfaction as to the voluntariness and spontaneous nature of the confession of the accused, in that case; such confession cannot be vitiated from illegality and this type of confession alone is enough to convict the confessing accused.
8.	Youngone Synthetic Ind. Ltd & anr Vs Commissioner of Taxes *(Sheikh Hassan Arif, J)* 7 SCOB [2016] HCD 98	Income Tax Ordinance, 1984 Section 28, 29; Wears and tears of assets; depreciation; written down value	In calculating the total income in a concerned assessment year, the wears and tears of assets, which have been used for the purpose of the business and to earn revenue, have to be taken into consideration. From the context of the said concept, the relevant provisions have been incorporated in our statute book, namely Income Tax Ordinance, 1984. Thus, while Section 28 of the said Ordinance classifies the income from business and profession, Section 29 provides for the allowances to be deducted from the said income while calculating the same for the purpose of assessment. Clause(VIII) of sub-section (1) of Section 29 provides that the depreciation of building, machinery, plan or furniture etc. of the concerned assessee, which have been used for the purposes of business or profession, shall be allowed as

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			admissible under the Third Schedule to the said Ordinance. Again, Paragraph-2 of the said Third Schedule, in particular sub-paragraph (1) of the same, provides that in computing the profits and gains from the business or profession, an allowance for depreciation shall be made in the manner provided hereinafter. This Paragraph 2 is followed by a Table under Paragraph 3 prescribing fixed rates of depreciations to be allowed on the 'written down value' of any particular assets used in the business.
9.	State & anr Vs Aynal Haque & anr *(Bhabani Prashad Singha, J)* 7 SCOB [2016] HCD 106	Nari-O-Shishu Nirjatan Daman Ain, 2000, Section 11(ka); Value of circumstantial evidence in a wife killing case	In a wife killing case, there could be no eye-witness of the occurrence, apart from the inmates of the house who may refuse to tell the truth, the neighbors may not also come forward to depose. The prosecution is, therefore, necessarily to rely on circumstantial evidence.
10.	Orascom Telecom Bangladesh Ltd Vs. BTRC & ors *(Md. Ashraful Kamal, J)* 7 SCOB [2016] HCD 115	Bangladesh Telecommunication Act, 2001, Section 55(3); spectrum assignment fee; VAT Act, 1991, Section 2, 3 (N), and 5:	The issue of applicability of VAT and/or liability of the petitioner company to pay the VAT has no relation whatsoever with regard to the payment of license renewal fee and spectrum assignment fee. The petitioner company is bound to pay the net amount of the license renewal fee fixed by BTRC, without any kind of deduction.
11.	Md. Jahangir Alam & ors Vs D.C Munshiganj & ors *(Mohammad Ullah, J)* 7 SCOB [2016] HCD 130	Protection and Conservation of Fish Act, 1950, Section 5(2)(b) read with section 5A; Mobile Court Ain, 2009; Protection and Conservation of Fish Rules, 1985; Article 40 and 42 of the Constitution	It appears that the powers conferred under section 5(2)(b) read with section 5A on an Executive Magistrate extend to conviction and sentence and also to confiscation of the article(s) or thing(s) used in the commission of the offence. Besides, the Act or the Rules does not speak of putting the factories under sealed lock and key. Therefore in putting the factories under sealed lock and key the Executive Magistrate has clearly exceeded the authority conferred upon him which has not empowered him to do so under the Act, the Ain and the Rules. The orders of sealing the factories of the petitioners, by the Executive Magistrate is also violative of the fundamental rights of the petitioners guaranteed under Article 40 and 42 of the constitution with regard to their lawful business.

SL No.	Name of the Parties and Citation	Key Words	Ratio
12.	Mainuddin Ahammed Vs Bangladesh & ors *(Muhammad Khurshid Alam Sarkar, J)* 7 SCOB [2016] HCD 134	State Acquisition and Tenancy Act, 1950, Section 144B; What to be fulfilled to direct excision of a fraudulent entry; record-of-rights,	During conducting the revisional survey under Section 144 of the SAT Act, till final record-of-rights are published, no suit lies in any civil Court challenging any action or Order of the Settlement Officer as provided in Section 144B of the SAT Act and, thus, the only option available for respondent no. 12 was to take recourse to the provision of Rule 42A of the Tenancy Rules.
13.	Asoke Das Gupta Vs Ministry of Finance & ors *(Kashefa Hussain, J)* 7 SCOB [2016] HCD 148	Gift Tax Act, 1990, Section 4(ja); Income Tax Ordinance, 1984, Section 53M;	Section 53M Explanation 1 is contrary to the rest of the provisions of the ITO, 1984, being against the sprit and intent of the Ordinance and also contrary to the Section 4 of Gift Tax Act, 1990. Therefore the impugned collection of advance tax against transfer of shares to the daughter of the petitioner is unlawful and without lawful authority.
14.	Sonali Bank Vs. Md. Abu Baker Sarker *(S.M. Mozibur Rahman, J)* 7 SCOB [2016] HCD 156	Artha Rin Adalat Ain, 2003, Section 50;	The court has no power to exempt the defendant respondent from the liability of paying up interest however high rate it may be ... since the financial institution bank itself preserves the exclusive right to exempt any-body from payment of interest of loan they sanctioned.
15.	Afangir @ Kalu Vs. The State *(Md. Farid Ahmed Shibli, J)* 7 SCOB [2016] HCD 161	Explosive Substance Act, 1908, Section 4/6	Mere knowledge of an accused or his equivocal disclosure about existence of bomb-making powders during his police custody shall not expose him to any criminal liability of possessing or controlling that illegal substance.

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APPELLATE DIVISION

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

CIVIL APPEAL NO.145 OF 2005.
WITH
CIVIL PETITION FOR LEAVE TO APPEAL NO.405 OF 2005.
(From the judgment and order dated 02.02.2005 passed by the High Court Division in Writ Petition No.2454 of 2004.)

Md. Idrisur Rahman	**:**	Appellant. (In C.A. No.145 of 2005)
Government of Bangladesh and others	**:**	Petitioners. (In C. P. No.405 of 2005)

=Versus=

Syed Shahidur Rahman and others	**:**	Respondents. (In both the cases)
For the Appellant (In C.A. No.145 of 2005)	**:**	Dr. Kamal Hossain, Senior Advocate, (with Mr. Idrisur Rahman, Advocate), instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For the Petitioner (In C. P. No.405 of 2005)	**:**	Mr. Murad Reza, Additional Attorney General (with SK. Saifuzzaman, Deputy Attorney General) instructed by Mr. Haridas Paul, Advocate-on-Record.
For the Respondents (In C.A. No.145 of 2005)	**:**	Mr.Shahidur Rahman, (In Person) instructed by Mr. Nurul Islam Bhuiyan Advocate-on-Record.
For the Respondents (In C. P. No.405 of 2005)	**:**	N. R.

Date of hearing : 5th and 18th August, 2015.

Date of Judgment : 16th September, 2015.

Constitution of Bangladesh
Article 152:
There are set of customs and usages which are being followed by the Judges in this sub-continent for over a century and those customs and usages have the force of law. Thus,

if a Judge violates any of the established conduct, usage or custom, he will not only commit gross-misconduct but also violates his oath, the Constitution and the law.

...(Para 6)

An ordinary offender and a Judge cannot be equated at par while finding them guilty of the charges:

The question is whether the conclusion arrived at by the Council in forming the opinion by the President to remove Mr. Syed Shahidur Rahman from the office of a Judge on the ground of gross misconduct was in conformity with the provisions of the constitution. The conclusion of the Council is that the materials on record are sufficient to come to the conclusion that the allegations made against Mr. Syed Shahidur Rahman have substance. It merely disbelieved the receipt of Tk.50,000/- in the absence of corroborative evidence but it has totally believed the entire episode. What more else is required to prove about the misconduct of a sitting Judge of the highest Court by a woman? These findings and observations are sufficient to come to the conclusion that the Judge had not only violated the 'Code of Conduct' but also judicial ethics and norms which are sufficient to remove him from the office of a Judge. It is to be borne in mind that in adjudicating a disciplinary proceeding against a Judge of the highest court and holding trial of an offender in a criminal case, one cannot claim similar principle to be followed. For proving an offence against an offender, the prosecution must prove the offence against him beyond reasonable doubt but this doctrine cannot be applicable in respect of a Judge while hearing a disciplinary proceeding for removal of a Judge on the ground of gross misconduct. In the alternative, it may be said that an ordinary offender and a Judge cannot be equated at par while finding them guilty of the charges.

...(Para 55)

A Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher than that expected of a layman and also higher than that expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. ...(Para 60)

Constitution of Bangladesh

Article 102:

The High Court Division cannot sit over the opinion of the Council as an appellate forum:

Judicial review against such removal is not available in this particular case in the facts of the given case, inasmuch as, judicial review is available against such order on limited grounds. The High Court Division cannot sit over the opinion of the Council as an appellate forum or from the Order of the President pursuant to the recommendation of the Council. The High Court Division has apparently equated a proceedings taken by a sitting Additional Judge against an order of removal on the ground of misconduct with an ordinary litigant which seeks judicial review against an administrative action. There is no doubt that judicial review is a basic feature of our constitution so also the rule of law but that does not mean that the same doctrine will be applicable in all cases. ...(Para 76)

There is no Rules providing the procedure to be followed for removal of a Judge of the highest Court. The Supreme Judicial Council enjoins the power as per provision of clause (4) of Article 96 to prescribe the 'Code of Conduct' of the Judges. Similarly for

the purpose of inquiry also, there is no Rules or Regulations framed by the government. It is left with the discretion of the Council to follow the procedure. The Council on following conduct rules and after affording Mr. Syed Shahidur Rahman sufficient opportunity to explain his conduct and upon hearing the parties held that Mr. Syed Shahidur Rahman should not remain in the judiciary because of his conduct. This opinion having been made by the highest body authorized by the constitution and the President having taken the decision relying upon the recommendation of the Council, the judicial review is not permissible against such decision. ...(Para 82)

When judicial review is permissible:
It is only in exceptional cases when the principles of *audi alteram partem* have not been followed or the affected Judge has not been afforded sufficient opportunity to examine witnesses or cross-examine the witnesses, judicial review against his removal is permissible but otherwise not. ...(Para 84)

The High Court Division cannot sit over the judgment of the Council. It has totally ignored that aspect of the matter and opined that the President did not apply his judicial mind in passing the order of removal of Mr. Syed Shahidur Rahman. As per provisions of the constitution after the recommendation of the Supreme Judicial Council the President is left with no discretion other than to accord the recommendation. It is not correct to hold the view that the Council's opinion is expressly beyond the scope of article 96(5) of the constitution, and that such portion of the opinion contained in the report is without jurisdiction, inasmuch as, in the absence of proof of alleged payment of money to the writ petitioner by Ms. Kona the allegations against the writ petitioner is baseless. This view of the High Court Division is totally misconceived one. The High Court Division has exceeded its jurisdiction in making such observation. As observed above, even if the payment of Tk.50,000/- has not been proved, that does not disprove the allegations made by Ms. Kona. Mr. Syed Shahidur Rahman being a sitting Judge could not entertain Ms. Kona with two of her relations at his residence for fixation of a bail matter and also he could not maintain liasion with his previous junior Ms. Jesmin Akther Keya relating to conducting cases. ...(Para 85)

<u>Our conclusion is as under</u>:
.....

(6) A Judge should dispose of promptly the business of the court including avoiding inordinate delay in delivering judgments/orders. In no case a judgment shall be signed not later than six months of the date of delivery of judgment in exceptional cases.

.....

(21) No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.

...(Para 87)

J U D G M E N T

Surendra Kumar Sinha, CJ:

1. A constitutional point of law is involved in this appeal, which has public importance. The point is directly related to the Code of Conduct of the Judges of the higher echelons.

2. Article 96 of the constitution prescribes the tenure of the office of the Judges, formulation of their Code of Conduct, their removal, inquiry and the procedure to be followed in that regard. This appeal relates to the removal of Mr. Syed Shahidur Rahman, an additional Judge of the High Court Division. The provision for removal of a Judge is so much importance that it is set out in extenso for arriving at a correct conclusion on the question:

> "96. (1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-seven years.
>
> (2) A Judge shall not be removed from his office except in accordance with the following provisions of this article.
>
> (3) There shall be a Supreme Judicial Council, in this article referred to as the Council, which shall consist of the Chief Justice of Bangladesh, and the two next senior Judges:
>
> Provided that if, at any time, the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or other cause, the Judge who is next in seniority to those who are members of the Council shall act as such member.
>
> (4) The function of the Council shall be –
>
> (a) to prescribe a Code of Conduct to be observed by the Judges: and
>
> (b) to inquire into the capacity or conduct of a Judge or of any other functionary who is not removable from office except in like manner as a Judge.
>
> (5) Where, upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge –
>
> (a) may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or
>
> (b) may have been guilty of gross misconduct, the President may direct the Council to inquire into the matter and report its finding.
>
> (6) If, after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct, the President shall, by order, remove the Judge from office.
>
> (7) For the purpose of an inquiry under this article, the Council shall regulate its procedure and shall have, in respect of issue and execution of processes, the same power as the Supreme Court.
>
> (8) A Judge may resign his office by writing under his hand addressed to the President."

3. The Article has provided a comprehensive and complete procedure regarding the Judges' tenure and removal. The proviso to clause (3) in particular makes certain that if a member of the Supreme Judicial Council is not capable of inquiring into the conduct of the Judge, the Judge who is next in seniority shall act as such member. A look at these provisions

manifest that for removal of a Judge there should be a Supreme Judicial Council consisting of the Chief Justice and next two senior Judges and the functions of the Council have been clearly detailed in clause (4) of article 96, that is to say, the Council shall prescribe a Code of Conduct which shall be observed by the Judges. The reference may be made to the Council in any of the following manner.

4. If the Chief Justice gets any information from various sources regarding the misconduct of a Judge, and if he is satisfied on perusal of the information that a Judge has been guilty of gross misconduct or is incapable of properly performing the functions of his office due to physical or mental incapacity, he may bring to the notice of the President intimating about the information collected regarding the conduct of the Judge. If the President is satisfied with the materials placed before him which are sufficient to remove a Judge, he shall refer the matter to the Supreme Judicial Council for inquiry and report. Or if the President is satisfied from information received from other sources that an inquiry should be held by the Council for removal of a Judge, he may refer the matter to the Council for inquiry and report for his satisfaction that the Judge may be removed for any of the eventualities mentioned in clause (5) of article 96. If the Council after holding inquiry is of the opinion that the conduct of the concerned Judge is such that he should be removed from the office for physical and mental incapacity or guilty of conduct, the President shall order for removal of the Judge.

5. There is no hard and first rule for conducting such inquiry by the Council and it is the Council which shall regulate its procedure. In exercise of the powers conferred under clause (4) of article 96, the Council promulgated on 7th May, 2000, the 'Code of Conduct'. In the preamble of the 'Code of Conduct', it is stated that the Judges should be alive to the oath prescribed in the Third Schedule of the constitution. It reminds the Judges that they are under obligation to discharge the constitutional responsibilities in order to maintain, follow and interpret the constitution and the law for the maintenance of the rule of law over the whole range of human activities within the nation. As per 'Third Schedule', a Judge takes oath to 'preserve, protect and defend the constitution and the laws of Bangladesh.' So, it is imperative for a Judge to follow the oath and reflect it in his conduct, behaviour and in every aspect of his life.

6. 'Law' as per definition in article 152 means, 'any Act, ordinance, order, rule, regulation, bye- law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh'. Since the 'Code of Conduct' has been promulgated by the Council in exercise of Powers under clause (4)(a) of article 96, it has force of law in view of the above definition, which includes 'other legal instrument', and any 'custom or usage'. The 'Code of Conduct' is definitely a legal instrument. Besides, the custom and usage being followed by the Judges is also a law as per constitution. There are set of customs and usages which are being followed by the Judges in this sub-continent for over a century and those customs and usages have the force of law. Thus, if a Judge violates any of the established conduct, usage or custom, he will not only commit gross-misconduct but also violates his oath, the Constitution and the law.

7. The noble objectives of the 'Code of Conduct' have been mentioned in its preamble. In Craies on Statutory Law, Seventh Edition, while describing the 'Object of Preamble' it is stated that preambles, especially in the earlier Acts, have been regarded as of great importance as guides to construction. They were used to set out the facts or state of law for which it was proposed to legislate by the statute. Coke said 'The Preamble of the statute is a

good means to find out the meaning of the statute, and as it were a key to open the understanding thereof.' Lord Thring said, 'The proper function of a preamble is to explain certain facts which are necessary to be explained before the enactments contained in the Act can be understood.' Pollock in Salkeld V. Johnson, (1848) 2 Ex. 256. 283 said 'The preamble is undoubtedly part of the Act.'

8. The first clause of the 'Code of Conduct' relates to upholding the integrity and independence of judiciary. It reminds a Judge to maintain 'high standards of conduct' so that the integrity and independence of judiciary' are preserved. Clause 2 proscribed impropriety in all activities such as:

A. A Judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A Judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the Judge.

9. Clause 11 is also relevant for our consideration which read:

> "11 Every Judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of his office."

10. Finally it has been reminded that the 'Code of Conduct is only restatement of values of judicial life and is not meant to be exhaustive but illustrative of what is expected of a Judge.' So, a Judge should abide by norms and ethics which are being followed by the Judges for many centuries. That area is covered by the sense of propriety of the Judge himself. It is expected that a Judge is guided by self imposed restrictions. P.Ramanatha Aiyer, in his 'Law Lexicon' Edition 1987, at page 821, has collected from several decisions the meaning of the word 'misconduct' and arrived at the conclusion that the expression is vague. Literally, it means wrong conduct or improper conduct. It is to be constructed with reference to the subject-matter and the context wherein the term occurs having regard to the scope of the Act or the statute under consideration. 'Misconduct' on the part of an arbitrator was construed to mean that misconduct does not necessarily comprehend or include misconduct of a fraudulent or improper character but it does comprehend and include action on the part of the arbitrator which is, upon the face of it, opposed to all rational and reasonable principles that should govern the procedure of any person who is called upon to decide upon questions in difference and dispute referred to him by the parties.

11. In clause 5(b) of article 96, the President may direct to hold inquiry by the Council if there is information regarding the allegation of 'gross misconduct' of a Judge. Similarly in clause (6) it is provided that on perusal of the inquiry report, if the President is satisfied that a Judge is guilty of 'gross misconduct' he shall make an order of removal. In the constitution no definition or explanation has been given of the expression 'gross misconduct'. In the absence of any explanation or definition, the Court is required to consider the 'Code of Conduct' of the Judges. If there is allegation against a Judge who violates the 'Code of Conduct' and on inquiry the Council finds that the Judge has violated the norms and 'Code of Conduct' he will be deemed that he has committed 'gross misconduct', otherwise the formulation and circulation of 'Code of Conduct' will be meaningless. It will be illusory to

formulate the conduct rules. In that case there will hardly be any difference in the conduct of a Judge and an ordinary person. A Judge should maintain the 'Code of Conduct' in all aspects of his life. He should not mix with any person other than his close relatives not to speak of keeping liaison with his previous clientele. Aloofness is virtue of a Judge.

12. On perusal of the 'Code of Conduct, it is obligatory on the part of a Judge, who is oath bound to preserve, protect and defend the constitution and the laws, to maintain the dignity and follow it. If a Judge violates the 'Code of Conduct' it may be said that he has violated his oath and such violation may be taken as 'gross misconduct'.

13. In Corpus Juris Secundum, Vol-48A, referring to the standards of Conduct, Disabilities and Privileges of Judges Guidelines for judicial conduct are found both in codes of judicial conduct and in general moral and ethical standards expected of judicial officers by the community. Canons or codes are intended as a statement of general principles setting forth a wholesome standard of conduct for Judges which will reflect the credit and dignity on the profession and insofar as they prescribe conduct which is *malum in se* as opposed to *malum prohibitum* they operate to restate those general principles that have always governed judicial conduct. 'Although these canons have been held to be binding on Judges and may have the force of law where promulgated by the courts, except as legislatively enacted or judicially adopted they do not of themselves have the force and effect of law.'

14. On the nature of proscribed conduct it is stated:

> "A judge's official conduct should be free from impropriety and the appearance of impropriety and generally, he should refrain from participation in activities which may tend to lessen public respect for his judicial office.
>
> It is a basic requirement, under general guidelines and canons of judicial conduct, that a Judge's official conduct be free from impropriety and the appearance of impropriety and that both his official and personal behaviour be in accordance with the highest standard society can expect. The standard of conduct is higher than that expected of lay people and also higher than that expected of attorneys. The ultimate standard must be conduct which constantly reaffirms fitness for the high responsibilities of judicial office and Judges must so comport themselves as to dignify the administration of justice and deserve the confidence and respect of the public. It is immaterial that the conduct deemed objectionable is probably lawful albeit unjudicial or that it is perceived as low humored horseplay.
>
> In particular, a Judge should refrain from participation in activities which may tend to lessen public respect for his judicial office and avoid conduct which may give rise to a reasonable belief that he has so participated. In fact even in his private life a Judge must adhere to standards of probity and propriety higher than those deemed acceptable for others. While a Judge does have the right to entertain his personal views on controversial issues and is not required to surrender his rights or opinions as a citizen his right of free speech and free association are limited from time to time by his official duties and he must be most careful to avoid becoming involved in public controversies."

15. R.C. Lahoti, CJ. in an article 'Canons of Judicial Ethics' stated as under:

'Principles' are fundamental truth, the axioms, the code of right conduct. Much of these remain confined to theory or hidden in books. Canons are the type or the rules perfected by the principles put to practice. Principles may be a faculty of the mind, a source of action which are a pleasure to preach or read. 'Canons' are principles put into practice so as to be

recognized as rules of conduct commanding acceptability akin to religion or firm faith, the departure wherefrom would be not a pardonable mistake but an unpardonable sin. Let us bear this distinction in our mind while embarking upon a voyage into the dreamland called the 'Canons of Judicial Ethics'.

16. 'Canons are the first verse of the first chapter of a book whose pages are infinite. The life of a Judge i.e. the judicial living is not an easy thing. Things in judicial life do now always run smoothly. Performing the functions of a judicial office, an occupant at times rises towards the heights and at times all will seem to reverse itself. Living by canons of judicial ethics enables the occupant of judicial office to draw a line of life with an upward trend travelling through the middle of peaks and valleys. In legal circles, people are often inclined to remember the past as glorious and describing the present as full of setbacks and reverses. There is dark period of trial and fusion. History bears testimony to the fact that there has never been an age that did not applaud the past and lament the present. The thought process shall ever continue. Henry George said- "Generations, succeeding to the gain of their predecessors, gradually elevate the status of mankind as coral polyps, building one generation upon the work of the other, gradually elevate themselves from the bottom of the sea." Progress is the law of nature. Setbacks and reverses are countered by courage, endurance and resolve. World always corrects itself and the mankind moves ahead again. "Life must be measured by thought and action, not by time" –said Sir John Lubbock.

17. Observance of Canons of Judicial Ethics enables the judiciary to struggle with confidence; to chasten oneself and be wise and to learn by themselves the true values of judicial life. The discharge of judicial function is an act of divinity. Perfection in performance of judicial functions is not achieved solely by logic or reason. There is a mystic power which drives the Earth and the Sun, every breeze on a flower and every smile on a child and every breath which we take. It is this endurance and consciousness which enables the participation of the infinite forces which command us in our thought and action, which, expressed in simple terms and concisely put, is called the 'Canons of Judicial Ethics'.

18. Judicial Ethics

"Judicial ethics is an expression which defies definition. In the literature, wherever there is a reference to judicial ethics, mostly it is not defined but attempted to be conceptualized. According to Mr. Justice Thomas of the Supreme Court of Queensland, there are two key issues that must be addressed: (i) the identification of standard to which members of the judiciary must be held; and (ii) a mechanism, formal or informal, to ensure that these standards are adhered to. A reference to various dictionaries would enable framing of a definition, if it must be framed. Simply put, it can be said that judicial ethics are the basic principles of right action of the Judges. It consists of or relates to moral action, conduct, motive or character of Judges; what is right or befitting for them. It can also be said that judicial ethics consist of such values as belong to the realm of judiciary without regard to the time or place and are referable to justice dispensation.

19. 'In all democratic constitutions, or even those societies which are not necessarily democratic or not governed by any constitution, the need for competent, independent and impartial judiciary as an institution has been recognized and accepted. It will not be an exaggeration to say that in modern times the availability of such judiciary is synonymous with the existence of civilization in society. There are constitutional rights, statutory rights, human rights and natural rights which need to be protected and implemented. Such protection and implementation depend on the proper administration of justice which in its turn depends

on the existence and availability of an independent judiciary. Courts of Law are essential to act and assume their role as guardians of the Rule of Law and a means of assuring good governance. Though it can be said that source of judicial power is the law but, in reality, the effective exercise of judicial power originates from two sources. Externally, the source is the public acceptance of the authority of the judiciary. Internally and more importantly, the source is the integrity of the judiciary. The very existence of justice-delivery system depends on the Judges who, for the time being, constitute the system. The Judges have to honour the judicial office which they hold as a public trust. Their every action and their every word-spoken or written-must show and reflect correctly that they hold the office as a public trust and they are determined to strive continuously to enhance and maintain the people's confidence in the judicial system.

20. In Krishna Swami V. Union of India, (1992) 4 SCC 605 it was observed:

> 'Every act or even error of judgment or negligent acts by higher judiciary *per se* does not amount to misbehaviour. Wilful abuse of judicial office, wilful misconduct in the office, corruption, lack of integrity, or any other offence involving moral turpitude would be misbehaviour. Misconduct implies actuation of some degree of *mens rea* by the doer. Judicial finding of guilt of grave crime is misconduct persistent failure to perform the judicial duties of the Judge or willful abuse of the office *dolus malus* would be misbehaviour. Misbehaviour would extend to conduct of the Judge in or beyond the execution of judicial office. Even administrative action or omissions too need accompaniment of *mens rea*.'

21. It is pointed out that the 'Code of Conduct' should be maintained and observed by a Judge and he should not do anything 'which erodes the credibility'. Of the said conducts, clause 2B above is very pertinent, that is to say, it proscribed a Judge not to allow family, social and other relationship to influence judicial conduct or judgment. 'A Judge should not lend the prestige of the judicial office to advance the private interests of others'.

22. Conduct of Judge in private

'When a Judge sits on trial, he himself is on trial. The trust and confidence of 'we the people' in judiciary stands on the bedrock of its ability to dispense fearless and impartial justice. Any action which may shake that foundation is just not permitted. Once having assumed the judicial office, the Judge is a Judge for 24 hours. It is a mistaken assumption for any holder of judicial office to say that I am a Judge from 10 to 5 and from 5 to 10 it is my private life. A Judge is constantly under public gaze. "Judicial office is essentially a public trust. Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process.

23. 'Society, therefore, expects higher standards of conduct and rectitude from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the court itself. It is, therefore, a basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is

higher than that expected of a layman and also higher than that expected of an Advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society".

24. In an article "Ethics of Justices & Judicial Accountability' V.G.Ranganath, working as Faculty of Law, IFHE University, Hyderabad, noted the following:

Code of Ethics of a Judge:

It is, therefore, absolutely essential that in order that the Judge's life is full of public confidence in their role in the society, the judicial decision is to be honest and fair.

25. Lord Denning M.R. in his book has observed as follows:-

> "When a Judge sits to try a case, he is himself on trial-before his fellow country men. It is on his behaviour that they will form their opinion on our system of justice. He must be robed in the scarlet of the red Judge-so as to show that he represents the majesty of law. He must be dignified – so as to earn respect to all who appear before him. He must be alert to follow, all that case on. He must be understanding-to show that he is aware of the temptation that beset any one. He must be merciful so as to show that he too has that quality which dropeth as gentle rain from heaven upon the place beneath."

26. Thus, the great guarantee of justice is not law but the personality of the Judge and the way he discharges his duties and functions. The warranty of appointment of a Judge does not confer on him a degree of wisdom, larger than he has. But it certainly places him under an obligation to dispose justice without fear or favour, affection or ill-will in consequence of his oath of office and not to go out of his way to be on the right side of the establishment which is the biggest litigant in any country. Therefore, if the element of the fear, favour, affection or ill-will come to play any role in the formation of judicial opinion or affect the judicial behaviour of a Judge, the judgment though unimpeachable by the judge at the time of holding the office of a Judge.

27. 'Judges do require a degree of detachment and objectivity in judicial dispensation. They being duty bound by the oath of office taken by them in adjudicating the disputes brought before the court in accordance therewith, Judges must remain impartial, should be known by all people to be impartial. 'A Judge should not allow either reasons of State or political consequences, however, formidable they might be to influence his decision. He should guard against intimidation of powerful outside interests, which often threatened the impartial administration of justice and keep himself free from application of crude pressure, which may result in manipulation of the law for political purposes at the behest of the government in power or anybody else. Lord Mansfield's observation in this context in the celebrated case of John Wilkes is worth noting. John Wilkes had published a seditious libel in a paper called the North Briton. He had fled abroad and been outlawed. He returned and himself asked for the outlawry to be reversed, but he was cast into prison meanwhile. He was a popular hero and many supported him and urges his release. Numerous crowds thronged in or around West Minister Hall. Pamphlets were issued in the name of the people dictating the Judges the way they should decide. Reasons of policy were urged emphasizing the danger to the Kingdom by commotions and general confusion. This is how Lord Manfield answered them when he came to give Judgment:

> "Give me leave to take the opportunity of this great and respectable audience, to let the whole world know, all such attempts are in vain. Unless we have been able to find

an error, which will bear us out, to reverse the outlawry, it must be affirmed. The Constitution does not allow reasons of State to influence our judgments: God forbid it should. We must not regard political consequences, we are bound to say "fiat justitia, ruat caelum". The Constitution trusts the King with reasons of State and policy; he may stop prosecutions; he may pardon offences; it is his, to judge whether the law or the criminal should yield. We have no election. We are to say, what we take the law to be; if we do not speak our real opinions, we prevaricate with God and our consciences. Once for all, let it be understood, that no endeavours of this kind will influence any man who at present sits here."

"Distances may be maintained from the relations and acquaintances, parties to the dispute and their lawyers. Judges should be cautious in their outlook and approach. They should neither provide supportive stool to their sons and daughters, close relations and acquaintances in order that they may succeed in the profession nor recognize chosen ones in that sphere."

28. In India on 7th May 1997, a 16 point 'Code of Conduct', for ensuring proper conduct among members of the higher judiciary was adopted by the Judges of the Supreme Court and the High Courts with the Gujarat High Court as the sole dissenter, reportedly. The 16 points code which the Judges prefer to describe as "The Restatement of Values of Judicial Life" is believed to have become effective since then. It was drafted by a Committee of five Judges, headed by Justice Dr. A.S.Anand, and the other members were Justice S.P. Barucha, Justice K.S. Paripoornan, Justice M. Srinivasan and Justice D.P.Mohapatra. The 16 point code stipulates:

'(1) Justice must not merely be done but it must also be seen as done. The behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, any act of a Judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the credibility of the perception has to be avoided.

(2) A Judge should not contest the election of any office of a Club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.

(3) Close association with individual members of the Bar, particularly those who practice in the same court shall be eschewed.

(4)A Judge shall not permit any member of his immediate family to, such as spouse, son, or daughter, son-in-law, or daughter-in-law, or any other close relative, if as member of the Bar, to appear before him or even be associated in any manner with a case to be dealt with by him.

(5) No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.

(6) A Judge should practice a degree of aloofness consistent with the dignity of his office.

(7) A Judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.

(8) A Judge shall not enter into a public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.

(9) A Judge is expected to let his judgment speak for themselves. He shall not give interview to the media.

(10) A Judge shall not accept gifts or hospitality except from his family, close relations and friends.

(11) A Judge shall not hear and decide a matter in which a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.
(12) A Judge shall not speculate in shares, stocks or the like.
(13) A Judge should not engage directly or indirectly trade or business, either by himself or in association with any other person. (publication of a legal treaties or any activity in the mature of a hobby shall not be constructed as trade business).
(14) A Judge should not ask for accept, contribute or otherwise actively associate himself with the raising of any fund for any purpose.
(15) A Judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be got resolved and clarified through the Chief Justice.
(16) Every Judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which the office is held.

29. These are only the "Restatement of the Values of Judicial Life" and are not meant to be exhaustive but illustrative of what is expected of a Judge.'

30. The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973 is as follows.

CANON 1: A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. Respect for Law. A Judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
B. Outside Influence. A Judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A Judge should neither lend the prestige of the judicial office to advance the private interests of the Judge or others nor convey or permit others to covey the compression that they are in a special position to influence the Judge. A Judge should not testify voluntarily as a character witness.
C. Nondiscriminatory Membership. A Judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY AND DILIGENTLY.

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the Judge should adhere to the following standards:

A. Adjudicative Responsibilities.

(1) A Judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A Judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A Judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the Judge deals in an official capacity. A Judge should require similar conduct of those subject to the Judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A Judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a Judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a Judge receives an unauthorized ex parte communication bearing on the substance of a matter, the Judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A Judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the Judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A Judge should dispose promptly of the business of the court.

(6) A Judge should not make public comment on the merits of a matter pending or impending in any court. A Judge should require similar restraint by court personnel subject to the Judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the Judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

C. Disqualification:

(1) A Judge shall disqualify himself or herself in a proceeding in which the Judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the Judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the Judge served as a lawyer in the matter in controversy, or a lawyer with whom the Judge previously practiced law served during such association as a

lawyer concerning the matter, or the Judge or lawyer has been a material witness;

(c) the Judge knows that the Judge, individually or as a fiduciary, or the Judge's spouse or minor child residing in the Judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the Judge or the Judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) know by the Judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the Judge's knowledge likely to be a material witness in the proceeding;

(e) the Judge has served in governmental employment and in that capacity participated as a Judge (in a previous judicial position) counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A Judge should keep informed about the Judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree or relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor or other active participant in the affairs of a party, except that;

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a Judge would be disqualified because of a financial interest in a party (other than an interest that

could be substantially affected by the outcome), disqualification is not required if the Judge (or the Judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

D. Remittal of Disqualification, instead of withdrawing from the proceeding, a Judge disqualified by Canon 3C (1) may, except in the circumstances specifically set out in subsections (a) through (e) disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a Judge should not participate in extrajudicial activities that detract from the dignity of the Judge's office, interfere with the performance of the Judge's official duties, reflect adversely on the Judge's impartiality, lead to frequent disqualification or violate the limitations set forth below.

A. Law-related Activities.

(1) Speaking, Writing, and Teaching. A Judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) Consultation. A Judge may consult with or appear at a public hearing before an executive or legislative body or official:

(a) on matters concerning the law, the legal system, or the administration of justice.

(b) to the extent that it would generally be perceived that a Judge's judicial experience provides special expertise in the area; or

(c) when the Judge is acting pro se in a matter involving the Judge or the Judge's interest.

(3) Organizations. A Judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A Judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

(4) Arbitration and Mediation. A Judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the Judge's official duties unless expressly authorized by law.

(5) Practice of Law. A Judge should not practice law and should not serve as a family member's lawyer in any forum. A Judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

B. Civic and Charitable Activities. A Judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:

(1) A Judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the Judge or be regularly engaged in adversary proceedings in any court.

(2) A Judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. Fund Raising.....

D. Financial Activities.

(1) .....

(2) .....

(3) .....

(4) .....

(5) .....

E. Fiduciary Activities. A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:

(1) .....

(2) .....

F. Governmental Appointments. .....

G. Chambers, Resources, and Staff. A Judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Cannon.

H. Compensation, Reimbursement, and Financial Report. .....

(1) .....

(2) .....

(3) .....”

31. Alexander Hamilton once said- “The judiciary ... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment ....”. The greatest strength of the judiciary is the faith of the people in it. Faith, confidence and acceptability cannot be commanded; they have to be earned. And that can be done only by developing the inner strength of morality and ethics.

32. The Bangalore Draft Principles

The values of judicial ethics which the Bangalore Principles crystallises are: (i) independence, (ii) impartiality, (iii) integrity, (iv) propriety, (v) equality and (vi) competence & diligence.

33. The above values have been further developed in the Bangalore Principles as under:-

1. Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A Judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

2. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by the which the decision is made.

34. Integrity is essential to the proper discharge of the judicial office.

35. Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a Judge.

36. Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

37. Competence and diligence are prerequisites to the due performance of judicial office.

38. Implementation – By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

39. The preamble to the Bangalore Principles of Judicial Conduct states inter alia that the principles are intended to establish standards for ethical conduct of Judges. They are designed to provide guidance to Judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that Judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the Judge. There are a few interesting facts relating to the Bangalore Principles. The first meeting to prepare the Draft Principles was held in Vienna in April 2000 on the invitation of the United Nations Centre for International Crime Prevention, and in conjunction with several other institutions concerned with justice administration.

40. In preparing the draft Code of Judicial Conduct, the core considerations which recur in such codes were kept in view. Several existing codes and international instruments more than three in number including the Restatement of Values of Judicial Life adopted by the Indian judiciary in 1999 were taken into consideration. At the second meeting held in Bangalore in February 2001, the draft was given a shape developed by Judges drawn principally from Common Law countries. It was thought essential that it will be scrutinized by Judges of all other legal traditions to enable it to assume the status of a duly authenticated international code of judicial conduct. The Bangalore Draft was widely disseminated amongst Judges of both common law and civil law systems and discussed at several judicial conferences. The draft underwent a few revisions and was finally approved by a Round Table Meeting of Chief Justices (or their representatives) from several law system, held in Peace Palace in The Hague, Netherlands, in November 2002.

41. 'Accountability' as one of the principles which was included in the original draft was dropped in the final draft. It is apparently for two reasons, firstly, it was thought that the principles enshrined in the Bangalore Principles presuppose the 'accountability' on the part of the Judges and are inherent in those principles and secondly, the mechanism and methodology of 'accountability' may differ from country to country and therefore left to be taken care of individually by the participating jurisdictions.

42. 'The judiciary has been trusted and hence entrusted with the task of upholding the Constitution and zealously and watchfully guarding the constitutional values. The oath administered to a Judge ordains him to uphold the Office as a citadel of public justice and public security to fulfil the constitutional role assigned to the judiciary.

43. "The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rested the edifice of the democratic polity. If there is one principle which runs through the entire fabric of the constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armoury of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers." This is the principle of independence of judiciary which Judges must keep in mind while upholding the Constitution and administering the laws.

44. A Judge must bear not only faith but 'true faith' and 'allegiance' to the Constitution. The oath demands of a Judge not only belief in constitutional principles but a loyalty and a devotion akin to complete surrender to the constitution beliefs. The Bangalore Principles of judicial conduct were initiated by the United Nations in 2001 and, after wide consultation, were endorsed at the 59th session of the United Nations Rights commission at Geneva in 2003. Their stated intention is:

> "To establish standards for ethical conduct of Judges. They are designed to provide guidance to Judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the Executive and Legislature, and lawyers and the public, in general to better understand and support the judiciary.'

45. According to Justice V.R. Krishna Iyer, the Judges who do not pronounce judgment in time commit turpitude. He notes with a sense of sorrow-

> "It has become these days, for the highest to the lowest courts' Judges, after the arguments are closed, take months and years to pronounce judgments even in interlocutory matters – a sin which cannot be forgiven, a practice which must be forbidden, a wrong which calls for censure or worse".

46. Lord Denning puts it mildly by way of tendering good advice for a new Judge. He says that when judgment was clear and obvious it was for the benefit of the parties and the Judge himself that judgment should be delivered forthwith and without more ado. Though, the art is difficult and requires great skills but practice can enable perfection. However, not all judgments can be delivered ex tempore; there are cases in which doubts are to be cleared, law has to be settled and conflicts are to be resolved either by performing the difficult task of reconciling or the unpleasant task of overruling. Such judgments need calm and cool thinking and need deliberations. Such judgments must be reserved but not for an unreasonable length of time.

47. It is seen, all these principles, Code of Conduct, Judicial ethics etc. are almost identical. All these values, conducts are not meant to be exhaustive but illustrative of what is expected of a Judge. In the above context, it is to be looked into whether the respondent has

committed 'gross misconduct' as a Judge of the High Court Division. The allegations against the respondent are that the former President of the Supreme Court Bar Association in an address at a meeting of the lawyers alleged that inefficient persons have been elevated to the Bench and one of the Judges violating the 'Code of Conduct' received Tk.50,000/- from a client fixing bail. This having published in the media, the Chief Justice noticed the allegation, who by letter dated 14th October, 2003, requested the President of the Bar to address him in writing the complaint giving the name of the Judge and in reply, the President of the Bar on 16th October, 2003, informed that the allegation related to the conduct of Mr. Syed Shahidur Rahman.

48. Upon receipt of the reply of the President of the Bar, the Chief Justice in accordance with Article 96(5) of the constitution brought the matter to the notice of the President by letter dated 20th October, 2003. The President directed the Supreme Judicial Council to inquire into the matter and pursuant thereto, the Supreme Judicial Council held inquiry and submitted report stating, inter alia, that "though the allegations against Mr. Justice Syed Shahidur Rahman are not proved beyond doubt but on consideration of the facts and circumstances and the materials on record in their entirety it cannot be said that there is total absence of material in support of the allegations nor can it be said that the allegations are without any basis. Therefore, in our opinion Mr. Justice Syed Shahidur Rahman should not continue as an Additional Judge of the High Court Division of the Supreme Court of Bangladesh." On receipt of the aforesaid inquiry report, the President removed Mr. Syed Shahidur Rahman by order dated 20th April, 2004.

49. The High Court Division was of the view that since the statements of fact having not been controverted, it should be looked into whether the removal of Mr. Syed Shahidur Rahman was made in accordance with article 96 of the constitution. This very approach of the High Court Division is wrong and this wrong approach has reflected in its subsequent decision. It ignored fundamental fact that most of the allegations made against Mr. Syed Shahidur Rahman have been admitted and found to be true in the inquiry except that of receipt of Tk.50,000/-. It is alleged by Ms. Nasima Sultana Kona that she paid Tk.50,000/- to Mr. Syed Shahidur Rahman for arranging an anticipatory bail for her husband's relation Aktheruzzaman Babu in Nari-O-Shishu-Nirjatan Daman Tribunal Case No.305 of 2003 through a friend (sitting Judge) of Mr. Syed Shahidur Rahman. Before the Supreme Judicial Council, Mr. Syed Shahidur Rahman admitted about his acquaintance and visitation of Mrs. Nasima Sultana Kona at his residence with two other persons and that he advised Mrs. Kona to approach Advocate Jesmin Aktar Keya, an associate of his previous chamber.

50. Admittedly Mrs. Nasima Sultana Kona had acquaintance with Mr. Syed Shahidur Rahman from the time he was practising as an Advocate. After elevation to the Bench, she maintained visiting terms with him and on the fateful day, Mrs. Kona with her two relations visited the residence of Mr. Syed Shahidur Rahman with prior consent of the latter. Again we noticed that Mr. Syed Shahidur Rahman also maintained liasion with Advocate Jesmin Aktar Keya, who had worked as junior of Mr. Syed Shahidur Rahman, and after his elevation, his law chamber was entrusted to her and she had been maintaining the chamber.

51. These admitted facts sufficiently suggest that despite being elevated to the Bench, Mr. Syed Shahidur Rahman had been maintaining his law chamber indirectly through Jesmin Aktar Keya and sometimes he entertained some of his previous clientele which is evident from the fact of allowing Mrs. Kona to visit his residence for a bail fixation matter. The Council though disbelieved the receipt of Tk.50,000/- as fees for bail from Mrs. Kona in the

absence for corroborative evidence, believed from the admission of Mr. Syed Shahidur Rahman that he did not give up his previous professional relationship altogether. It observed that 'but admitted about their acquaintance and visit to his (Syed Shahidur Rahman) residence by Mrs. Kona and others and his advice to Mrs. Kona to approach Advocate Jesmine Akter Keya.'

52. After evaluation of the evidence of Mrs. Kona, the Council believed the incident preceding to the rejection of the prayer for bail. It has narrated the incident as under: 'After the prayer for bail was refused and the petition was dismissed as not pressed, Mrs. Kona on 26.08.2003 went to the chamber of Advocate Keya and wanted back the file. The latter replied that she would not hand over the file, as she had not received the fees, to which Mrs. Kona informed that she had paid the fees to Mr. Justice Rahman. Whereupon there was serious altercations and use of abusive words between them. This happened in the presence of many lawyers including one Helaluddin, Advocate, who asked Mrs. Kona to meet the Bar President Barrister Rokanuddin. On 26.08.2003 she tried to meet Mr. Mahmud but could not. She met Mr. Mahmud on 3.09.2003 in his chamber and narrated the incident who asked her to give the same in writing.'

53. In this regard, the Council observed, 'Mr. Asaduzzaman Advocate and Barrister Mustafizur Rahman Khan have made statements to the above effect before the Council that they were sitting at that chamber while Mrs. Kona visited Barrister Rokanuddin at his chamber.' The Council on evaluation of the statement of Mr. Asaduzzaman observed: "Mr. Asaduzzaman advocate further stated that Mrs. Kona stated to him that as some senior Advocates refused to accept the brief because of their workload, she approached Mr. Justice Rahman over telephone as she was acquainted with him from before. Justice Rahman asked her to visit him with the file. Accordingly she visited the Lalmatia residence of Mr. Justice Rahman, accompanied by the brother of accused Aktaruzzaman and another."

54. After perusal of the statement of Mr. Mostafizur Rahman, the Council observed that "The aforesaid statements lead to show that these two learned advocates were present at the chamber of the Bar President and that Mrs. Kona has narrated the incident to Mr. Rokanuddin Mahmud." After perusal of the statement of Mr. Shahidur Rahman and his witnesses, the Council has then observed that "it is admitted that Mrs. Kona had conducted few cases through Mr. Justice Rahman's chamber, while he was a Deputy Attorney General, the cases were conducted by Justice Rahman's junior Mrs. Keya Advocate." The Council observed that in an inquiry though the ordinary procedure of admitting as accepting particular facts or statement into evidence is not strictly applicable, rule of procedure demands that the allegation before the inquiry should be supported by some amount of reliable statements. It then concluded its opinion holding that "it cannot be said that there is total absence of material in support of the allegations nor can it be said that the allegations are without any basis. Therefore, in our opinion Mr. Justice Syed Shahidur Rahman should not continue as an Additional Judge of the High Court Division of the Supreme Court of Bangladesh."

55. The question is whether the conclusion arrived at by the Council in forming the opinion by the President to remove Mr. Syed Shahidur Rahman from the office of a Judge on the ground of gross misconduct was in conformity with the provisions of the constitution. The conclusion of the Council is that the materials on record are sufficient to come to the conclusion that the allegations made against Mr. Syed Shahidur Rahman have substance. It merely disbelieved the receipt of Tk.50,000/- in the absence of corroborative evidence but it has totally believed the entire episode. What more else is required to prove about the

misconduct of a sitting Judge of the highest Court by a woman? These findings and observations are sufficient to come to the conclusion that the Judge had not only violated the 'Code of Conduct' but also judicial ethics and norms which are sufficient to remove him from the office of a Judge. It is to be borne in mind that in adjudicating a disciplinary proceeding against a Judge of the highest court and holding trial of an offender in a criminal case, one cannot claim similar principle to be followed. For proving an offence against an offender, the prosecution must prove the offence against him beyond reasonable doubt but this doctrine cannot be applicable in respect of a Judge while hearing a disciplinary proceeding for removal of a Judge on the ground of gross misconduct. In the alternative, it may be said that an ordinary offender and a Judge cannot be equated at par while finding them guilty of the charges.

56. It is because in a democracy it is expected from the Judges of higher echelons that they are the protectors of the constitution and the law. The rights of the citizens either fundamental or statutory are to be protected by the Judges. Such implementation and protection depend on the proper administration of justice which is in its turn depends on the existence and availability of an independent judiciary. Judges have to honour judicial office which they hold as public trust. Independent of judiciary is indispensable to justice in our society and elsewhere in the world. So, it is sufficient if it is found by the Council or the body which is entrusted to decide the conduct of the Judges that the conduct of the Judge is such that his continuing in the judiciary is detrimental to the administration of justice and the public perception towards the judiciary will be eroded. Because in such eventuality the Judge is found to have abused the trust of the society has in him.

57. Independence of judiciary is an essential attribute to the rule of law. The notion of independence of judiciary is not limited to the independence from the executive pressure or influence-it is a wider concept which takes within its sweep independence from any other pressure or prejudices. If the judiciary manned by the Judges are not independent how the independence of judiciary can be secured. It is observed in C. Ravichandran Iyer V. Justice A.M. Bhattacharjee, (1995) 5 SCC 457 as under:

> "Independent judiciary is, therefore, most essential when liberty of citizen is in danger. It then becomes the duty of the judiciary to poise the scales of justice unmoved by the powers (actual or perceived) undisturbed by the clamour of the multitude. The heart of judicial independence is judicial individualism. The judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own. Judicial individualism, in the language of Justice Powell of the Supreme Court of United States in his address to the American bar Association, Labour Law Section on 11-8-1976, is 'perhaps one of the last citadels of jealously preserved individualism ...."

58. Douglas,J. in his dissenting opinion in Stephen S. Chandler V. Judicial Council of the Tenth Circuit of the United States, 398 US 74; 26 L ED 2d 100, observed "No matter how strong an individual judge's spine, the threat of punishment-the greatest peril to judicial independence- would project as dark a shadow whether cast by political strangers or by judicial collegues. A federal judge must be independent of every other judge ..... Neither one alone nor any member banded together can act as censor and place sanctions on him. It is vital to preserve the opportunities for judicial individualism."

59. It has further been observed that "Judicial office is essentially a public trust. Society, is therefore, entitled to expect that a Judge must be a man of high integrity, honesty and

required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge. Unwritten code of conduct is writ large from judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the court itself (emphasis supplied).

60. It is, therefore, a basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher than that expected of a layman and also higher than that expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society.

61. The conduct that tends to undermine the public confidence in the character, integrity or impartiality of the Judge must be eschewed. It is expected of a Judge to voluntarily set forth wholesome standards of conduct reaffirming fitness to higher responsibilities. A Judge must be endowed with sterling character, impeccable integrity and upright behaviour. Erosion thereof would undermine the efficacy of the rule of law and the working of the constitution itself. The behaviour of a Judge is the bastion for the people to reap the fruits of the democracy, liberty and justice and the antithesis rocks the bottom of the rule of law. It is, therefore, needed for a Judge to uphold good behaviour as a constitutional tautology. The preservation of public confidence in the honesty and impartiality of a Judge which depends with the personal reputation of a Judge.

62. According to the provisions, the inquiry is conducted by a highest body, the Chief Justice and the two next senior Judges of the Court. The constitution empowers the Council to formulate the 'Code of Conduct' for the Judges and also entrust it a wide discretion to regulate its inquiry procedure. The Council formulated the 'Code of Conduct' and circulated to the Judges. It is an established custom prevalent in our system that as soon as a Judge subscribes an oath after elevation, he is served with a copy of the 'Code of Conduct', and he is under obligation to meet the Chief Justice and other senior Judges to seek advice. At such meetings, the senior Judges appraise him of the conduct, usage, custom, ethics and decorum to be followed and maintained by him throughout the tenure. This is why at the end of the 'Code of Conduct' it is specifically pointed out that those conducts are 'only restatement of values of judicial life and is not meant to be exhaustive but illustrative of what is expected of a Judge.' The Council on consideration of the inquiry report vis-a-vis the evidence adduced by the parties clearly observed that though the payment of Tk.50,000/- could not have been proved in the absence of corroborative evidence, the allegations made against Mr. Syed Shahidur Rahman could not be said to have no basis at all or that it could not be said that there was total absence of materials in support of the allegations. Thereby the Council opined that he had violated the 'Code of Conduct' for which he should not continue as a Judge. The Council was of the firm view that Mr. Syed Shahidur Rahman's conduct amounts to misconduct although in so many words it has not expressly observed but the ultimate recommendation that he should not continue as a Judge is tantamount that his misconduct and behaviour is sufficient to come to the conclusion that he has committed 'gross misconduct'.

63. In Corpus Juri Secundum Vol.48A prescribes the question of the manner of inquiry for removal of a Judge it is stated:

> "Investigations may be conducted into matters relating to judicial conduct as a preliminary to formal disciplinary proceedings.

64. A judiciary commission may conduct an investigation into matters relating to judicial conduct as a preliminary to formal disciplinary proceedings, and a court may, under its general powers over inferior courts, appoint a special commissioner to preside over a preliminary investigation. A court rule providing that a Judge charged with misconduct should be given a reasonable opportunity in the course of a preliminary investigation to present such matters as he may choose, affords him more protection than is required by constitutional provisions."

65. It further observed that:

> "The State which creates a judicial office may set appropriate standards of conduct for a Judge who holds that office, and in many jurisdictions, courts acting within express or implied powers have adopted or have followed certain canons or codes of judicial conduct. The power of a particular court in matters of ethical supervision and the maintenance of standards for the judiciary may be exclusive."

66. The International Bar Association at its 19th Biennial Conference held at New Delhi in October 1982 adopted Minimum Standards of Judicial Independence. Paras 27 to 32 relating to '*Judicial Removal and Discipline'* are as under:

> "27. The proceedings for discipline and removal of judges should ensure fairness to the judge, and adequate opportunity for hearing.
>
> 28. The procedure for discipline should be held in camera. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the Disciplinary Tribunal. Judgments in disciplinary proceedings whether held in camera or in public, may be published.
>
> 29.(a) The grounds for removal of judges should be fixed by law and shall be clearly defined.
>
> (b) All disciplinary action shall be based upon standards of judicial conduct promulgated by law or in established rules of court.
>
> 30. A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.
>
> 31. In systems where the power to discipline and remove judges is vested in an institution other than the legislature, the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.
>
> 32. The head of the court may legitimately have supervisory powers to control judges on administrative matters."

67. In the First World Conference on the Independence of Justice held at Montreal on June 10, 1983, adopted a Universal Declaration on the Independence of Justice. It relates to international judges as well as national Judges. On the question of '*Discipline and Removal'* it is recommended as under:

> "2.32 A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice, and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

2.33(a) The proceedings for judicial removal or discipline, when such are initiated, shall be held before a court or a board predominantly composed of members of the judiciary and selected by the judiciary.
(b) However, the power of removal may be vested in the legislature by impeachment or joint address, preferably upon a recommendation of a court or board as referred to in 2.33(a).
2.34 All disciplinary action shall be based upon established standards of judicial conduct.
2.35 The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.
2.36 With the exception of proceedings before the legislature, the proceedings for discipline and removal shall be held in camera. The judge, may, however, request that the hearing be held in public, subject to a final and reasoned disposition of this request by the disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.
2.37 With the exception of proceedings before the legislature or in connection with them, the decision of a disciplinary Tribunal shall be subject to appeal to a court.
2.38 A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour, rendering him unfit to continue in office.
2.39 In the event that a court is abolished, judges serving in this court shall not be affected, except for their transfer to another court of the same status."

68. On the same issue in Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from August 26 to September 6, 1985, adopted the Basic principles are as under:

"17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachments or similar proceedings."

69. Article 124 of the Indian constitution prescribes the manner and procedure for removal of a Judge of the High Courts or Supreme Court. Under the constitutional dispensation of India, every Judge of the Supreme Court and a High Court on his appointment is irremovable from the office during his tenure except in the manner provided in Clause (4) Article 124 of the Constitution of India. Besides it has promulgated the Judges (Inquiry) Act, 1968 and the Judges (Inquiry) Rules, 1969 framed thereunder. Clause (4) provides or removal of a Judge as under:

"(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity."

70. As to the remedy available to a Judge and his right against any disciplinary action taken against him, it is said in *Corpus Juris Secundum* as under:

> "The general rule is that before a Judge may be disciplined, as by removal, he is entitled to notice and an opportunity to defend even though there is no statute so requiring. Ordinarily, the right to defend is exercised in a trial or hearing, as considered infra 51. More specifically the Judge is entitled to notice of the particular charges against him. In addition, notice of the charge should be given sufficiently in advance of the time for presenting a defence to permit proper preparation of a showing in opposition."

71. The law enacted under article 124(5) (India) provides that any accusation made against a sitting Judge to initiate the process of his removal from office has to be by not less than the minimum number of members of Parliament specified in the Act, all other methods being excluded. If the motion for removal of the Judge is adopted by the requisition majority by Parliament culminating in the order of removal by the President of India under article 124(4) of the constitution, then only the Judge concerned would have the remedy of judicial review available on the permissible grounds against the order of removal. The inquiry committee is statutory character but is not a tribunal for the purpose of article 136 of the constitution.

72. The expression 'misbehaviour' of a Judge postulates an act or conduct or even an error or negligence act by a Judge of the higher judiciary. It includes wilful abuse of judicial office, wilful misconduct in the office, corruption, lack of integrity, or any other offence involving moral turpitude. 'Misconduct' implies actuation of some degree of *mens rea* by the actor. Misbehaviour would extend to conduct of the Judge in or beyond the execution of judicial office. The holder of the office of a Judge be it in the higher echelons or not, should, therefore, be above the conduct of ordinary mortals in the society. The standards of judicial behaviour both on and off the Bench are normally high. Any conduct that tends to undermine the public confidence on the part of a Judge should be avoided. Society expects higher standards of conduct and behaviour from a Judge. Apart from the 'Code of Conduct' as observed above, the unwritten 'Code of Conduct' which is being taught to the Judges are to be observed, followed in rigour.

73. It is a writ large for the newly appointed Judges to emulate high moral and ethical standards expected of a Judge of higher judiciary. He must show a standard of conduct which is much higher than expected of a layman and an Advocate. The society, therefore, is entitled to expect higher degree of propriety and probity in the judicial conduct from higher judiciary. There cannot be any fixed or set principles, but an unwritten 'Code of Conduct' of well-established traditions are the guidelines for judicial conduct. The conduct that tends to undermine the public confidence in the character, integrity and impartiality of a Judge must be eschewed. It is expected of him to voluntarily set forth wholesome standards of conduct reaffirming fitness to higher responsibilities. Even the private life of a Judge must adhere to standards of probity and propriety, acceptable to others. They alone would receive confidence and respect from the public.

74. The High Court Division has totally ignored the 'Code of Conduct' and the ethical values to be followed by the Judges which have been prepared by the Supreme Judicial Council in exercise of powers under article 96(4)(a). On perusal of the allegations, the inquiry report and clauses (4)(a), (5)(b) and (6) of article 96, the Council has arrived at the conclusion

that the allegations against Mr. Syed Shahidur Rahman have substance and basis. This conclusion of the Council is sufficient on the Part of the President to form his opinion that the Judge should not continue as a Judge of the High Court Division.

75. The conduct shown by Mr. Syed Shahidur Rahman is totally unfit to remain a Judge, inasmuch as, he had violated the 'Code of Conduct' as discussed above and if any sitting Judge violates the 'Code of Conduct' that amounts to 'gross misconduct'. Assuming that the Council did not give any definite finding that Mr. Syed Shahidur Rahman was guilty of gross misconduct, but the ultimate opinion of the Council that he should not continue as an Additional Judge of the High Court Division meaning thereby he has exceeded the norms of a Judge and thereby he has misconducted for being a Judge of the High Court Division. The President having accepted the recommendation, removed him from the office.

76. Now the question is whether judicial review against the order of removal is available in the manner the High Court Division has exercised its power. There is no denial to the fact that the Council, which is the highest body has recommended for removal of Mr. Syed Shahidur Rahman. We are of the view that Judicial review against such removal is not available in this particular case in the facts of the given case, inasmuch as, judicial review is available against such order on limited grounds. The High Court Division cannot sit over the opinion of the Council as an appellate forum or from the Order of the President pursuant to the recommendation of the Council. The High Court Division has apparently equated a proceedings taken by a sitting Additional Judge against an order of removal on the ground of misconduct with an ordinary litigant which seeks judicial review against an administrative action. There is no doubt that judicial review is a basic feature of our constitution so also the rule of law but that does not mean that the same doctrine will be applicable in all cases.

77. Corpus Juris Secundum, Vol.48-A referring to the nature and purpose of a proceeding for removal of a Judge observed:

> "As a general rule, disciplinary or removal proceedings relating to Judges are *sui generis* and are not civil or criminal in nature; and their purpose is to inquire into judicial conduct and thereby maintain standards of judicial fitness."

78. This observation is in accord with the opinion expressed herein before and I find no cogent ground to depart from the same. The High Court Division has traveled beyond the issue involved in the matter. The Council was requested to examine the allegations and the materials and then to decide as to whether the concerned Judge has violated the norms as well as the 'Code of Conduct'. It has reached at the conclusion that the Judge has violated the established norms and conducts. That's final and it cannot be reopened in the manner it has been examined.

79. In Sarojini Ramaswami V. Union of India, (1992) 4 SCC 506 (para 95). Kasliwal, J. while concurring with the majority view observed that "the right of judicial review is not a right emerging under any principle of natural justice. It cannot be equated with the rule of *audi alteram partem*. The right of judicial review is itself a right available only on limited permissible grounds. The right of seeking a judicial review depends on the facts of each individual case and will depend on several factors which would be necessary to be examined before the particular order or action is put under challenge. There cannot be any demand of judicial review as an abstract proposition of law on the premise of violation of any principle of natural justice at this stage in the scheme of the Act and the Rules. Neither in the scheme

of the Act and the Rules nor under any provision of the Constitution it has been shown that such right is available to the Judge concerned.'

80. It has been observed by Verma,J. expressing the majority opinion that judicial review is the exercise of the Court's inherent power to determine legality of an action and award suitable relief and thereby uphold the rule of law. No further statutory authority is needed for the exercise of this power which is granted by the constitution of India to the superior courts. There is no reason to take the view that an order of removal of a Judge made by the President of India under Article 124(4) of the constitution is immune from judicial review on permissible grounds to examine the legality of the finding of guilty made by the Inquiry Committee during the statutory process for removal which is the condition precedent for commencement of the parliamentary process culminating in the making of order or removal by the President.

81. In India an Act of Parliament and the Rules have been framed providing the procedure for removal of a judge. Under the prevailing law, a right is given to the Judge concerned to refute the charges and his right to contest the disciplinary proceedings. Even then it has been decided that judicial review is permissible only on limited ground. It was held that after the order of removal made by the President, judicial review against such decision is available only on limited grounds.

82. Under our provision as observed above, there is no Rules providing the procedure to be followed for removal of a Judge of the highest Court. The Supreme Judicial Council enjoins the power as per provision of clause (4) of Article 96 to prescribe the 'Code of Conduct' of the Judges. Similarly for the purpose of inquiry also, there is no Rules or Regulations framed by the government. It is left with the discretion of the Council to follow the procedure. The Council on following conduct rules and after affording Mr. Syed Shahidur Rahman sufficient opportunity to explain his conduct and upon hearing the parties held that Mr. Syed Shahidur Rahman should not remain in the judiciary because of his conduct. This opinion having been made by the highest body authorized by the constitution and the President having taken the decision relying upon the recommendation of the Council, the judicial review is not permissible against such decision.

83. De Smith's Judicial Review, Sixth Edn., in para 3-068 the author stated that 'judicial review may also be possible in relation to disciplinary proceedings which are specifically provided for the legislation, as opposed to being wholly informal or domestic matters. The role of Administrative Court here is analogous to its supervisory jurisdiction over other inferior tribunals.' Again in para 4-002 it is observed that 'judicial review of administrative action was founded upon the premise that the inferior tribunal or administrative public authority is entitled to decide wrongly, but is not entitled to exceed the jurisdiction it was given by statute.'

84. As observed above, the President has formally consented to the recommendation of the Council. The Council after consideration of the pros and cons of the matter took the decision of not keeping the concerned Judge in the judiciary. It cannot be said that the opinion formed by the Council is inferior tribunal for which judicial review from its opinion is available. It is only in exceptional cases when the principles of *audi alteram partem* have not been followed or the affected Judge has not been afforded sufficient opportunity to examine witnesses or cross-examine the witnesses, judicial review against his removal is

permissible but otherwise not. In this particular case, sufficient opportunity has been provided to the concerned Judge and he has defended the charge.

85. The High Court Division cannot sit over the judgment of the Council. It has totally ignored that aspect of the matter and opined that the President did not apply his judicial mind in passing the order of removal of Mr. Syed Shahidur Rahman. As per provisions of the constitution after the recommendation of the Supreme Judicial Council the President is left with no discretion other than to accord the recommendation. It is not correct to hold the view that the Council's opinion is expressly beyond the scope of article 96(5) of the constitution, and that such portion of the opinion contained in the report is without jurisdiction, inasmuch as, in the absence of proof of alleged payment of money to the writ petitioner by Ms. Kona the allegations against the writ petitioner is baseless. This view of the High Court Division is totally misconceived one. The High Court Division has exceeded its jurisdiction in making such observation. As observed above, even if the payment of Tk.50,000/- has not been proved, that does not disprove the allegations made by Ms. Kona. Mr. Syed Shahidur Rahman being a sitting Judge could not entertain Ms. Kona with two of her relations at his residence for fixation of a bail matter and also he could not maintain liasion with his previous junior Ms. Jesmin Akther Keya relating to conducting cases.

86. The materials on record sufficiently proved that he was indirectly maintaining his law chamber through his previous junior which itself is a misconduct and by allowing Ms. Kona with her two of her relations for arranging bail for one of her relations is another misconduct. That prompted the Council in holding the view that the conduct of Mr. Syed Shahidur Rahman was not such that he should continue as a Judge of the High Court Division since he had violated the Code of Conduct. There was no violation clause (5) of article 96 either by Supreme Judicial Council or by the President nor there was any violation of 96(3).

87. Our conclusion is as under:

(1) A Judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary may be preserved.

(2) A Judge should respect and comply with the constitution and law, and should act at all times in a manner that promotes public confidence in the judiciary.

(3) A Judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A Judge should not lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the Judge.

(4) A Judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism.

(5) A Judge should be patient, dignified, respectful, and courteous to litigants, lawyers, and others with whom the Judge deals in an official capacity, and should require similar conduct of those officers to the Judge's control, including lawyers to the extent consistent with their role in adversarial system.

(6) A Judge should dispose of promptly the business of the court including avoiding inordinate delay in delivering judgments/orders. In no case a judgment shall be signed not later than six months of the date of delivery of judgment in exceptional cases.

(7) A Judge should avoid public comment on the merit of a pending or impending Court case.

(8) A Judge shall disqualify himself or herself in a proceeding in which the Judge's impartiality might reasonably be questioned.

(9) A Judge shall disqualify to hear a matter/cause where he served as lawyer in the matter in controversy, or a lawyer with whom the Judge previously practiced law served during such association as a lawyer concerning the matter, or the Judge or such lawyer has been a material witness.

(10) A Judge shall not hear any matter if he knows or if he is aware or if it is brought into his notice that, individually or as a fiduciary, the Judge or the Judge's spouse or minor child residing in the Judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

(11) A Judge requires as degree of detachment and objectivity in judicial dispensation and he is duty bound by the oath of office.

(12) A Judge should practise a degree of aloofness consistent with the dignity of his office.

(13) A Judge must not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination before him.

(14) A Judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person.

(15) A Judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of his office and the public esteem in which that office is held.

(16) A Judge should not engage in any political activities, whatsoever in the country and abroad.

(17) A Judge shall disclose his assets and liabilities if, asked for, by the Chief Justice.

(18) Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of a member of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, any act of a Judge, whether in official or personal capacity, which erodes the credibility of this perception has to be avoided.

(19) Close association with individual members of the Bar, particularly those who practice in the same court, shall be eschewed.

(20) A Judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.

(21) No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.

(22) A Judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.

(23) A Judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.

(24) A Judge is expected to let his judgments speak for themselves. He shall not give interviews to the media.

(25) A Judge shall disqualify himself or herself from participating in any proceedings in which the Judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the Judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where the Judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; the Judge previously served as a lawyer or was a material witness in the matter in controversy; or the Judge, or a member of a Judge's family has an economic interest in the outcome of the matter in controversy.

(26) A Judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

(27) The behavior and conduct of a Judge must reaffirm the people's faith in the integrity of the judiciary.

(28) A Judge shall avoid impropriety and the appearance of impropriety in all of the Judge's activities.

(29) As a subject of constant public scrutiny, a Judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a Judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

(30) A Judge shall, in his or her personal relations with individual members of the legal profession who practice regularly in the Judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favoritism or partiality.

(31) A Judge shall not participate in the determination of a case in which any member of the Judge's family represents a litigant or is associated in any manner with the case.

(32) A Judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

(33) A Judge shall not allow the Judge's family, social or other relationships improperly to influence the Judge's judicial conduct and judgment as a Judge.

(34) A Judge shall not use or lend the prestige of the judicial office to advance the private interests of the Judge, a member of the Judge's family or of anyone else, nor shall a Judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the Judge in the performance of judicial duties.

(35) A Judge shall not practice law whilst the holder of judicial office.

(36) A Judge and members of the Judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favor in relation to anything done or to be done or omitted to be done by the Judge in connection with the performance of judicial duties.

(37) A Judge shall not knowingly permit court staff or others subject to the Judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favor in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

(38) A Judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

(39) A Judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, witnesses, lawyers and others with whom the Judge deals in an official capacity. The Judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

(40) A Judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

88. Mr. Syed Shahidur Rahman has violated some of the above 'Code of Conduct' and thereby he has committed gross misconduct. In view of the above, the High Court Division has committed manifestly wrong in declaring the order of removal of Mr. Syed Shahidur Rahman from the office of a Judge of the High Court Division without lawful authority. The appeal, is therefore, allowed without any order as to costs.

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APPELLATE DIVISION

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

CIVIL APPEAL NO.201 OF 2005
(From the judgment and order dated the 1st day of December, 2002 passed by the High Court Division in Civil Revision No.4859 of 1997)

Karim Khan and others	:	. . . Appellants
=Versus=		
Kala Chand @ Chand Miah and others	:	. . . Respondents
For the Appellants	:	Mr. Bivash Chandra Biswas, Advocate-on-Record
For Respondent Nos.1-4	:	Mr. M. A. Quayum, Senior Advocate instructed by Mr. Nurul Islam Chowdhury, Advocate-on-Record
For Respondent Nos.5-7	:	None represented
Date of Hearing	:	06.05.2015
Date of Judgment	:	The 12th day of May, 2015

Code of Civil Procedure, 1908
Section 115
And
Permanent Injunction:
It is a well settled legal proposition that the Appellate Court is the last Court of fact and if the Appellate Court comes to a finding of fact on consideration of the evidence on record that cannot be disturbed or reversed by the High Court Division in exercising jurisdiction under section 115(1) of the Code of Civil Procedure, unless it can be shown that the finding of the Appellate Court is perverse or contrary to the evidence on record or based on misreading of the evidence on record or on misconception of law. It is also a settled legal principle that in a suit for permanent injunction title can be looked into incidentally and the prime consideration is whether the plaintiff has got exclusive possession in the suit land. ... (Para 8)

Code of Civil Procedure, 1908
Order VII, Rule 3:
The plaintiff mentioned the number of the C.S. and the S.A. Khatians and also the plot numbers of the lands in the suit and thus there was full compliance with the previsions

of Order VII, rule 3 of the Code. And since no fraction or portion of the lands of the two plots was claimed, there was no necessity of giving any chauhaddi or boundary of the suit plots. ... (Para 10)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This appeal, by leave, is from the judgment and order dated the 1st day of December, 2002 passed by a Single Bench of the High Court Division in Civil Revision No.4859 of 1997 making the Rule absolute.

2. Facts necessary for disposal of this appeal are that the appellants as the plaintiffs filed Title Suit No.16 of 1993 in the Court of Senior Assistant Judge, Rupganj, Narayangonj against the defendant-respondents for permanent injunction on the averments, *inter alia*, that Akbar Ali Bhuiyan was the owner of the land of C.S. Khatian No.15 and some other lands and that Jonab Ali and others were the owners of the land of C.S.Khatian No.243 and some other lands including the suit land. Prior to the C.S. operation, the land of C.S. plots of C.S. Khatian No.15 was owned and possessed by Maizuddin and that at one time, he handed over possession of the land of the said khatian to Akbar Ali Bhuiyan. The lands of Khatian Nos.15 and 243 were sold in auction and the landlord purchased the auction sold land of the said khatians. After the auction purchase, the auction purchased land including the suit land came in the hand of one Mohabbat Khan before 1940. Said Mohabbat Khan owned and possessed the suit land along with other lands on payment of rent to the Zamindar. Mohabbat Khan died leaving behind sons: Ayer Khan, Taiub Khan and Ala Box and the S.A. and the R.S. records were prepared in their names. Ayer Khan died leaving behind the plaintiffs as his heirs and they have been possessing the suit land by growing crops therein to the knowledge of all including the defendants. The defendants who have no right, title and interest as well as possession in the suit land tried to dispossess the plaintiffs on 19.03.1993, but due to the intervention of the people of the locality, they were not successful and in that background, the plaintiffs were constrained to file the suit for the relief aforementioned.

3. The suit was contested by defendant Nos.1-4 by filing a written statement denying the material statements made in the plaint and contending, *inter alia*, that Akbar Ali Bhuiyan was the owner and possessor of the land of C.S. Khatian No.15 and Jonab Ali and others were the owners and possessors of the land of C.S. Khatian No.243. The lands of the said khatians were sold in auction and Suja Khan, father of Mohabbat Khan and Immat Khan purchased the auction sold land from the Zaminder. Suja Khan died leaving behind sons: Mohabbat Khan and Immat Khan and the suit land fell in the saham of Immat Khan on amicable partition and as he was owning and possessing the same, R.S. record was prepared in his name and in the name of Mohabbat Khan. Immat Khan sold 45 decimals land out of 50 decimals land to defendant No.1(Kala Chand) from Plot No.360 on 05.12.1977 and handed over possession thereof to him. Later one Immat Khan also sold 30 decimals land out of 36 decimals land from Plot No.361 on 12.03.1979 to defendant No.1 and handed over possession thereof to him. On 12.03.1979, Immat Khan gifted $4\frac{1}{2}$ decimals land from Plot No.360 to his two grand children: Serajul Islam Khan and Md. Dulal Khan and handed over possession of the said land to them. On 12.03.1979, Immat Khan gifted $4\frac{1}{2}$ decimals land to his son, Md. Rup Khan and handed over possession of the transferred land to him. The son, the grand children and

the mother of the grand children of Immat Khan sold 1 decimal land from Plot No.360 and 6 decimals land from Plot No.361 and some other lands to defendant No.1 and handed over possession thereof to him. Defendant No.1 acquired 54 decimals land from Plot No.360 and 36 decimals land from Plot No.361 and he got his name mutated on 03.03.1986 and has been paying rents to the Government and he has been possessing the lands for more than 13 years planting fruit trees. The plaintiffs have no right, title, interest and possession in the suit land, but they filed the suit making false statements and as such, the suit was liable to be dismissed.

4. The trial Court dismissed the suit by the judgment and decree dated 29.11.1994. Against the judgment and decree of the trial Court, the plaintiffs filed Title Appeal No.148 of 1994 before the District Judge, Narayangonj. The learned Subordinate Judge, 1st Court, Narayangonj on hearing the appeal by the judgment and decree dated 28.08.1997 allowed the appeal and decreed the suit. Having felt aggrieved by and dissatisfied with the judgment and decree of the Appellate Court, the defendants preferred Civil Revision No.4859 of 1997 before the High Court Division and a learned Judge of the Single Bench by the impugned judgment and order made the Rule absolute and dismissed the suit.

5. Against the judgment and decree of the Appellate Court, the plaintiffs preferred Civil Petition for Leave to Appeal No.1221 of 2003 before this Court and leave was granted to consider the submissions of the learned Advocate for the plaintiff-appellants as under:

> "The learned Counsel for the petitioners submits that the High Court Division has erred in law in making the Rule absolute on holding that "a suit for permanent injunction where the plaintiff did not mention the boundary of the specific plot and there is no specific demarcation, in that view of the matter granting injunction in favour of the plaintiff can not be sustained." whereas, it was and/or is not the case of either of the parties, inasmuch as the appellate Court has clearly found as fact and observed that "মামলার আরজি, বিবাদীদের জবাব, স্বাক্ষীদের জবানবন্দী ও জেরা পর্যালোচনা e¡¢mn£ i¢j vague h¡ unspecified HC I¦f ®L¡e ¢haL ®cM¡ k¡u e¡z k¢cJ ¢h ' ¢ejÀBc¡ma Eš² বিষয়ে কোন ইস্যু (বিচার্য বিষয়) ধার্য্য করেন নাই, তথাপিও এই পোষকে নালিশী (ভুমি) vague, unspecified নহে মর্মে সিদ্ধান্ত হইল" and as such, the impugned judgment and order is liable to be set aside. The learned Counsel further submits that inspite of claiming injunction for the entire land of the two suit plots, the High Court Division has committed an error of law in deciding the revision case without considering the provisions of Order 7, Rule 3 of the Code of Civil Procedure and has thereby arrived at a wrong decision occasioning failure of justice; that the impugned judgment of the High Court Division seriously suffer from non-application of judicial mind to the facts of the case as well as the principles and guidelines laid down by the Appellate Division in several cases with regard to matters of reversing an appellate Court's judgment in exercising jurisdiction under Section 115 of the Code of Civil Procedure that in any view of the matter the impugned judgment is not a proper and legal judgment in the eye of law."

6. Mr. Bivash Chandra Biswas, learned Advocate-on-Record, for the appellants has made his submissions in the light of leave granting order. He has further submitted that the

Appellate Court being the last Court of fact on consideration the evidence on record, both oral and documentary, gave clear finding that the plaintiffs are in possession of the suit land, but the High Court Division did not at all reverse the said finding of the Appellate Court with reference to the evidence on record and thus erred in law interfering with the judgment an decree of the Appellate Court restoring those of the trial Court and as such, the impugned judgment and order is liable to be set aside and the appeal be allowed.

7. Mr. M. A. Quayum, learned Counsel, for the defendant-respondents on the other hand, has supported the impugned judgment and order.

8. It is a well settled legal proposition that the Appellate Court is the last Court of fact and if the Appellate Court comes to a finding of fact on consideration of the evidence on record that cannot be disturbed or reversed by the High Court Division in exercising jurisdiction under section 115(1) of the Code of Civil Procedure, unless it can be shown that the finding of the Appellate Court is perverse or contrary to the evidence on record or based on misreading of the evidence on record or on misconception of law. It is also a settled legal principle that in a suit for permanent injunction title can be looked into incidentally and the prime consideration is whether the plaintiff has got exclusive possession in the suit land. Keeping in view the above settled legal propositions, let us see whether the High Court Division rightly interfered with the judgment and decree of the Appellate Court.

9. So far as the trial Court is concerned, it appears that it did not consider the oral evidence on record in its entirety as to the possession of the suit land by the parties; it considered the evidence of the PWs and some of the DWS in a piece-meal manner and also failed to consider the presumption of the S.A. khatian and the rent receipts which were exhibited as exhibits-'4', '5' series and '6' series. The Appellate Court, the last court of fact, considered the evidence of both the PWs and the DWs and also the documentary evidence, namely: exhibits-'4, 5 series and 6 series' and came to the positive finding to the effect:

> "উপরোক্ত সাক্ষীদের জবান বন্দী ও জেরা পর্যালোচনা ও বিশ্লেষনে বাদী আপীল কারী পক্ষ নালিশী ভূমিতে দখল bাকার বিষয়েটি প্রতিষ্ঠিত হয়। পূর্বেই সিদ্ধান্তিত হইয়াছে যে, যেহেতু বিবাদীদের পূর্ববর্তী সুজা খা জমিদারদের নিকট হইতে পত্তন গ্রহনের পোষকতায় বিবাদী রেসপনডেন্ট পক্ষ কোন রুপ কাগজাদি দাখিল করেন নাই। এমন কি সুজা খার ২ পুত্র মহব্বত খাঁ ইম্মত খার মধ্যে পরিবারিক আপোষ ইম্মত খা নালিশী ভূমি ভোগ দখল করিতে এমন কোন প্রমান আদালত উপস্থাপন করা হয় নাই ফলে বিবাদীদের ভায়া ইম্মত খার নামে আর, এp, BV Be¡ Awn qJu¡a ¢ea¡¿C ভিত্তি হীন। যেহেতু বিবাদীপক্ষ স্বত্বইহীন লোকের নিকট হইতে নালিশী ভূমি ফরিদের (sic) L¢afu c¢mm fËç হইয়াছেন এবং যেহেতু উক্ত দলিলের, ফলে কোন দখল লাভ করেন নাই সেহেতু বিবাদীদের দলিলpjq L¡k£L¡l£a¡ প্রশ্নে রহিয়াছে এবং যেহেতু বাদী পক্ষ তাহাদের দাবীর সমর্থনে মহাব্বত খার নামীয় পত্তন গ্রহনের পোষকতায় জমিদার বরাবরে খাজনার দাখিলা fËne£ 6, ¢p¢lS Hhw jqîa খার ওয়ারিশদের নামে পরবর্তীতে এস, H, Sl£f qJu¡ fËne£ 4 Hবং পরবর্তীতে মহব্বত খার ওয়ারিশগন নালিশী ভূমির সরকার বরাবরে খাজনা প্রদান প্রদর্শনী ৫ সিরিজ এবং একইভাবে নালিশী ভূমির অদ্যাবধি দখলে থাকার বিষয়েটি প্রতিষ্ঠিত হওয়ায় নালিশী ভূমিতে বাদী আপীলকারী পক্ষের আপাতঃ স্বত্ব ও দখল বিদ্যমান থাকায় বিবাদী পক্ষ কর্তৃক law full croo (sic) h£a£a বেদখলের কোন অবকাশ না থাকায় বাদী আপীলকারী পক্ষ স্হায়ী নিষেধাজ্ঞার ডিক্রী পাইতে পারে।"

10. As noted in the leave granting order, in fact, the High Court Division interfered with the judgment and decree of the Appellate Court on the view that *"the plaintiffs did not mention the boundary of the specific plot and there is no specific demarcation, in that view of the matter granting injunction in favour of the plaintiff cannot be sustained."* The High Court Division was totally wrong in taking the said view inasmuch as from the schedule to the plaint, it is *prima facie* clear that the plaintiff filed the suit for permanent injunction in respect of two plots being Plot Nos.361 and 360, the total area of the land involved in the said two plots are 39+54 decimals respectively and the plaintiffs claimed the entire area of the said two plots. Therefore, it was not at all necessary for the plaintiff to give the boundary of the said two plots. In this regard, the learned Judge of the Single Bench totally misconceived the provisions of Order VII, rule 3 of the Code of Civil Procedure (the Code) inasmuch as the said provisions of the Code has clearly spelt out that where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers. In the instant case, from the schedule to the plaint, it is clear that the plaintiff mentioned the number of the C.S. and the S.A. Khatians and also the plot numbers of the lands in the suit and thus there was full compliance with the previsions of Order VII, rule 3 of the Code. And since no fraction or portion of the lands of the two plots was claimed, there was no necessity of giving any chauhaddi or boundary of the suit plots. Therefore, we find substance in the first submission as noted in the leave granting order.

11. From the judgment of the Appellate Court, it appears that it discussed the case of the respective party, considered the oral as well as the documentary evidence and adverted the findings of the trial Court as regards the *prima facie* title of the plaintiffs and also their exclusive possession in the suit land and then reversed the decision of the trial Court in decreeing the suit. Mr. Quayum could not show with reference to the evidence on record that the finding of *prima facie* title in favour of the plaintiffs in the suit land and their possession therein by the Appellate were contrary to any evidence or misreading of any evidence. The High Court Division in its judgment did not also point out what evidence the Appellate Court failed to consider or the Appellate Court misread in arriving at the finding of the *prima facie* title and exclusive possession in the suit land in favour of the plaintiff. Therefore, we find merit in the 2nd and the 3rd submissions on which leave was granted.

12. For the discussion made hereinbefore, we find substance in the appeal and accordingly, the same is allowed without any order as to cost. The impugned judgment and order of the High Court Division is set aside and that of the Appellate Court is restored.

7 SCOB [2016] AD 37

APPELLATE DIVISION

PRESENT:
Ms. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali

CIVIL APPEAL NO.179 of 2008
(From the judgment and order dated 26.11.2006 passed by the High Court Division in Civil Revision No.376 of 1997.)

Shantipada Shil	: .....Appellant
=Versus=	
Sunil Kumar Sarker and others	: .....Respondents
For the Appellant	: Mr. M. A. Quiyum, Senior Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For Respondent No.1	: Mr. Habibul Islam Bhuiyan, Senior Advocate instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
Respondent Nos.2-31	: Not represented.
Date of hearing	: 06.05.2014 and 07.05.2014.
Date of judgment	: 08.05.2014

Pre-emption:
On scrutiny of the deposition of this preemptor-petitioner we find that the preemptor-petitioner while deposing before court, though denied this alleged fact that he obtained the certified copy of the case kabala in the year 1982 for the opposite party No.2, but he did not deny the fact that he was the engaged lawyer of the opposite party No.2. The opposite party No.2 filed Other Suit No.70 of 1982 challenging the genuineness of the impugned kabala. In the circumstances it is not believable at all that the preemptor-petitioner could not know about the case kabala before his alleged date of knowledge. From the facts and circumstances stated above it is rather proved beyond any doubt that the preemptor-petitioner knew about the case transfer in the year 1982. In the circumstances the trial court rightly dismissed the case for preemption. ... (Para-13)

J U D G M E N T

Nazmun Ara Sultana, J:

1. This Civil Appeal, by leave, has arisen out of the judgment and order dated 26.11.2006 passed by the High Court Division in Civil Revision No.376 of 1997 discharging the rule.

2. The preemptor-respondent No.1 herein filed Miscellaneous Case No.45 of 1985 in the Court of the Assistant Judge, Boalkhali, Chittagong both under section 96 of the State Acquisition and Tenancy Act and under section 24 of the Non-Agricultural and Tenancy Act for pre-emption of the case land on the averments that he was a co-sharer of the case holding while the purchaser-opposite party was a stranger to that. That on 25.09.1973 the vendor-opposite party No.2 sold the case land to the purchaser-opposite party No.1 by a registered kabala dated 25.09.1973 beyond the knowledge of the petitioner. That no notice of that kabala was ever served upon the petitioner and the purchaser-opposite party No.1 also did not take possession of the case land and the son of the vendor- opposite party remained in possession of the case land as before. That on 17.07.1985 when the purchaser- opposite party No.1 came to the case land for constructing a house thereon the petitioner, for the first time, could know about the case transfer. Thereafter, he obtained the certified copy of that kabala on 31.07.1985 and being thus confirmed about the sale in question filed the preemption case on depositing the requisite amount within the statutory period of limitation from the date of his knowledge.

3. The purchaser-opposite party No.1 and the respondent Nos.2, 18 and 19 contested that case by filing separate written objection. The material case of the purchaser-opposite party No.1 was that he purchased the case land within the full knowledge of the father of the petitioner-who was co-sharer of the case holding and that the petitioner was not at all a co-sharer of the case holding at the time of sale in question. That after purchasing the case land the purchaser-opposite party mutated the case land in his name and the B.S. record of rights in respect of the case land also was duly prepared in the name of the purchaser-opposite party. The further case of this purchaser opposite party No.1 was that after his purchase of the case land the opposite party No.2-the son of the vendor-filed Other Suit No.70 of 1982 in the Court of Munsif, 1st Court, Potia, Chittagong against him for declaring the case kabala collusive and void and that in the plaint of that suit, in para-3, the opposite party No.2 stated clearly that his Advocate Mr. Sunil Kumar Sarker (the present preemptor-petitioner) obtained the certified copy of the present case kabala for him. That the opposite party No.2 filed another case being No.18 of 1982 in the Court of Union Parishad against this purchaser-opposite party and in that case also the present preemptor-petitioner was a witness. This purchaser- opposite party, in his written objection, stated also that he exchanged 15 decimals of land out of the case land with some other land of Jogeshwar Shil in the year 1982 and thereafter he sold out 96 decimals of land to Jogeshwar Shil in the year 1983 and now he is in possession of only 5 decimals of land out of the case land.

4. The opposite party No.2 also filed a written objection alleging that the case kabala was forged and that his mother Modhumaloti never executed this kabala and that Modhumaloti left for India in 1965.

5. The opposite party No.18 filed written objection stating that he got the case land from the opposite party No.1 by way of exchange and that subsequently he sold out that land to Babul Shil-the opposite party No.19.

6. The opposite party No.19 also filed a written objection stating that he purchased some portion of the case land from the opposite party No.18.

7. However, the trial court, on consideration of the evidence adduced by both the sides, dismissed the case for preemption by the judgment and order dated 22.02.1992. Against that judgment and order of the trial court the preemptor-petitioner preferred Miscellaneous Appeal No.93 of 1992 before the learned District Judge, Chittagong which was ultimately heard and disposed of by the learned Subordinate Judge, 1st Commercial Court, Chittagong. This appellate court below, on hearing both the parties and examining the evidence on record allowed the appeal, set aside the judgment and order of the trial court and allowed the preemption case by the judgment and order dated 02.11.1996.

8. Being aggrieved by that judgment and order of the appellate court below the purchaser-opposite party No.1 preferred the above mentioned Civil Revision No.376 of 1997 before the High Court Division and obtained rule. A Single Bench of the High Court Division ultimately, after hearing both the parties, discharged that rule by the impugned judgment and order.

9. Mr. M. A. Quiyum, the learned Senior Advocate appearing for the preemptee-appellant has mainly submitted before us that this case for preemption filed long 14 years after the case transfer is hopelessly barred by limitation, that there are ample evidence on record and facts and circumstances to prove that this preemptor-petitioner knew about the case transfer from the very beginning; that the appellate court below and the High Court Division committed great error and injustice in allowing the case for preemption ignoring this inordinate delay in filing this preemption case and also the evidence and facts and circumstances telling that the preemptor-petitioner knew about the case transfer from the very beginning. The learned Counsel has made argument to the effect also that the trial court duly considered all these evidence and facts and circumstances and rightly came to the decision that this preemption case was hopelessly barred by limitation, but the appellate court below and the High Court Division without reversing these findings and decision of the trial court whimsically allowed the case for preemption on misinterpretation and misappreciation of the evidence on record. The learned Counsel has pointed out also that in this case there is a strong fact to prove that this preemptor-petitioner knew about the case transfer from the very beginning. Elaborating this argument the learned Counsel has stated before us that in the very written objection filed before the trial court this preemptee-appellant stated clearly that immediate after the case transfer the opposite party No.2-the son of the vendor-opposite party filed Other Suit No.70 of 1982 before the 1st Court of Munsif, Potia, Chittagong challenging the genuineness of the case kabala and in the plaint of that suit the opposite party No.2 stated clearly that this present preemptor-petitioner was his engaged lawyer and he obtained the certified copy of the case kabala for him. The learned Counsel has pointed out also that this preemptee-appellant, in support of this case, filed the certified copy of the plaint of Other Suit No.70 of 1982 which was duly marked as exhibit-P, and the trial court though rightly took into consideration this exhibited-P, but the appellate court below and the High Court Division ignored this exhibit-P and most illegally and erroneously allowed the case for preemption. The learned Counsel for the preemptee-appellant has contended that the judgment of the trial court was a correct one and the judgments of the appellate court below and the High Court Division are wrong.

10. Mr. Habibul Islam Bhuiyan, the learned Senior Advocate for the preemptor-respondent has made submissions supporting the impugned judgment. He has argued that in

this case it is rather an admitted fact that the son of the vendor-opposite party is still in possession of the case land and that the purchaser-opposite party never took possession of the case land before the alleged date of knowledge of the petitioner as stated in the petition for preemption and in the circumstances the appellate court below did not commit any wrong in allowing the case for preemption and the High Court Division also rightly affirmed the judgment and order of the appellate court below. Mr. Habibul Islam Bhuiyan has argued also that the exhibit-P is not a conclusive proof of the defence case that the preemptor-petitioner knew about the case transfer from the very beginning. The learned Counsel has argued that this exhibit-P is not at all a statement of the preemptor- petitioner himself and that the preemptor-petitioner, during trial of the case, clearly denied the alleged fact that he obtained certified copy of the case kabala for the opposite party No.2. The learned Counsel for the preemptor-respondent has argued that both the appellate court below and the High Court Division, on proper appreciation of evidence on record and other facts and circumstances rightly allowed the case for preemption and in the circumstances this appeal is liable to be dismissed.

11. We have considered the arguments advanced by the learned Counsel of both the sides and gone through the impugned judgment and order of the High Court Division and those of the appellate court below and the trial court and also the evidence on record.

12. Admittedly, this preemption case was filed long 14 years after the case transfer. It is also an admitted fact that at the time of case transfer the preemptor-petitioner was not a co-sharer to the case holding since his father was alive at that time and at the death of his father the preemptor-petitioner became co-sharer to the case holding. So, the preemptor-petitioner was not entitled to get any notice of the case transfer. Admittedly, the father of the preemptor-petitioner-who was the co-sharer of the case holding-did not file any preemption case. The purchaser-opposite party, in his written objection, stated clearly that the father of this preemptor-petitioner knew about the case transfer very well. However, the preemptor-petitioner has contended that after the death of his father the registration of the kabala in question as per section 60 of the Registration Act was completed and as such the preemptor-petitioner, who became the co-sharer of the case holding before that, was entitled to get pre-emption of the case land. However, the main question in this case for preemption is whether the case for preemption is barred by limitation or not.

13. It has already been mentioned above that this case for preemption has been filed long about 14 years after the case transfer. The preemptor-petitioner though has pleaded that he had no knowledge about the case transfer before his alleged date of knowledge-as mentioned in the application for preemption-but on examining the evidence on record we do not find that this case of the preemptor-petitioner was proved. Though, admittedly, the opposite party No.2-the son of the vendor was in possession of some portion of the case land but this fact alone cannot be a proof of the petitioner’s case that he could not know about the case transfer before his alleged dated of knowledge. In this case there are, rather, sufficient evidence and

facts and circumstances to prove that the preemptor-petitioner had knowledge about the case transfer from the very beginning. In this case the documents filed from the side of the contesting opposite parties have proved that after his purchase the purchaser opposite party transferred some of the case land to the opposite party No.18 and later the opposite party No.18 transferred some of the case land to opposite party No.19 and both these subsequent purchasers have deposed in this case claiming their possession in the case land. Over and above, there is another strong evidence which proves that the preemptor-petitioner knew about the case transfer from the very beginning. This is exhibit-P-about which I have already mentioned above. Admittedly, the opposite party No. 2-the son of the vendor-filed Other Suit No.70 of 1982 challenging the genuineness of the case kabala immediate after the execution and registration of the same. It should be mentioned that the said Other Suit No.70 of 1982 was ultimately dismissed. However, in the plaint of that suit the opposite party No.2 stated clearly that this preemptor-petitioner was his engaged lawyer and he obtained a certified copy of the case kabala for him. Mr. Habibul Islam Bhuiyan, the learned Counsel for the preemptor-respondents has argued that during trial of the case the preemptor-petitioner clearly denied this statement of exhibit-P that he obtained certified copy of the case kabala for the opposite party No.2. But on scrutiny of the deposition of this preemptor-petitioner we find that the preemptor-petitioner while deposing before court, though denied this alleged fact that he obtained the certified copy of the case kabala in the year 1982 for the opposite party No.2, but he did not deny the fact that he was the engaged lawyer of the opposite party No.2. The opposite party No.2 filed Other Suit No.70 of 1982 challenging the genuineness of the impugned kabala. In the circumstances it is not believable at all that the preemptor-petitioner could not know about the case kabala before his alleged date of knowledge. From the facts and circumstances stated above it is rather proved beyond any doubt that the preemptor-petitioner knew about the case transfer in the year 1982. In the circumstances the trial court rightly dismissed the case for preemption. The appellate court below and the High Court Division committed wrong in allowing the preemption case.

14. So this appeal succeeds.

15. Hence it is ordered that this appeal be allowed on contest without any order as to cost.

16. The impugned judgment and order of the High Court Division and also that of the appellate court below are set aside and the judgment and order of the trial court be restored.

7 SCOB [2016] AD 42

APPELLATE DIVISION

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

CIVIL REVIEW PETITION NO.76 OF 2015
(From the order dated 5th May, 2015 passed by the Appellate Division in Civil Appeal No.116 of 2010)

Bangladesh Legal Aid and Services Trust (BLAST) and another.	:	.....Petitioners.
=Versus=		
Government of Bangladesh, represented by the Secretary, Ministry of Home Affairs and others.	:	.....Respondents.
For the Petitioners.	:	Mr. M. K. Rahman, Senior Advocate (Mrs. Sara Hossain, Advocate and Mr. A. B.M. Bayezid, Advocate with him) instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.
Respondents.	:	Not presented.
Date of hearing.	:	The 3rd August, 2015.

Commutation of death sentence:
The petitioner has no significant history of prior criminal activity and that he was aged 14 years at the time of commission of the offence and 16 years at the time of framing of charge. The petitioner has been in the condemned cell since 12.07.2001, that is, more than 14 years. Considering all aspects of the case, we are of the view that the death sentence of the petitioner be commuted to imprisonment for life. ... (Para 17)

JUDGMENT

SYED MAHMUD HOSSAIN, J:

1. This petition for review arises out of the judgment and order dated 05.05.2015 passed by this Division in Civil Appeal No.116 of 2010 allowing the appeal in part and maintaining the death sentence against convict-appellant Shukur Ali.

2. The facts, leading to the filing of this petition for review, in brief, are:

The prosecution case is that on 11.06.1999 Sumi Akter aged about 7 years, daughter of Md. Harun driver, was playing with one Sajib, P.W.10 on the varandah of their house while her mother Rahima Begum was sleeping in the house. At about 2.30 p.m. she woke up but failed to trace out the whereabouts of her daughter Sumi Akter. She along with P.W.6, Abdur Rouf, searched Sumi Akter from door to door and the house of the condemned prisoner Shukur Ali (hereinafer referred to as the petitioner) was found under lock and key. On search, the body of Sumi Akter was found inside the house, which was taken out of the house and the gold and silver ornaments which she was wearing were found missing. There were marks of injuries on her leg and also reddish liquid was found by the side of her genital organ. The petitioner was caught by the people from Tepra and was brought there who admitted in presence of witnesses to have raped and killed Sumi. On the basis of a First Information Report to that effect a case was started in Sibalaya Police Station.

3. The petitioner was convicted by Nari-O-Shishu Nirjatan Daman Bishesh Adalat for sexually assaulting to death of Sumi Akter, a minor girl aged about 7 years. The Bishesh Adalat sentenced him to death. The High Court Division confirmed the death sentence and this Division also affirmed the death sentence. A review petition filed before this Division was also dismissed. After that, the petitioner along with another moved the High Court Division challenging the mandatory death penalty provided in section 6(2) of the Ain as *ultra vires* the Constitution.

4. Upon hearing the parties, the High Court Division declared section 6(2) of the Ain, 1995 *ultra vires* the Constitution but refrained from declaring section 34 of the Ain,2000 unconstitutional and also did not declare the sentence of the petitioner to be unlawful. The High Court Division granted a certificate under section 103(2)(a) of the Constitution and as a result of which, Civil Appeal No.116 of 2010 has been initiated.

5. By the judgment dated 05.05.2015, this Division declared sub-sections 2 and 4 of section 6 Nari-O-Shishu Nirjatan Daman Bishesh Bidhan Ain,1995, sub-sections (2) and (3) of section 34 of the Nari-O-Shishu Nirjatan Daman Ain,2000 and section 303 of the Penal Code ultra vires the Constitution. This Division further has held that despite repeal of Ain of 1995, the pending cases and pending appeals in respect of those offences shall be tried and heard in accordance with the provision of the Ain,1995, but the sentences prescribed in respect of similar nature of offences of the Ain,2000 shall be applicable. This Division has further held that there shall be no mandatory sentence of death in respect of offence of murder committed by an offender who is under sentence of life imprisonment.

6. Admittedly, the petitioner was caught red-handed by the people of Tepra and was brought to the place of occurrence and before the witnesses. He admitted the incident of killing the victim. The victim Sumi Akter was only 7 years old. This Division found that the

killing was brutal and diabolical and that there was no extenuating ground for commuting the sentence and accordingly his sentence was confirmed.

7. Feeling aggrieved by the impugned judgment dated 05.05.2015, the petitioner filed this review petition before this Division.

8. Mr. M. K. Rahman, learned Senior Advocate (Ms. Sara Hossain, Advocate with him), appearing on behalf of the petitioner, submits that the petitioner was merely a boy of 14 years old at the time of occurrence and 16 years at time of trial and therefore, he was a minor and sub-sections (2) and (4) of section 6 of Ain,1995 and sub-sections (2 and (3) of 34 of Ain,2000 having been declared ultra vires the Constitution, the question of imposing death sentences prescribed in respect of those offences in the Ain,2000 does not arise. He further submits that the petitioner was a minor boy and that there are mitigating circumstances which warrant conversion of death sentence to imprisonment for life.

9. Ms. Sara Hossain also tries to submit that the confession alleged to have been made by the petitioner was not true and voluntary and that it was obtained by torture.

10. We have considered the submissions of the learned Advocates of the review-petitioners, perused the impugned judgment and the materials on record.

11. The learned Advocates have drawn our attention as regards the age of the petitioner at the time of commission of the offence as found by the High Court Division in Death Reference No.29 of 2001 along with Jail Appeal No.2882 of 2001. The High Court Division found that the petitioner was merely a boy of 14 years old at the time of occurrence and 16 years at the time of trial of the case and therefore, he was a minor. The High Court Division further found that since no alternative sentence has been provided for the offence, it was left with no other option but to maintain the sentence if it believed that the prosecution had been able to prove the charge beyond reasonable doubt. The High Court Division observed that had the petitioner been tried for an offence punishable under section 302 of the Penal Code his sentence of death could have been commuted to imprisonment for life because of his tender age. The High Court Division observed that this was one of the extenuating circumstances for commuting his sentence. The High Court Division, however, hoped that it was a fit case, in which, the President of the Republic could consider the circumstances and commute the sentence in the light of the of the observation made by it provided the condemned prisoner would make such a prayer.

12. In Jail Appeal No.08 of 2004 arising out the judgment of the High Court Division, this Division held that the minimum sentence that could be given for committing an offence under section 6(2) of the Ain was death and death alone and as such, it was impossible to take a different view in the matter of sentence.

13. A review application was filed against the judgment delivered in Jail Appeal No.08 of 2004 and this Division observed that the condemned prisoner if so advised might seek mercy to the appropriate forum.

14. Having gone through the judgment of the High Court Division in the death reference, we find that it could not convert the death sentence to imprisonment for life as section 6(2) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain,1995 did not provide for any other sentence except death. The High Court Division was of the view that it was a fit case where the President of the Republic could consider the sentence and commute the sentence to imprisonment for life provided the petitioner would make such a prayer. In Jail Appeal No.08 of 2004 arising out of the judgment of the High Court Division and this Division could not commute the death sentence as section 6(2) of the Ain did not permit as such.

15. From the judgment delivered by the High Court Division in the death reference, we find that the petitioner was aged about 14 years at the time of occurrence and 16 years at the time of the trial and that he was a minor.

16. In the case of ***Nalu vs. State, (2012) 17 BLC (AD) 204***, we have mentioned the grounds for which a death may be commuted to imprisonment for life. The mitigating circumstances mentioned in the above case are as follows:

(a) The condemned prisoner has no significant history of prior criminal activity.
(b) Youth of the condemned prisoner at the time of commission of the offence.
(c) The condemned prisoner would not be likely to commit acts of violence if released.
(d) Confinement of the condemned prisoner in the condemned cell from 09.06.2005 till date i.e. for more than 7 years during which period the sword of death has been hanging on his head.

17. In the case in hand, we find that the petitioner has no significant history of prior criminal activity and that he was aged 14 years at the time of commission of the offence and 16 years at the time of framing of charge. The petitioner has been in the condemned cell since 12.07.2001, that is, more than 14 years. Considering all aspects of the case, we are of the view that the death sentence of the petitioner be commuted to imprisonment for life.

18. Accordingly, this review petition is disposed of. The sentence of death imposed upon the petitioner is commuted to imprisonment for life.

7 SCOB [2016] AD 46

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. 3056 OF 2014

(From the judgment and order dated 11th of September, 2014 passed by the High Court Division in Civil Revision No. 1589 of 2013)

Md. Imtiaz Faruque (Imran)	**:**	... Petitioner
= Versus =		
Afsarunnessa Khatun Chowdhury and others	:	... Respondents
For the Petitioner	:	Mr. Md. Ashad Ullah, Advocate, instructed by Syed Mahbubar Rahman Advocate-on-Record
For Respondent Nos. 1-10	:	Mr. Mahmudul Islam, Senior Advocate, instructed by Mr. Md. Taufique Hossain Advocate-on-Record
Respondent Nos. 11-24	:	Not represented
Date of hearing & judgement	:	The 20th of April, 2015

(Emergency) Requisition of Property Act, 1948
Section 5 (7):

It is an admitted fact that the suit land was acquired in L.A. Case No. 06 of 1948-49 and although steps have been taken for release of the land from acquisition, the applicants have not succeeded in getting the land released. According to section 5 (7) of the (Emergency) Requisition of Property Act, 1948 the land having been duly acquired and compensation paid, it vests absolutely in the Government free from all encumbrances. Hence, the title in the property is no longer with the petitioner. We note from the plaint that the petitioner has not included any prayer for declaration of title and hence, in any event, the prayer for temporary injunction is not sustainable. ... (Para-11)

JUDGMENT

MUHAMMAD IMMAN ALI, J:-

1. This civil petition for leave to appeal is directed against the judgment and order dated 11.09.2014 passed by a Single Bench of the High Court Division in Civil Revision No. 1589 of 2013 discharging the Rule.

2. Facts of the case, in brief, are that the petitioner and the proforma-respondent Nos. 21-24 as plaintiffs instituted Title Suit No. 05 of 2002 in the Court of Joint District Judge, 4th Court, Dhaka praying for a declaration that the judgment and decree passed in Title Suit No. 152 of 1957 by the Munsif, 3rd Court, Dhaka on 28.05.1960 was not binding upon them. They stated, *inter alia,* that the land of Title Suit No. 152 of 1957 was part of C.S. Plot No. 67 under C.S. Khatian No. 174 and the total area of C.S. Khatian No. 174 of Mouja Dhanmondi, former Keranigonj Police Station and at present Dhanmondi Police Station was 60.13 acres and the superior landlords were Nezabot Ali Kha, Abdul Hakim and others. The land of the C.S. Plot No. 67 was owned and possessed by one Gopeswar Paul, son of late Bhubaneswar Paul as tenant under the superior landlord and C.S. record-of-rights was finally published in the name of tenant Gopeswar Paul. C.S. Plot No. 67 comprised an area of 38.48 acres. Said Gopeswar Paul while owning and possessing the said land died leaving behind two sons, namely Nilkanta Paul and Harekrishna Paul as his heirs. Subsequently, Harekrishna Paul died leaving behind only son Debraj Paul as his heir. Said Nilkanta Paul and Debraj Paul while possessing the said land, sold 4 bighas of specific chala land out of total 38.48 acres of land of C.S. Plot No. 67 to one Sreejukta Kiron Chandra Bandapadhaya, son of late Binod Chandra Bandapadhaya vide registered deed No. 1845 dated 14.07.1933 and delivered possession to him. Thereafter, Kiron Chandra Bandapadhaya sold his entire purchased 4 bighas land, equivalent to 1.33 acres with trees standing thereon to Md. Shahjahan Bhuiyan, son of late Moulvi Mohammad Abdul Wahab Bhuiyan, predecessor of the present petitioner and opposite party Nos. 21-24 vide registered sale deed No. 4623 dated 18.08.1948 and handed over possession to them and they are in possession of the said land jointly. The Government, for the construction of the residence of Government employees, acquired 16.75 acres of land including 1.33 acres of C.S. Plot No. 67 owned and possessed by Md. Shahjahan Bhuiyan vide Land Acquisition Case No. 06 of 1948-49 and compensation was prepared in his name for an amount of Tk. 3,976.11. But the Government did not take possession of the entire acquired land including the land owned and possessed by the predecessor of the petitioner as the said land was not needed for the purpose for which acquisition proceeding was started, and the said land is a small unspecified part of a bigger plot. The compensation was not withdrawn by the predecessor of the petitioner and the said amount was deposited in the Government Revenue Accounts. Since possession of 1.33 acres of land owned and possessed by the predecessor of the petitioner was not taken over by the Land Acquisition Department, the said land remained in the possession of the petitioner's predecessor Md. Shahjahan Bhuiyan who died on 18.02.1982. On the recommendation of the Ministry of Works and Housing, the then Prime Minister directed release of the unused acquired portion of land of the owners in possession on 18.03.1974, and also directed to take back the compensation money from those awardees who had taken compensation, and further directed to publish Gazette Notification immediately in that regard. But the said direction was not acted upon. Ultimately, in the year 1984 decisions were taken by the Government for implementation of the earlier decision. Mrs. Salma Bhuiyan, mother of the petitioner on 19.06.1989 filed an application to the Minister, Ministry of Land for releasing the said property form L.A. Case No. 06 of 1948-49 and he directed the Additional Deputy

Commissioner (L.A.) Dhaka to submit report after inquiry. Accordingly, the Additional Deputy Commissioner (L.A.), Dhaka after inquiry submitted report on 26.06.1989 to the Ministry of Land. In the said report it was clearly stated that the petitioners were in possession of the said property by constructing structures. The petitioner's property not having been released, they filed Title Suit No. 133 of 2001 in the Court of the Joint District Judge, 3rd Court, Dhaka against the Government for declaration of their 16 annas right, title and interest in the said 1.33 acres of land and the said suit is pending for disposal. The opposite party Nos. 1-18 or their predecessor got their names recorded in respect of 50 decimals of land out of total 1.33 acres of the aforesaid land of C.S. Plot No. 67 at the field level in the recent Dhaka City Survey and they filed appeal under Rule 31 of the State Acquisition Tenancy Rules, 1955 framed under State Acquisition and Tenancy Act, 1950 and from the said case record, the petitioner found photocopy of the certified copy of the judgment and decree dated 28.05.1960 passed in Title Suit No. 152 of 1957 of the Court of Munsif, 3rd Court, Dhaka and the petitioner came to know that the opposite party Nos. 1-18 or their predecessor, suppressing the facts of the earlier title deed, possession of the petitioner's predecessors as well as acquisition proceedings, obtained a decree in respect of unspecified 50 decimals of land out of total 38.48 acres of land. The petitioner does not claim any interest in the suit land of the Title Execution Case No. 32 of 1962 but claim different land by way of earlier title document because of the question of the identity of the suit land. The said judgment and decree has cast cloud upon the right, title, interest and possession of the suit land of the petitioner because of identity of the suit land and the decretal land. As the heirs of late Md. Shahjahan Bhuiyan, they filed Title Suit No. 05 of 2002 before the District Judge, 4th Court, Dhaka against the opposite party Nos. 1-18 and prayed for declaration that the judgment and decree passed on 28.05.1960 in Title Suit No. 152 of 1957 of the 3rd Court of Munsif, Dhaka is not binding upon the plaintiffs of the present suit.

3. During pendency of the Title Suit No. 05 of 2002 with a view to pre-empt the possible judgment of the suit, the defendant-opposite party Nos. 1-18 forcibly tried to dispossess the petitioner from the suit land and as such, the petitioner and the opposite party Nos. 21-24 on 18.05.2009 field an application under Order 39, Rules 1 and 2 read with section 151 of the Code of Civil Procedure.

4. Respondent Nos. 1-11 as defendants of the suit filed written statements stating, *inter alia,* that their predecessor purchased the land measuring an area of 50 decimals of C.S. Plot No. 67 out of total 38.48 acres of land vide registered deed No. 3075 dated 21.5.1953 from Debraj Paul and that on the same day A.M. Nur Meah and 2 others purchased 46 decimals of land from the same Debraj Paul and the said land is situated on the northern side of the land purchased by them. On 05.12.1955 aforesaid A.M. Nur Meah and others dispossessed the decree-holder opposite party Nos. 1-18, consequently, they filed Title Suit No. 152 of 1957 in the Court of Munsif and that suit was decreed in favour of the predecessors of the opposite party Nos. 1-18.

5. After hearing the parties the learned Joint District Judge by his order dated 14.11.2012 rejected the application field under Order 39, Rule 1 and 2 read with section 151 of the Code of Civil Procedure for temporary injunction.

6. Against the said order passed by the Joint District Judge, 4th Court, Dhaka, the plaintiffs preferred Miscellaneous Appeal No. 317 of 2012, which was heard by the learned Additional District Judge, who by his judgment and order dated 05.05.2013 dismissed the appeal.

7. Being aggrieved by the said judgment and order of the appellate Court the plaintiff filed Civil Revision No. 1589 of 2013 before the High Court Division and obtained Rule, which was discharged by the impugned judgment and order. Hence, the petitioner has filed the instant civil petition for leave to appeal before this Division.

8. Mr. Md. Ashad Ullah, learned Advocate appearing on behalf of the petitioner submits that the petitioner and proforma respondent No. 20 to 24 claimed title to the property by way of inheritance and are in exclusive possession of the suit land since 18.08.1948 and hence, the High Court Division erroneously upheld the order of the lower Courts rejecting the application for injunction. He further submits that the High Court Division failed to consider that the land concerned in Title Suit No. 152 of 1957 and the suit land are not the same and also that the petitioner was not party to the said title suit and hence, the result of the suit is not binding upon the petitioner. Finally, he submits that the High Court Division and the Courts below failed to notice that in view of the long standing exclusive possession of the petitioner in the suit land and title by way of registered deed dated 18.8.1948 balance of convenience and in-convenience is in favour of the petitioner and hence, the High Court Division erred in discharging the Rule.

9. Mr. Mahmudul Islam, learned Senior Advocate appearing for the respondent Nos. 1-10 made submission in support of the impugned judgment and order of the High Court Division.

10. We have considered the submissions of the learned Advocates for the parties concerned, perused the impugned judgment and other connected papers on record.

11. It is an admitted fact that the suit land was acquired in L.A. Case No. 06 of 1948-49 and although steps have been taken for release of the land from acquisition, the applicants have not succeeded in getting the land released. According to section 5 (7) of the (Emergency) Requisition of Property Act, 1948 the land having been duly acquired and compensation paid, it vests absolutely in the Government free from all encumbrances. Hence, the title in the property is no longer with the petitioner. We note from the plaint that the petitioner has not included any prayer for declaration of title and hence, in any event, the prayer for temporary injunction is not sustainable.

12. In the impugned judgment the High Court Division observed that as per the admission of the plaintiff-petitioner the suit land of Title Suit No. 05 of 2002 was acquisitioned vide L.A. Case No. 06 of 1948-49 and that the plaintiff-petitioner is yet to be successful in releasing the said suit property from the list of acquisition and requisition and that his right to the suit land is yet to be established. It was further noted that there is no record of rights in respect of the suit land in the name of the plaintiff-petitioner and that there is no rent receipt to show that the plaintiff-petitioner is in physical possession in the suit land. The High Court Division concluded that "the plaintiff-petitioner is yet to establish his right, title and possession in the suit land by way of releasing the suit land from the list of acquisition and requisition. So long the plaintiff-petitioner is unable to establish his title and possession in the suit-acquired land he cannot get any relief of temporary injunction."

13. In the light of the discussion above, we find that the impugned judgment does not suffer from any illegality or infirmity and does not call for any interference. Accordingly, the civil petition for leave to appeal is dismissed.

7 SCOB [2016] AD 50

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

CRIMINAL APPEAL NO.01 OF 2015
(From the judgment and order dated 31.01.2013 passed by the High Court Division in Criminal Miscellaneous Case No.4918 of 2007.)

Bo-Sun Park	:	Petitioner.
=Versus=		
The State and another	:	Respondents.
For the Petitioner	:	Mr. Abdul Baset Majumder, Senior Advocate, instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.
For Respondent No.1	:	Mr. M.A. Azim, Advocate, instructed by Mr. Haridas Paul, Advocate-on-Record.
Respondent No.2	:	Ko. Kyung Oh (in person)
Date of hearing and judgment	:	26-01-2016

Code of Criminal Procedure, 1898
Section 247 read with section 403:
Since the order passed under section 247 of the Code of Criminal Procedure is one of acquittal the second complaint on the same allegation is not maintainable. At whatever stage of the proceeding the acquittal order section 247 is ordered, such order will operate as a bar the fresh trial, in the same way as are acquittal after trial on merits.
...(Para 11)

J U D G M E N T

Hasan Foez Siddique, J:

1. This appeal is directed against the judgment and order dated 31.01.2013 passed by the High Court Division in Criminal Miscellaneous Case No.4918 of 2007 discharging the Rule.

2. The appellant filed an application under section 561A of the Code of Criminal Procedure challenging the proceeding of Petition Case No.421 of 2006 under sections 323/ 324/ 321/ 342/ 343/606 of the Penal Code pending in the Court of Magistrate, Gazipur and obtained Rule.

3. The relevant facts, for the disposal of this appeal, in short, are that the respondent No.2 Ms. Ok Kyung Oh, filed a petition of complaint on 09.01.2005 against the appellant under sections 323/324/341/342/343/506 of Penal Code alleging that the appellant fraudulently excluded her from the post of Managing Director by forging her signatures and managed to get registration of the company changed with the Registrar, Joint Stock Companies and Firms showing her forged resignation letter during her absence in the country. On 28.12.2004, when the complaint asked about the same to the appellant, he became furious and started to abuse her with filthy language. At one stage, the appellant dragged her to the room and threw on the floor making her naked and started assaulting with private parts of her body. Over the said incident, the respondent No.2 at first initiated a complaint case before the Nari-O-Shishu Nirjatan Daman Tribunal under section 10 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 along with sections 323/343/506 of the Penal Code, which was registered as Petition Case No.18 of 2005 as the police did not receive allegation. Ultimately, the said case was dismissed and Criminal Appeal against the order of dismissal was also dismissed with an observation that no offence was committed under section 10 Nari-O-Shishu Nirjatan Daman Ain but for other offences under the Penal Code, separate criminal case may be initiated, if the complainant is so advised. In pursuance of the said observation passed in the Criminal Appeal No.1756 of 2005, the complainant respondent No.2 filed C.R. Case No.143 of 2006 under sections 323/324/341/342/343/506 of the Penal Code against the accused petitioner for the same occurrence showing the dates of occurrence from 21.12.2004 to 29.12.2004. The said C.R. Case was filed (Ùb‖_f~³Ó) under section 247 of the Code of Criminal Procedure by an order dated 30.11.2006. Subsequently, on 14.12.2006, the complainant respondent No.2 again filed another petition of complaint which is registered as C.R. Case No.421 of 2006 on the same facts of the previous case. On the basis of the said second complaint, cognizance was taken on 20.12.2006 under sections 323/324/341/342/343/506 of the Penal Code and the learned Magistrate, First Class, Gazipur issued summon upon the accused appellant. Thereafter, the accused appellant appeared before the Court below and obtained bail on 19.02.2007 and then he approached this Court for quashing the second criminal proceeding under section 561A of the Code of Criminal Procedure and obtained the instant Rule.

4. The High Court Division by the impugned judgment and order discharged the Rule. Thus, the appellant filed the instant appeal after getting leave.

5. Mr. Abdul Baset Majumder, learned Senior Counsel appearing on behalf of the appellant, submits that there is a clear provision of law under section 417 of the Code of Criminal Procedure to prefer appeal against the order of acquittal of the appellant passed by the learned Magistrate on 30.11.2006 in petition Case No.143 of 2005 but the complainant without resorting the opportunity of said provision filed second petition complaint which is barred under section 403 of the Code of Criminal Procedure, the High Court Division erred in law in not quashing the instant proceeding.

6. The learned Counsel for the respondent No.2 supported judgment and order of the High Court Division.

7. Admittedly, the complainant-respondent No.2 instituted Criminal Petition Case No.143 of 2005 against the appellant under sections 323/324/341/342/343/506 of Penal Code bringing the allegations which have been brought in this case again. It further appears from the order sheet of the said case that the same was disposed of under the provision of section 247 of the Code of Criminal Procedure since the complainant could not appear in the case.

8. The contents of the said order were as follows:

"Dfq c¶ webv Z`ex‡i Mo nwRi| mxb|ev`x c¶ `yB avh Zwi‡L Av`vj‡Z Mo nwRi | mwPeK we‡ePbvq GUvB Av`vj‡Zi Kv‡Q cZxqgvb †h, ev`x c¶ Avi G gvgjv Pvjv‡Z Pv‡nb bv| Bnv wm, Avi gvgjv| GgZve¯nvq ev`xi Abyqvw¯wZ‡Z I gvgjv cwiPvjbvi Abxnvi Kvi‡b gvgjv wm, Avi, wc, wm, 247 avivq bw_fz‡ Kiv n‡jv|"

9. The order shows that the complainant, before passing the said order, was found absent in the Court in two consecutive dates. That is, it was third time she was found absent. No adjournment was sought on her behalf. Though earlier the complainant was found absent twice but the Court did not dismiss the case rather it adjourned the case which clearly indicates that the presence of the complainant before the Court was insisted on but she could not appear before it third time. Section 247 affords some deterrence against dilatory tactics on the part of the complainant who set the law in motion through his complaint. In the case of Obaidur Rahman Vs. The State reported in 19 BLD (AD) page 128 this Division has observed;

> "The language of section 247 thus having clearly empowered the concerned Magistrate to acquit the accused for the failure of the complainant to appear in the case on the date fixed for the appearance of the accused, it cannot be said that only the order of acquittal passed upon holding full trial can create a bar under Section 403 Cr.P.C. from entertaining a second complaint on the self same allegation. So long as the order of acquittal, passed under section 247 Cr.P.C., remains in force the provision of Section 403 Cr.P.C. shall stand on the way of entertaining a second complaint on the self-same allegations."

10. The Magistrate while passing the order dated 30.11.2006 had observed, *"mwPeK we‡ePbvq GUvB Av`vj‡Zi Kv‡Q cZxqgvb †h, ev`x c¶ Avi G gvgjv Pvjv‡Z Pv‡nb bv|"* . Where the complainant is found repeatedly absent on the date, any of the two courses are to be followed by the Magistrate exercising his discretion in indicial manner: (1) To acquit the accused; or (ii) to adjourn the case. Since the discretion vested with the Magistrate, it adopted the first option. However, such discretion has to be exercised with great care and caution because an order of acquittal operates as a bar to a fresh complaint.

11. Since the order passed under section 247 of the Code of Criminal Procedure is one of acquittal the second complaint on the same allegation is not maintainable. At whatever stage of the proceeding the acquittal order section 247 is ordered, such order will operate as a bar the fresh trial, in the same way as are acquittal after trial on merits.

12. In view of such circumstances, the High Court Division ought to have been quashed the proceeding.

13. Accordingly, we find substance in the appeal.

14. Thus the appeal is allowed. The judgment and order of the High Court Division is set aside. The proceeding of C.R. Case No.421 of 2006 is hereby quashed.

7 SCOB [2016] HCD 1

High Court Division
(Special Original Jurisdiction)

I.T. Ref: Application No. 90 of 2014
With
I.T. Ref: Application No. 82 of 2009
And
I.T. Ref: Application No. 81of 2009

Ahmed Services Limited
....Assessee-Applicant.
Versus

The Commissioner of Taxes

Mr. Md. Erfan Ullah, Adv.
...For the Assessee-applicant.

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

Heard on: 19.11.2014 & 10.12.2014
And
Judgment on: The 14th December, 2014

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

Income Tax Ordinance, 1984
Section 35(4):
Since the DCT concern did not raise any dissatisfaction as to the method of accounting and did not pin point any of the defect in the accounts, the two lower appellate authorities were required to consider the said question and decide the appeals before them in its true perspective. But that has not been done by the two lower appellate authorities and as such the questions as have been formulated in the instant three Income Tax Reference Applications are required to be answered in negative and in favour of the Assessee-applicant. ... (Para-17)

Judgment

A.F.M. Abdur Rahman, J:

1. These 3 (three) Income Tax Reference Applications filed by the Assessee-applicant, Ahmed Services Limited, having involved the similar question of law on the identical factual aspects have been heard analogously and now disposed off by this single judgment.

2. ***Facts of the case in ITR No. 90 of 2014:***

It has been asserted in Income Tax Reference Application No. 90 of 2014 that the Assessee-applicant Ahmed Services Limited is a private limited company and runs a Hotel business under the name and style Hotel Park International, having Hotel, Restaurant and Bar facilities. The Assessee-applicant is a regular income tax payer holding TIN. 002-200-5331, which maintained proper books of accounts as required under the provision of section 75(2)(d)(iii) of the Income Tax Ordinance 1984, following regular method of accounting which has been audited by a chartered accountant company which certified the account as true and correct. The Assessee-applicant in course of his business submitted its income tax return for the assessment year 1996-1997 showing net income of Tk. 87,190.00 and submitted the said chartered accountant certified books of account as required under the

provision of section 35(3) of the Income Tax Ordinance 1984. But the Deputy Commissioner of Taxes refused to accept the book version of the accounts and upon disallowing some of the expenditure without any material basis only on assumptions assessed net income of the assessee-applicant at an amount of Tk. 86,97,305.00, against which the Assessee-applicant preferred BuLl Bf£mfœ ew-26/®L¡w-2/LxAx-2/1998-1999 before the 1st Appellate Authority which having been rejected by the First Appellate Authority, thereafter the applicant filed Appeal before the Taxes Appellate Tribunal, who remanded the case to the First Appellate Authority, which has been renumbered as BuLl Bf£mfœ ew- 465/®L¡w-21/LxAx-7/2007-2008, which having been failed the Assessee-applicant further preferred an unsuccessful appeal, being ITA No. 4368 of 2007-2008 before the Taxes Appellate Tribunal and being failed now preferred the instant Income Tax Reference Application formulating the following question of law, seeking opinion from this court:

1. *Whether in the facts and on the circumstances of the case the learned Taxes Appellate Tribunal was legally justified under section 159(2)/35 of the Income Tax Ordinance 1984 in maintaining without any material basis but only on assumptions of higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account resulting enhancement of income without rejecting the audited statement of accounts the method of accounting regularly employed with the provision of section 35(3) of the Income Tax Ordinance 1984.*
2. *Whether the learned Taxes Appellate Tribunal was legally justified in confirming the higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account without any material basis but only on the assumption where the VAT authority accepted the disclosed sales shown in the accounts.*
3. *Whether the learned Taxes Appellate Tribunal was legally justified where the contents of the inspection report were not furnished to the assessee-petitioner to enable him to controvert the same whether it violates the principle of natural justice.*

3. ***Facts of the case in ITR No. 82 of 2009:***

It has been asserted in Income Tax Reference Application No. 82 of 2009 that the Assessee-applicant in the same manner maintained its account and submitted its income tax return for the assessment year 2003-2004 showing net income at an amount of Tk. 8,351.00. But the Deputy Commissioner of Taxes upon discarding the book version of the accounts estimated the income of the Assessee-applicant without any material basis but only on assumptions at an amount of Tk. 1,59,13,145.00, against which the Assessee-applicant preferred BuLl Bf£mfœ ew-1100/®L¡w-21/LxAx-7/2004-2005 before the 1st Appellate Authority, which having been failed in substance, the Assessee-applicant further preferred unsuccessful appeal before the Taxes Appellate Tribunal being ITA No. 1165 of 2005-2006 and being failed now preferred the instant Income Tax Reference Application formulating the following question of law in the supplementary-affidavit, seeking opinion from this court;

1. *Whether in the facts and on the circumstances of the case the learned Taxes Appellate Tribunal was legally justified under section 159(2)/35 of the Income Tax Ordinance 1984 in maintaining without any material basis but only on assumptions of higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account resulting enhancement of income without rejecting the audited statement of accounts the method of accounting regularly employed by the applicant having complied with the provision of section 35(3) of the Income Tax Ordinance 1984.*

2. *Whether the learned Taxes Appellate Tribunal was legally justified in confirming the higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account without any material basis but only on assumption where the VAT authority accepted the disclosed sales shown in the accounts.*

4. ***Facts of the case in ITR No. 81 of 2009:***

It has been asserted in Income Tax Reference Application No. 81 of 2009 that the Assessee-applicant upon maintaining its accounts in the same manner, submitted its income tax return for the assessment year 2005-2006, showing net income at an amount of Tk. 6,07,561.00. But the Deputy Commissioner of Taxes discarded the book version of the accounts and estimated the net income of the Assessee-applicant at an amount of Tk. 74,73,551.00, against which the Assessee-applicant preferred BuLl Bf£mfœ ew-106/®L¡w-21/LxAx-7/2006-2007 before the 1st Appellate Authority which having been failed, the Assessee-applicant further preferred unsuccessful appeal before the Taxes Appellate Tribunal, being ITA No. 2568 of 2006-2007 and now preferred the instant Income Tax Reference Application formulating the following question in the supplementary-affidavit, seeking opinion from this court;

1. *Whether in the facts and on the circumstances of the case the learned Taxes Appellate Tribunal was legally justified under section 159(2)/35 of the Income Tax Ordinance 1984 in maintaining without any material basis but only on assumptions of higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account resulting enhancement of income without rejecting the audited statement of accounts the method of accounting regularly employed with the provision of section 35(3) of the Income Tax Ordinance 1984.*
2. *Whether the learned Taxes Appellate Tribunal was legally justified in confirming the higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account without any material basis but only on assumption where the VAT authority accepted the disclosed sales shown in the accounts.*

5. ***Claim of the Taxes Department:***

Upon service of the notice, the Taxes Department appeared through the learned Assistant Attorney General Ms. Nasrin Parvin and Mr. Saikat Basu and filed affidavit-in-reply, wherein it has been categorically asserted that the Assessee-applicant having maintained its books of accounts under the mercantile system of accounting claimed exorbitant expenditure and shown less income and therefore the true and correct income of the Assessee-applicant could not be deduced from the books of accounts and as such the DCT concern invoked its power available under the provision of section 35(4) of the Income Tax Ordinance 1984 and accordingly the income of the Assessee-applicant for the assessment year 1996-1997, 2003-2004 and 2005-2006 were disposed off by discarding the book version of accounts and estimating the income of the Assessee-applicant in a correct and lawful manner. Therefore, the two lower appellate authorities lawfully did not entertain the objection as raised by the Assessee-applicant and accordingly the questions as have been formulated in these three Income Tax Reference Applications are not required to be answered in negative and in favour of the Assessee-applicant.

6. The learned Advocate Mr. Md. Erfan Ullah, represented the Assessee-applicant, while the learned Assistant Attorney General Ms. Nasrin Parvin conducted hearing on behalf of the Taxes Department at the time of hearing of these three Income Tax Reference Applications.

7. ***Argument of the Parties:***

The learned Advocate Mr. Md. Erfan Ullah, appearing on behalf of the Assessee-applicant at the very outset has drawn the attention of this court that the latitude of power available under the provision of section 35(4) of the Income Tax Ordinance 1984 to discard the book version of the account maintained regularly by the Assessee of income tax has already been decided in so many cases especially, in the case of Titas Gas (T&D) Limited-Vs-The Commissioner of Taxes reported in 53 DLR 209, the case of Mark Builders Limited-Vs-The Commissioner of Taxes reported in 59 DLR 463 and in the case of Eastern Hardware Store-Vs-The Commissioner of Taxes reported in 54 DLR 125 and therefore the DCT concern was required to observe the *ratio decidendi* of those decisions while discarding the book version of the accounts since the Assessee-applicant maintained regular method of accounting audited and certified by the Chartered Accountant and the DCT concern did not raise any objection as to the method of accounting, nor it has pin pointed the defects in the accounts, submitted by the Assessee-applicant. Therefore, the two lower appellate authorities were required to consider this aspect of the assessment but they having been failed, the question as have been formulated by the Assessee-applicant in these three Income Tax Reference Applications are required to be answered in negative and in favour of the Assessee-applicant.

8. The learned Advocate further argued that the VAT authority already accepted the disclosed sales shown in the account and without any material basis only on assumptions the DCT concern enhanced the net income which is not maintainable in the eye of law and equity.

9. On the other hand the learned Assistant Attorney General Ms. Nasrin Parvin, appearing on behalf of the Taxes Department strenuously argued that the facts as have been decided in the referred cases are quite different from the instant Income Tax Reference Applications. Ms. Parvin submits that the Assessee-applicant made an exorbitant claim of expenditure and also shown a lesser income in the book version of the accounts which is nothing but concealment of income by the Assessee-applicant. The DCT concern correctly and lawfully invoked its power available under the provision of section 35(4) of the Income Tax Ordinance 1984. Therefore, the *ratio decidendi* of the referred cases are not applicable in the instant Income Tax Reference Applications and therefore the questions as have been formulated by the Assessee-applicant in these three Income Tax Reference Applications are not required to be answered in negative and in favour of the Assessee-applicant.

10. We have heard the learned Advocates and perused the materials on record.

11. ***Deliberation of the Court:***

It appears that the Assessee-applicant is a private limited company which upon complying the provision of section 75(2)(d)(III) of the Income Tax Ordinance 1984 maintained its account in mercantile system which has been audited regularly by chartered accountant firm and the Assessee-applicant upon complying the provision of section 35(3) of the Income Tax Ordinance 1984 submitted the said chartered accountant audited and certified accounts with the return of the assessment years. But the DCT concern did not accept the book version of the accounts, rather it has discarded the same on the ground of non-verifiability of different

head of expenditure and also the non-verifiability of the income as has been claimed by the Assessee-applicant.

12. But it appears that the DCT concern prior to that did not raise any dissatisfaction as to the method of accounting or did not pin point any of the defects in the accounts expressing that due to the same the correct and true income of the Assessee-applicant could not be deduced from the book version of the accounts.

13. In this respect various cases of this court and the apex court has decided the question as to the latitude of power available to the DCT concern while invoking the provision of section 35(4) of the Income Tax Ordinance 1984. The provision of section 35(4) of the Income Tax Ordinance 1984 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 manner as the Deputy Commissioner of Taxes may think fit.*

14. 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.*

15. 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.*

16. 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.*

17. From the aforesaid decisions it appears that the questions which have been raised in these three instant Income Tax Reference applications have already been decided in the above mentioned referred cases. In the instant cases since the DCT concern did not raise any dissatisfaction as to the method of accounting and did not pin point any of the defect in the accounts, the two lower appellate authorities were required to consider the said question and decide the appeals before them in its true perspective. But that has not been done by the two lower appellate authorities and as such the questions as have been formulated in the instant three Income Tax Reference Applications are required to be answered in negative and in favour of the Assessee-applicant.

18. ***Result of the cases:***

In the result, these three Income Tax Reference Applications are allowed.

19. The questions as have been formulated by the Assessee-applicant are hereby answered in negative and in favour of the Assessee-applicant.

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

7 SCOB [2016] HCD 7

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 7650 OF 2012

Z. I. Khan Panna
..... Petitioner

Versus

Bangladesh and others
.....Respondents

Dr. Shahdeen Malik, Advocate
.....For the petitioner.

Mr. Md. Motaher Hossain (Sazu), DAG with
Ms. Purabi Rani Sharma, AAG and
Mr. A.B.M. Mahbub, AAG
….For the respondent no. 2.

Heard on 04.12.2014, 04.05.2015, 15.06.2015, 01.07.2015, 12.08.2015 and 31.08.2015.

Judgment on 13.09.2015.

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

Supremacy of the Constitution:
Supremacy of the Constitution means that its mandates shall prevail under all circumstances. As it is the source of legitimacy of all actions, legislative, executive or judicial, no action shall be valid unless it is in conformity with the Constitution both in letter and spirit. If any action is actually inconsistent with the provisions of the Constitution, such action shall be void and can not under any circumstances be ratified by passing a declaratory law in Parliament. If a law is unconstitutional, it may be re-enacted removing the inconsistency with the Constitution or re-enacted after amendment of the Constitution. However, supremacy of the Constitution is a basic feature of the Constitution and as such even by an amendment of the Constitution, an action in derogation of the supremacy of the Constitution can not be declared to have been validly taken. Such an amendment is beyond the constituent power of Parliament and must be discarded as a fraud on the Constitution. ... (Para-19)

Essence of the rule of law:
What emerges from the above discussion is that no one is above law and everybody is subject to law. This is the essence of the rule of law in a constitutional dispensation like ours. In this respect, we are reminded of an oft-quoted legal dictum─ 'Be you ever so high, the law is above you'. ... (Para-31)

Article 46 of the Constitution:
There can not be any blanket indemnity of the persons accused of perpetration of crimes on the victims in their custody in view of the clear and unequivocal language of Article 46. Precisely speaking, indemnity can be given to the persons concerned for the

maintenance or restoration of order in any area meaning thereby in any specific area in Bangladesh as provided by Article 46 of the Constitution. In fact, there is no scope for wholesale indemnity of the members of the joint forces for the maintenance or restoration of order throughout the length and breadth of the country in terms of Article 46 of the Constitution. On this count, the impugned Act No. 1 of 2003 can not be upheld. ... (Para-35)

The law-enforcing agencies can not take the law into their own hands:

Any sort of deliberate torture on the victims in the custody of the joint forces or law-enforcing agencies is ex-facie illegal, unconstitutional and condemnable. In that event, they have the right to seek the protection of the law in any independent and impartial Court or Tribunal, as the case may be. Custodial death is the worst form of violation of human rights. Even a hard-core criminal has the right to be tried in the competent Court of law for his alleged perpetration of crimes. He can not be physically annihilated or killed by the members of the joint forces for his alleged crimes. The law-enforcing agencies or the joint forces can not take the law into their own hands. ... (Para-36)

®k±b A¢i k¡e c¡uj¢š² BCe, 2003 (200৩ সনের ১ নং আইন)

Section 3(ka):

It transpires that under Section 3(ka) of the impugned Act No. 1 of 2003, all the orders made by the Government from 16th October, 2002 to 9th January, 2003; all acts and orders done or given by the joint forces within such period and all arrests, detentions, searches, seizures and interrogations and all other such acts done by the joint forces during that period have been given an absolute and unqualified indemnity; but this type of indemnity to any person or force or personnel is totally unknown and foreign to the notion of the rule of law which is a basic feature of our Constitution and fundamental to the governance of Bangladesh. As such, Section 3(ka) of the impugned Act No. 1 of 2003 is repugnant to and inconsistent with the Constitution. . ... (Para-42)

যৌথ অভিযান দায়মুক্তি আইন, ২০০৩ (২০০৩ সনের ১ নং আইন)

Section 3(ka):

Section 3(kha) of the impugned Act No. 1 of 2003 imposes an absolute prohibition on the citizens of the country to seek any legal redress, whether civil or criminal, in any Court against any member of the joint forces involved in any kind of operation during the aforesaid period purporting to violate their legal and constitutional rights. Such an absolute prohibition is inconceivable, unjustifiable and barbaric and is destructive of the constitutional scheme of the rule of law and the fundamental right 'to protection of law' as guaranteed by the Constitution. ... (Para-45)

Constitution of the People's Republic of Bangladesh:

Article 102:

Compensation:

In a writ proceeding under Article 102 of the Constitution of the People's Republic of Bangladesh, adequate compensation can be awarded to the victims of human rights violations in the custody of the law-enforcing agencies/joint forces or to the dependants/family members of the deceased in case of custodial deaths by the High Court Division. The quantum of compensation to be assessed and awarded to the victims or to the dependants/family members of the deceased, as the case may be, will vary from case to case depending upon their facts and circumstances. On this issue, no hard and fast rule can be laid down. ... (Para-72)

The affected persons/victims of brutalities or torture or the dependants/family members of the deceased in case of custodial deaths during the 'Operation Clean Heart' will be at liberty to file cases against the perpetrators of the crimes, that is to say, the concerned members of the joint forces/law-enforcing agencies both under civil and criminal laws of the land for justice. They may also invoke the writ jurisdiction of the High Court Division under Article 102 of the Constitution for compensation, if they are so advised, in addition to the reliefs sought for under prevalent civil as well as criminal laws of Bangladesh. ... (Para-75)

Constitution of the People's Republic of Bangladesh:
Article 31 and 32:
সংবিধানের ৩১ এবং ৩২ ধারা পর্যালোচনায় ইহা সুস্পষ্ট যে, যে কোন ব্যক্তির জীবন, স্বাধীনতা, দেহ, সুনাম বা সম্পত্তির অধিকার তাঁর মৌলিক অধিকার। এবং আইনের আশ্রয়লাভ এবং আইনানুযায়ী ব্যবহার লাভ প্রত্যেক নাগরিকের অবিচ্ছেদ্য A¢dL¡lz Hhw BCe¡ek¡u£ h£a£a Hje ®L¡e h£hÙ¡ N¢ee Ll¡ k¡CCve না যাহাতে কোন নাগরিকের জীবন, স্বাধীনতা, দেহ, সুনাম ও সম্পত্তির হানি ঘটে। সুতরাং দায়মুক্তি আইন, ২০০৩ সংবিধানের অনুচ্ছেদ ৩১ এবং ৩২ এর সহিত সরাসরি সাংঘর্ষিক ab¡ Ap¡j"p£fZz It was born dead and had no legal existence Ab¡v HC BCe¢V f¢Eue C¢Rm ®hBCe£ a¡C Cq¡l S¡¢jই হইয়াছিল বেআইনী তথা বাতিল আইন হিসাবে। ... (Para-103)

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 impugned যৌথ অভিযান দায়মুক্তি আইন, ২০০৩ (২০০৩ সনের ১ নং আইন) (Annexure-'A' to the Writ Petition) should not be declared to be repugnant to and inconsistent with the Constitution and why a direction should not be issued upon the respondents to create a fund of Tk. 100 (one hundred) crore and to keep the same earmarked for payment of compensation to the victims of illegal and unlawful actions taken during the period indemnified by the impugned Act and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The case of the petitioner, as set out in the Writ Petition, in short, is as follows:

The petitioner is an Advocate of the Supreme Court of Bangladesh. Over the years, he has tried his best to uphold the supremacy of the Constitution and the fundamental rights of the citizens of the country. Anyway, যৌথ অভিযান দায়মুক্তি অধ্যাদেশ, ২০০৩ was promulgated on 9th January, 2003 providing for the indemnity of all disciplined forces and Government officials for the detention, arrest, search, interrogation and such other actions taken against the citizens between 16th October, 2002 and 9th January, 2003 pursuant to the order dated 16th October, 2002 and other subsequent orders of the Government. Thereafter ®k¡b A¢ik¡e c¡uj¢Š² BCe, 2003 (২০০৩ সনের ১ নং আইন) (hereinafter referred to as the Act No. 1 of 2003) was enacted by the House of the Nation and was published in Bangladesh Gazette, Extra-ordinary on 24th February, 2003 to provide for the indemnity of the members of all disciplined forces and public functionaries to that effect. Section 3(kha) of the Act No. 1 of 2003 purports to stipulate that no legal proceeding shall lie in any Court due to any harm to one's life, liberty or property or any mental or physical damage stemming therefrom if such injury was caused by the actions taken by the disciplined forces pursuant to the order dated 16th October, 2002 and other subsequent orders made by the Government. Section 3(kha) further purports to

stipulate that any proceeding initiated in any Court relating to the actions taken pursuant to the above-mentioned orders within the said period of time and any decision rendered by such Court shall be considered void, ineffective and abated. However, on the plea of maintenance of the law and order situation of the country, curbing terrorism and recovering illegal arms from miscreants etc., the Government issued an order on 16th October, 2002 to the disciplined forces to conduct drives under the name and style 'Operation Clean Heart' all over the country as and when required and accordingly they conducted drives till 9th January, 2003. During the drives of the joint forces during the period under reference, there were rampant allegations of violations of human rights and unlawful acts. Horrendous crimes such as harassment of people, illegal arrests, trespass, illegal seizure of property, torture, mutilation and killing of a considerable number of people in custody were committed. During that period, there were reports appearing almost every day in the national daily newspapers and electronic media about the widespread human rights violations and heinous crimes committed by the joint forces. The Daily Prothom Alo, the Daily Star and other daily newspapers carried the reports of the victimization of the people and the brutalities perpetrated upon them and custodial deaths. As per those paper-clippings, during 85(eighty-five) days of the drives conducted by the joint forces, at least 43(forty-three) people were killed in their custody. The losses suffered by the victims of the so-called 'Operation Clean Heart' could be redressed both under civil and criminal jurisdictions of the Courts of law. In cases of known, admitted and recognized failures of the State, funds were set apart and a Special Commission or Body or Authority was constituted to disburse funds as compensation among the victims of wrongful and unjustified State actions in various jurisdictions. Against this backdrop, the victims of torture and in case of custodial deaths, the dependants/family members of the deceased are entitled to be compensated under Article 102 of the Constitution of the People's Republic of Bangladesh. As the Act No. 1 of 2003 runs counter to the concept of the rule of law and the fundamental rights of the people as guaranteed by Part III of the Constitution, the same is liable to be struck down as being ultra vires the Constitution.

3. The respondent no. 2 has contested the Rule by filing an Affidavit-in-Opposition. His case, as set out in the Affidavit-in-Opposition, in short, runs as under:

During the period of the 'Operation Clean Heart', nobody did lodge or file any specific case against any personnel of the joint forces, nor did anybody claim any compensation from the Government on account of their unlawful actions. So the Government is not bound to pay or provide compensation to the victims of brutalities or to the dependants of the deceased in case of custodial deaths. Criminal liability is a personal liability and in this perspective, it can not be imposed upon the Government. As such, the Rule is liable to be discharged.

4. At the outset, Dr. Shahdeen Malik, learned Advocate appearing on behalf of the petitioner, submits that Article 46 of the Constitution can not be invoked in support of the Act No. 1 of 2003 in that there is no scope for providing any blanket indemnity to the perpetrators of crimes and that is why, the Act No. 1 of 2003 can not stand the test of constitutionality.

5. Dr. Shahdeen Malik further submits that the Bangladesh National Liberation Struggle (Indemnity) Order, 1973 (P. O. No. 16 of 1973) was promulgated in order to give indemnity to the persons in the service of the Republic and to other persons for or on account of or in respect of any acts done by them during the period from 1st day of March, 1971 to 16th day of December, 1971 in connection with the struggle for national liberation or for maintenance or restoration of order up to 28th day of February, 1972 and the Act No. 1 of 2003 inherently and conceptually does not stand comparison with the P. O. No. 16 of 1973 by any yardstick and

by that reason, the Act No. 1 of 2003 is repugnant to the rule of law which is one of the basic structures of the Constitution.

6. Dr. Shahdeen Malik also submits that as per Article 65 of the Constitution, there shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic and the power of the Parliament to enact laws has been circumscribed by the provisions of this Constitution and this being the position, the Parliament can not enact any law in derogation of the fundamental rights as enshrined in Part III of the Constitution and since the Act No. 1 of 2003 is repugnant to and inconsistent with the rule of law and the fundamental rights of the citizenry, the same is not a valid piece of legislation.

7. Dr. Shahdeen Malik further submits that as per Article 3 of the United Nations Universal Declaration of Human Rights, 1948, everyone has the right to life, liberty and security of person and Article 5 thereof contemplates that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and Article 9 provides that no one shall be subjected to arbitrary arrest, detention or exile and Article 10 envisages that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him and these Articles of the United Nations Universal Declaration of Human Rights as adopted by the General Assembly of the United Nations have been enshrined in Part III of our Constitution and as Bangladesh is a signatory to the United Nations Universal Declaration of Human Rights and as Bangladesh is one of the members of the United Nations, Bangladesh is in duty bound to abide by the various provisions of the United Nations Universal Declaration of Human Rights and what is of paramount importance is that in enacting the Act No. 1 of 2003, the House of the Nation can not by-pass or circumvent the fundamental rights of the people and as the Act No. 1 of 2003 runs counter to the fundamental rights of the people and the rule of law, the same should be declared ultra vires the Constitution.

8. Dr. Shahdeen Malik next refers to Articles 6 and 7 of the International Covenant on Civil and Political Rights, 1976 and submits that as per Article 6(1), every human being has the inherent right to life and this right shall be protected by law and no one shall be arbitrarily deprived of his life and Article 7 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and as every human being has the inherent right to life, he can not be deprived of his life save in accordance with law and since custodial brutalities and deaths have no sanction of the Constitution, those have fallen foul of the same.

9. Dr. Shahdeen Malik also adverts to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 to which Bangladesh is a signatory and submits that according to Article 2(1), each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction and Article 2(3) postulates that an order from a superior officer or a public authority may not be invoked as a justification of torture.

10. Dr. Shahdeen Malik further refers to Articles 13 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 and submits that each State Party shall ensure that any individual who alleges that he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities and steps shall be taken

to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given (Article 13) and that each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation and in the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation (Article 14).

11. Dr. Shahdeen Malik also submits that Article 31 of our Constitution mandates that to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law and that Article 32 of the Constitution provides that no person shall be deprived of life or personal liberty save in accordance with law and as the victims of the 'Operation Clean Heart' were meted out brutalities and torture in the custody of the joint forces and as there were deaths in their custody too as evidenced by Annexure-'B' series to the Writ Petition, it leaves no room for doubt that those persons were subjected to violations of human rights by means of torture, intimidation, coercion and so on and so forth and also by means of custodial deaths and this being the panorama, the impugned Act No. 1 of 2003 can not be intra vires the Constitution.

12. Dr. Shahdeen Malik further submits that in our jurisdiction, no Compensation Jurisprudence has yet been developed; but in the Indian jurisdiction, victims of human rights violations were awarded proper compensation by the various High Courts and the Supreme Court of India in appropriate cases and the reparations given to the victims by way of monetary compensation would be in addition to the reliefs sought for under the civil and criminal laws of the land and the instant Writ Petition may be instrumental in evolving the Compensation Jurisprudence in Bangladesh as in India. In support of this submission, Dr. Shahdeen Malik has adverted to a catena of decisions of the Indian jurisdiction, namely, Radhakanta Majhi…Vs…State of Orissa, AIR 2014 Ori 206; Puspa Reang…Vs…The State of Tripura, AIR 2014 Tripura 49; R. Gandhi and others…Vs… Union of India (UOI) and another, AIR 1989 Mad 205; Vipin P. V…Vs…State of Kerala and others, AIR 2013 Ker 67 and Jaywant P. Sankpal…Vs…Suman Gholap and others, (2010) 11 SCC 208.

13. Per contra, Mr. Md. Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent no. 2, submits that no case was ever lodged or filed by the victims or their family members against any personnel of the joint forces for perpetration of brutalities upon the victims and as such the Government is not bound to provide compensation to the victims or their family members, as the case may be.

14. Mr. Md. Motaher Hossain (Sazu) further submits that criminal liability is a personal liability and if any member of the joint forces committed any crime during the 'Operation Clean Heart', in that event, the Government can not be saddled with the personal liability of that member of the joint forces.

15. Mr. Md. Motaher Hossain (Sazu) also submits that the Writ Petition has been filed as a Public Interest Litigation and the submissions of Dr. Shahdeen Malik are virtually predicated upon the various decisions of several Indian High Courts and the Supreme Court of India with regard to payment of compensation to the victims in specific cases and as no specific case has been brought before this Court for awarding compensation under Article

102 of the Constitution, the Government is not legally bound to compensate the victims or their family members, as the case may be.

16. We have heard the submissions of the learned Advocate Dr. Shahdeen Malik and the counter-submissions of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) and perused the Writ Petition, Affidavit-in-Opposition and relevant Annexures annexed thereto.

17. It is a settled proposition of law that there is a presumption of constitutionality in favour of the impugned Act No. 1 of 2003. In that view of the matter, the onus is upon the petitioner to show that the Act No. 1 of 2003 is void and ultra vires the Constitution. We will see presently how far Dr. Shahdeen Malik has succeeded in discharging this onus to our satisfaction.

18. It is a truism that the Constitution is the "suprema lex" of the country. In other words, the Constitution is the supreme law of the land. In this connection, Article 7(2) of the Constitution may be mentioned. Article 7(2) mandates that 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. This Article has proclaimed the supremacy of the Constitution to bring home the point that no law, or any part thereof, can be valid if it is found to be inconsistent therewith.

19. Supremacy of the Constitution means that its mandates shall prevail under all circumstances. As it is the source of legitimacy of all actions, legislative, executive or judicial, no action shall be valid unless it is in conformity with the Constitution both in letter and spirit. If any action is actually inconsistent with the provisions of the Constitution, such action shall be void and can not under any circumstances be ratified by passing a declaratory law in Parliament. If a law is unconstitutional, it may be re-enacted removing the inconsistency with the Constitution or re-enacted after amendment of the Constitution. However, supremacy of the Constitution is a basic feature of the Constitution and as such even by an amendment of the Constitution, an action in derogation of the supremacy of the Constitution can not be declared to have been validly taken. Such an amendment is beyond the constituent power of Parliament and must be discarded as a fraud on the Constitution.

20. According to the Constitution, there are 3(three) organs of the State, that is to say, the Executive, the Legislature and the Judiciary. All the 3(three) organs of the State are to function within the parameters set by the Constitution. The unique feature of the Judiciary is its power of judicial review. But this power of judicial review does not make the Judiciary superior to the other 2(two) organs of the State, namely, the Executive and the Legislature. As a matter of fact, the Judiciary is co-ordinate and co-equal with the other 2(two) organs of the State.

21. Ours is a written Constitution. It is axiomatic that judicial review is the soul of the Judiciary in a written Constitution. In a written Constitution, the power of the Parliament in enacting laws is always subject to the provisions of the Constitution. Our Parliament is not as sovereign as the British Parliament. In Great Britain, the Constitution is unwritten and the Parliament is supreme. It is often said that the British Parliament can do and undo anything except making a man woman and a woman a man. Such is the amplitude of the sovereignty or supremacy of the British Parliament. But on the other hand, our Constitution has delineated the limitations of the Parliament in enacting laws. What we are driving at boils

down to this: our Parliament is sovereign in enacting laws, but that sovereignty is subject to the provisions of the Constitution. For example, our Parliament can not make any law contrary to the fundamental rights as enshrined in Part III of the Constitution.

22. In the case of Raja Ram Pal …Vs….Hon'ble Speaker, Lok Sabha and others, (2007) 3 SCC 184, it was held by the Supreme Court of India:

> "Parliament in India, unlike in England, is not supreme. Rather it is the Constitution of India that is supreme and Parliament will have to act within the limitations imposed by the Constitution. The law in England of exclusive cognizance of Parliament has no applicability in India which is governed and bound by the Constitution. A Legislature created by a written Constitution must act within the ambit of its power as defined by the Constitution and subject to the limitations prescribed by the Constitution. Parliament, like other organs of the State, is subject to the provisions of the Constitution and is expected, nay, bound to exercise its powers in consonance with the provisions of the Constitution. Any act or action of Parliament contrary to the constitutional limitations will be void."

23. The above view of the Indian Supreme Court, in my humble opinion, clearly holds good in our jurisdiction.

24. However, the provisions of Article 26 of our Constitution run as follows:

> "26.(1) All existing laws inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this 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."

25. The next relevant Article is Article 27 of the Constitution. According to Article 27, all citizens are equal before law and are entitled to equal protection of law.

26. 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".

27. 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."

28. Article 31 provides that to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

29. Article 32 mandates that no person shall be deprived of life or personal liberty save in accordance with law.

30. Article 35(3) contemplates that every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law. Again Article 35(5) provides that no person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.

31. What emerges from the above discussion is that no one is above law and everybody is subject to law. This is the essence of the rule of law in a constitutional dispensation like ours. In this respect, we are reminded of an oft-quoted legal dictum─ 'Be you ever so high, the law is above you'.

32. Indisputably Bangladesh is a signatory to the United Nations Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1976 and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987. Apart from the provisions of our Constitution mentioned hereinbefore, as a State Party as well, Bangladesh is committed to translate into reality the provisions of those international instruments and to see that no one is subjected to torture, intimidation, coercion, degrading treatment, brutality or custodial death save in accordance with law.

33. The provisions of Section 3(ka) and (kha) of the Act No. 1 of 2003 are in the following terms:

> "3(L) 16C অক্টোবর, ২০০২ তারিখ হইতে ৯ই জানুয়ারী, ২০০৩ তারিখ কার্যদিবস পর্যন্ত সময়ের মধ্যে দেশের শৃঙ্খলা রক্ষার প্রয়োজনে বেসামরিক প্রশাসনকে সহায়তা প্রদানের জন্য সIL¡l LaL 16ই অক্টোবর, ২০০২ তারিখে প্রদত্ত আদেশ এবং তৎপরবর্তী সময়ে প্রদত্ত সকল আদেশ, EŠ² আদেশসমূহ বাস্তবায়নের জন্য কৃত যাবতীয় কার্য এবং উক্ত আদেশসমূহ বলে ও অনুসারে যৌথ A¢ikানে নিয়োজিত শৃঙ্খলা বাহিনীর কোন সদস্য বা যৌথ অভিkানের অন্য কোন সদস্য বা দায়িত্বপ্রাপ্ত অন্য কোন ব্যক্তি কর্তৃক উক্ত সময়ের মধ্যে তাহার দায়িত্ব বিবেচনায় প্রদত্ত আদেশ, কৃত আটক, গ্রেফতার, তল্লাশী ও জিজ্ঞাসাবাদসহ সকল প্রকার কার্য ও গৃহীত ব্যবস্থা, প্রচলিত আইনে J আদেশসমূহে যাহাই থাকুক না কেন, ১৬ই অক্টোবর, ২০০২ তারিখ প্রদত্ত আদেশ প্রদানকারী এবং উক্ত আদেশবলে ও অনুসারে আদেশ প্রদানকারী এবং কার্য সম্পাদনকারী, এবং যৌথ অভিযানে নিয়োজিত শৃঙ্খলা বাহিনীর সদস্যগণকে তজ্জন্য সর্বপ্রকার দায়মুক্ত করা হইল;
>
> (M) দফা (ক) এ উল্লিখিত ১৬ই অক্টোবর, ২০০২ তারিখে প্রদত্ত আদেশ বা তৎপরবর্তী সময়ে প্রদত্ত কোন আদেশ বা কার্যের দ্বারা কাহারও প্রাণহানি ঘটিলে, কাহারও জান বা মালের কোন ক্ষতি হইলে বা কাহারও কোন অধিকার ক্ষুন্ন হইলে বা কেহ আর্থিক, শারীরিক বা মানসিকভাবে ক্ষতিগ্রস্ত হইলে বা ®Lq Aeÿ কোনভাবে সংক্ষুব্ধ হইলে তজ্জন্য সংশ্লিষ্ট সকল আদেশ প্রদানকারীর বিরুদ্ধে বা কার্য নির্বাহীর বিরুদ্ধে বা উক্ত দফায় উল্লিখিত কোন সদস্য বা ব্যক্তি বা শৃঙ্খলা বাহিনীর সদস্যগণের বিরুদ্ধে বা তাহাদিগকে আদেশ প্রদানকারীর বিরুÜ বা উক্ত বাহিনীর কোন কর্মকর্তার বিরুদ্ধে বা যৌথ অভিযানে নিয়োজিত শৃঙ্খলা বাহিনীর অন্য কোন সদস্যের বিরুদ্ধে বা সরকার বা সরকারের কোন সদস্যের বিরুদ্ধে বা সরকারের কোন কর্মকর্তার বিরুদ্ধে কোন আদালতে কোন প্রকার দেওয়াe¿ hj ®g±Sc¡l¿ ®j¡LŸj¡ hj L¡kd¡l¡ hj Ae¿ ®Lie fÐl BCeNত কার্যধারা চলিবে না বা তৎসম্পর্কে কোন আদালতের নিকট কোন অভিযোগ বা প্রশ্ন উত্থাপন করা যাইবে না এবw Hacসম্পর্কে hj HC fÐl কোন মোকদ্দমা বা কার্যধারা কোন আদালতে দায়ের করা হইলে বা এই ধরনের কোন মোকদ্দমায় বা L¡kধারায় বা প্রশ্নের ভিত্তিতে কোন রায়, আদেশ বা সিদ্ধান্ত দেওয়া হইলে তাহা বাতিল, অকার্যকর হইবে বা হইয়াছে বলিয়া গণ্য হইবে।"

34. Because of the non-obstante clause embodied in Article 46 of the Constitution, Parliament may by law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him or in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area.

35. It conspicuously appears that there is no reference to Article 46 in the Preamble of the Act No. 1 of 2003. Be that as it may, we are at one with Dr. Shahdeen Malik that there can not be any blanket indemnity of the persons accused of perpetration of crimes on the victims in their custody in view of the clear and unequivocal language of Article 46. Precisely speaking, indemnity can be given to the persons concerned for the maintenance or restoration of order in any area meaning thereby in any specific area in Bangladesh as provided by Article 46 of the Constitution. In fact, there is no scope for wholesale indemnity of the members of the joint forces for the maintenance or restoration of order throughout the length and breadth of the country in terms of Article 46 of the Constitution. On this count, the impugned Act No. 1 of 2003 can not be upheld. This is one way of looking at the Act No. 1 of 2003.

36. The members of the joint forces, or for that matter, the law-enforcing personnel are not above the law of the land. We have already observed that no one is above law and everybody is subject to law. Any sort of deliberate torture on the victims in the custody of the joint forces or law-enforcing agencies is ex-facie illegal, unconstitutional and condemnable. In that event, they have the right to seek the protection of the law in any independent and impartial Court or Tribunal, as the case may be. Custodial death is the worst form of violation of human rights. Even a hard-core criminal has the right to be tried in the competent Court of law for his alleged perpetration of crimes. He can not be physically annihilated or killed by the members of the joint forces for his alleged crimes. The law-enforcing agencies or the joint forces can not take the law into their own hands and by doing so, they have infringed the relevant provisions of the Constitution as evidenced by Annexure-'B' series to the Writ Petition.

37. Incidentally a reference may be made to নির্যাতন এবং হেফাজতে মৃত্যু (নিবারণ) আইন, ২০১৩ (২০১৩ সনের ৫০ নং আইন). Section 12 of the Act No. 50 of 2013 is quoted below verbatim:

> "এই আইনের অধীনে কৃত কোন অপরাধ যুদ্ধাবস্থা, যুদ্ধের হুমকি, অ¡iÉ¿l£Z l¡Se¢aL A¢Øq¢an£ma¡ Abh¡ SI¦l£ AhØq¡u; Abh¡ Fd র্তন কর্মকর্তা বা সরকারি কর্তৃপক্ষের আদেশে করা হইয়াছে এইরুপ অজুহাত অগ্রহণযোগ্য হইবে।"

38. This provision, without any shadow of doubt, upholds the basic spirit of the rule of law even under any exceptional circumstances.

39. It is true that criminal liability of a person is his personal liability. But none the less, the State can not shy away from its responsibility for the illegal and unconstitutional actions of the public functionaries. The State must be called to account for the unlawful and unconstitutional State-actions during the 'Operation Clean Heart'.

40. Needless to say, the Bangladesh National Liberation Struggle (Indemnity) Order, 1973 (P. O. No. 16 of 1973) is fundamentally, perspectively and notionally different from the Act No. 1 of 2003. So the alleged constitutionality of the Act No. 1 of 2003 can not be tested by the yardstick of the P. O. No. 16 of 1973.

41. As to the contention of Mr. Md. Motaher Hossain (Sazu) that no case was ever lodged or filed by the victims or their family members against any personnel of the joint forces for commission of brutalities upon the victims and as such the Government is not bound to provide compensation to the victims or their family members, as the case may be, we would like to observe that যৌথ অভিযান দায়মুক্তি অধ্যাদেশ, ২০০৩ was promulgated on 9th January, 2003

providing for the indemnity of all disciplined forces and Government officials for the detention, arrest, search, interrogation and such other actions taken against the citizens between 16th October, 2002 and 9th January, 2003 pursuant to the order dated 16th October, 2002 and other subsequent orders of the Government. Afterwards the Act No. 1 of 2003 was enacted by the House of the Nation and was published in Bangladesh Gazette, Extra-ordinary on 24th February, 2003 to the above effect. In such a situation, there was no legal scope on the part of the victims or their family members to lodge or file any case against the delinquent members of the joint forces. So the contention of Mr. Md. Motaher Hossain (Sazu) stands negatived.

42. It transpires that under Section 3(ka) of the impugned Act No. 1 of 2003, all the orders made by the Government from 16th October, 2002 to 9th January, 2003; all acts and orders done or given by the joint forces within such period and all arrests, detentions, searches, seizures and interrogations and all other such acts done by the joint forces during that period have been given an absolute and unqualified indemnity; but this type of indemnity to any person or force or personnel is totally unknown and foreign to the notion of the rule of law which is a basic feature of our Constitution and fundamental to the governance of Bangladesh. As such, Section 3(ka) of the impugned Act No. 1 of 2003 is repugnant to and inconsistent with the Constitution.

43. By way of according absolute and unqualified indemnity under Section 3(ka) of the impugned Act No. 1 of 2003, the members of the joint forces and all their actions during the period between 16th October, 2002 and 9th January, 2003 have been put above the law of the land, thereby creating a supra-law entity purportedly above and beyond the Constitution which itself destroys the very foundation of the rule of law and equality before law as enshrined and guaranteed in the Constitution.

44. By providing blanket indemnity under Section 3(ka) of the impugned Act No. 1 of 2003 to the members of the joint forces and all their actions during the period under reference, a clear discriminatory situation has been created amongst the citizenry which is violative of their fundamental rights as embodied and guaranteed in the Constitution.

45. As we see it, Section 3(kha) of the impugned Act No. 1 of 2003 imposes an absolute prohibition on the citizens of the country to seek any legal redress, whether civil or criminal, in any Court against any member of the joint forces involved in any kind of operation during the aforesaid period purporting to violate their legal and constitutional rights. Such an absolute prohibition is inconceivable, unjustifiable and barbaric and is destructive of the constitutional scheme of the rule of law and the fundamental right 'to protection of law' as guaranteed by the Constitution.

46. Section 3(kha) of the impugned Act No. 1 of 2003 provides that any decision or order on any matter filed in any Court relating to any State action taken during 16th October, 2002 to 9th January, 2003 shall be considered void and ineffective. This provision, it goes without saying, undermines and negates the scheme of separation of powers among the 3(three) organs of the State which is central to the independence of the Judiciary.

47. The actions of the joint forces during 16th October, 2002 to 9th January, 2003 as are manifestly clear from the newspaper-clippings (Annexure-'B' series to the Writ Petition) show the violations of fundamental rights of the citizens of the country guaranteed under the Constitution. But by the purported indemnity of those actions, the aggrieved citizens have

been 'en masse' deprived of enforcing their fundamental rights as well as the right of seeking redress, whether civil or criminal, in the Courts across Bangladesh.

48. The idea of the supremacy of the Constitution is at the core of constitutional democracy and governance and the guarantee and protection of fundamental rights are the centre-piece of the Constitution. If any legislative action contravenes any provision of the Constitution or the fundamental rights guaranteed thereunder, then it can not be sustained by the touchstone of the Constitution.

49. From the discussions made above and regard being had to the facts and circumstances of the case, we find that the impugned Act No. 1 of 2003 is not a valid piece of legislation and it is liable to be declared void abinitio and ultra vires the Constitution.

50. It is explicitly clear from Annexure-'B' series to the Writ Petition that during the period from 16th October, 2002 to 9th January, 2003, hundreds of thousands of citizens suffered financial losses by being injured and maimed and their properties being vandalized or ransacked. Furthermore, the families of those killed were deprived of the earnings of the deceased. As such, they were subjected to pain, suffering, anguish and other mental or psychological trauma for all of which those citizens have the right to compensation stemming from the violations of their fundamental rights guaranteed by Articles 27, 31, 32, 35(3), 35(5) and 40 of the Constitution.

51. This is a Public Interest Litigation. No individual victim, or for that matter, any family member of the deceased has come up with the instant Writ Petition for compensation. In this regard, the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu), it seems, has made a valid submission.

52. Given the facts and circumstances of the case, a pertinent question arises: can the State be ordered to pay compensation to the victims of brutalities or torture in the custody of the joint forces and in case of custodial deaths, to the dependants/family members of the deceased?

53. In Radhakanta Majhi…Vs…State of Orissa, AIR 2014 Ori 206 relied on by Dr. Shahdeen Malik, it was spelt out in paragraph 9:

> "9. Compensation in a writ proceeding can never be a substitute for loss of life and normally is by way of palliative and token in nature. This, by no means, as has been held by the Apex Court in a catena of decisions, is a bar to a person to pursue his other remedies available in law. The amount of compensation is only on a public law remedy for violation of Article 21 of the Constitution of India."

54. In Puspa Reang…Vs…The State of Tripura, AIR 2014 Tripura 49 adverted to by Dr. Shahdeen Malik, it was held in paragraph 10:

> "10. It is a clear case of unconstitutional deprivation of fundamental right to life and liberty. Thus this Court is competent to invoke the jurisdiction in the public law for penalizing the wrong-doer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of its citizen. No law has authorized the police to perpetrate any custodial torture. The law's abhorrence is no more funnelled in the international covenant. On umpteen occasions, the

> Supreme Court has held that the purpose of public law is not only to civilize the public power but also to assure the citizens that they live under a legal system which aims at protecting their interests and preserving their rights."

55. Ultimately in the facts and circumstances of that case, the High Court of Tripura directed the State Government to pay monetary compensation to the tune of Rupees 4(four) lac to the petitioner without prejudice to any other action like civil suit for damages which is lawfully available to the petitioner or to the heirs of the victim for the tortious acts committed by the functionaries of the State.

56. In R. Gandhi and others…Vs…Union of India (UOI) and another, AIR 1989 Mad 205, it was observed in paragraph 8:

> "8. The scope and ambit of public interest litigations, the rights of the citizens and the duties of the State under the Constitution have been the subject-matter of a series of recent enlightened judgments of the Supreme Court. The learned Judges have pointed out that it is not only the right but also the duty of the Court, not only to enforce fundamental rights but also to award compensation against the State for violation of these rights. In other words, the power of the Court is not only injunctive in ambit, that is preventing the infringement of a fundamental right; but it is also remedial in scope and provides the relief against the breach of the fundamental right already committed."

57. In that case, finally a Writ of Mandamus was issued directing the State of Tamil Nadu to pay compensation to the victims of the Coimbatore riots strictly as per the report of the Collector of Coimbatore dated 11.02.1985 in the sum of Rupees 33,19,033 as assessed and recommended by the Collector.

58. In Rudul Sah…Vs…State of Bihar, (1983) 4 SCC 141, the petitioner filed a habeas corpus petition under Article 32 seeking his release from detention in jail on the ground that his detention after his release by the Sessions Court on June 3, 1968 was illegal, and also seeking ancillary reliefs, viz., compensation for his illegal detention in jail for over 14 years, his medical treatment at Government expense and ex-gratia payment for his rehabilitation. The Supreme Court of India completely departed from the old doctrine of Crown immunity and observed as follows:

> "Although Article 32 can not be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of Courts, such as money claims, yet the Supreme Court in exercise of its jurisdiction under this Article can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. In these circumstances, the refusal of the Supreme Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 will be denuded of its significant content, if the power of the Supreme Court is limited to passing orders of release from illegal detention. The only effective method open to the Judiciary to prevent violation of that right and to secure due compliance with Article 21 is to mulct its violators by the payment of monetary compensation. The right to

> compensation is thus some palliative for the unlawful acts of instrumentalities of the State. Therefore, the State must repair the damage done by the officers to the petitioner's rights. It may have recourse against these officers."

59. In Nilabati Behra…Vs…State of Orissa, (1993) 2 SCC 746, the Indian Supreme Court considered the question whether the constitutional remedy of compensation for infringement of any fundamental right is distinct from and in addition to the remedy in private law for damages. The deceased aged 22 years was taken into police custody and on the next day, his dead body with multiple injuries was found on a railway track without being released from the custody. The State's plea that the deceased had escaped from police custody by chewing off the rope with which he was tied and was run over by a train was not substantiated by the evidence of the doctor who conducted post-mortem examination and the police officers were found responsible for the death. In such facts and circumstances, the Indian Supreme Court held in that case:

> "Award of compensation in a proceeding under Article 32 by the Supreme Court or under Article 226 by the High Court is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right."

60. In D. K. Basu…Vs…State of West Bengal, 1997 (1) SCC 416, the Supreme Court of India again considered the question of claim for damages in case of violation of rights guaranteed under Article 21 of the Constitution, while laying down certain principles to be followed in all cases of arrest and detention. Having regard to the facts and circumstances of that case, the Indian Supreme Court held:

> "The claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortious acts of the public servants. Public law proceedings serve a different purpose than the private law proceedings. Award of compensation for establishing infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved."

61. In Chairman, Railway Board and others…Vs…Chandrima Das (Mrs) and others, 2000 (2) SCC 465, a writ petition was filed seeking compensation from Railway Authorities for a victim, a Bangladeshi national, by name Hanuffa Khatoon who was gangraped by the employees of Railway, when the lady had arrived at Howrah Railway Station with a view

catching a train to Ajmeer; she was taken by the employees of Railway Board to Yathri Nivas. Room in the Yathri Nivas was booked by one of the employees against a railway card pass. She was raped there by 4 employees. Later she was taken out to a rented house by another employee and raped there. A practising lady Advocate of Calcutta High Court filed a Writ Petition before the High Court seeking compensation for the victim. Though it was allowed by the High Court, Railway Board preferred an appeal. Dismissing the appeal, the Supreme Court of India held as follows:

> "Where public functions are involved and the matter relates to violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the public law; notwithstanding that a suit could be filed for damages under private law. The public law remedies have also been extended to the realm and the court can award compensation to the petitioner who suffered personal injuries amounting to tortious acts at the hands of the officers of the Government."

62. In Jaywant P. Sankpal…Vs…Suman Gholap and others, (2010) 11 SCC 208 relied on by Dr. Shahdeen Malik, we find that the complainant's son was illegally arrested and brutally assaulted by the police while in custody as a result of which the State Human Rights Commission ordered the State Government to pay Rupees 45,000 as compensation and ultimately that order was upheld by the Bombay High Court as well as by the Indian Supreme Court.

63. The propositions laid down in the above decisions speak volumes about the awarding of compensation to the victims of violations of human rights in the custody of the public functionaries under Article 32 or under Article 226 of the Indian Constitution by the Supreme Court of India or the High Court concerned, as the case may be.

64. By the way, the relevant extract of the lecture of Lord Denning captioned "Freedom Under The Law" delivered in 1949 is in the following terms:

> "No one can suppose that the Executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do; and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us, what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not, just as the pick and shovel are no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to-date machinery, by declarations, injunctions and actions for negligence. This is not the task for Parliament. The Courts must do this. Of all the great tasks that lie ahead, this is the greatest. Properly exercised, the new powers of the Executive lead to the welfare state; but abused, they lead to a totalitarian state. None such must ever be allowed in this country."

65. The life and liberty of an individual is so sacrosanct that it can not be allowed to be interfered with except under the authority of law. It is a principle which has been recognized and applied in all civilized countries. The object of Article 32 of our Constitution (Article 21 of the Indian Constitution) is to prevent encroachment on the personal liberty of citizens by the Executive save in accordance with law and in conformity with the provisions thereof and

in accordance with the procedure established by law. The meaning and content of right to life and personal liberty have several facets and attributes and the Indian Supreme Court has time and again declared their scope and ambit in a good number of judicial pronouncements. Right to life and personal liberty is a basic human right and not even the State has the authority to violate this right.

66. It is implicit that a person must be free from fear and threat to life inasmuch as life under fear and threat of death will be no life at all. Right to life would include the right to live with human dignity. (Chameli Singh…Vs…State of U. P., AIR 1996 SC 1051). There is a great responsibility on the police to ensure that any citizen in their custody is not deprived of his right to life. Wrongdoer is answerable to the victim and the State. The State can not shirk its responsibility if the victim is deprived of his life except in accordance with law.

67. Protection of an individual from torture and abuse by the police and other law-enforcing agencies is a matter of deep concern in a free society. Custodial torture is a naked violation of human dignity which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity. Whenever human dignity is wounded, civilization takes a retrograde step. The flag of humanity must on each such occasion fly half-mast. The police are, no doubt, under a legal duty and have the legitimate right to arrest a criminal and to interrogate him during the investigation of an offence. But the law does not permit the use of third-degree methods or torture of any accused in their custody during interrogation and investigation in order to unravel the mystery of the offence. The end can not justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third-degree methods, the police may accomplish some hidden agenda behind closed doors what the demands of our legal regime forbid. No society can permit it.

68. The Courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. A court of law can not be blind to stark realities. Mere punishment of the offender can not give much solace to the family of the victim. A civil action for damages is a long-drawn-out and cumbersome judicial process. So monetary compensation by way of redress is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds.

69. In the light of the above deliberations and decisions, it is clear that though there is no express provision in the Constitution of India for grant of compensation to the victims by the State for the infringement of their right to life and personal liberty guaranteed under Article 21 of the Constitution of India, yet the Supreme Court of India has judicially evolved that such victims are entitled to get compensation under public law in addition to the remedies available under private law.

70. Speaking about Bangladesh jurisdiction, we have not come across any judicial pronouncement of the Apex Court that has awarded compensation to the victims by the State out of the State coffers for illegal and unconstitutional actions of the public functionaries as yet.

71. The Indian decisions adverted to above have a persuasive value. We find no reason whatsoever to disagree with the 'ratios' enunciated by different High Courts of India and the Indian Supreme Court with regard to awarding of compensation to the victims by the State on

account of violations of human rights by the public functionaries. In substance, we are in respectful agreement with the Indian decisions that have evolved a Jurisprudence of Compensation for the benefit of the victims of torture or the dependants/family members of the deceased in case of custodial deaths under writ jurisdiction, apart from any claim for damages in any action for tort under private law.

72. In such a posture of things, we are led to hold that in a writ proceeding under Article 102 of the Constitution of the People's Republic of Bangladesh, adequate compensation can be awarded to the victims of human rights violations in the custody of the law-enforcing agencies/joint forces or to the dependants/family members of the deceased in case of custodial deaths by the High Court Division. The quantum of compensation to be assessed and awarded to the victims or to the dependants/family members of the deceased, as the case may be, will vary from case to case depending upon their facts and circumstances. On this issue, no hard and fast rule can be laid down.

73. Since this is a Public Interest Litigation and no affected individual or victim has personally invoked the writ jurisdiction of the High Court Division for awarding compensation under Article 102 of the Constitution, we refrain from passing any wholesale order of payment of compensation to the victims of brutalities or torture or to the dependants/family members of the deceased in case of custodial deaths by the State; but nevertheless, they will be entitled to call in aid the writ jurisdiction of the High Court Division for reparations by way of pecuniary compensation to be paid to them by the State for the unlawful and unconstitutional State actions during the 'Operation Clean Heart'.

74. From the foregoing deliberations and in the facts and circumstances of the case, we find that যৌথ অভিযান দায়মুক্তি আইন, ২০০৩ (২০০৩ সনের ১ নং আইন) is void abinitio and ultra vires the Constitution. But we are not inclined to issue any direction upon the respondents to create a fund of Taka one hundred crore and to keep the same earmarked for the purpose of payment of compensation to the affected persons of the 'Operation Clean Heart' for the reasons assigned above.

75. Accordingly, the Rule is made absolute in modified form without any order as to costs. The affected persons/victims of brutalities or torture or the dependants/family members of the deceased in case of custodial deaths during the 'Operation Clean Heart' will be at liberty to file cases against the perpetrators of the crimes, that is to say, the concerned members of the joint forces/law-enforcing agencies both under civil and criminal laws of the land for justice. They may also invoke the writ jurisdiction of the High Court Division under Article 102 of the Constitution for compensation, if they are so advised, in addition to the reliefs sought for under prevalent civil as well as criminal laws of Bangladesh. Besides, the State may take necessary steps for enactment of a law like the Philippines Human Rights Victims' Reparation and Recognition Act of 2013 so as to provide for reparation and recognition to the victims/affected persons of human rights violations during the 'Operation Clean Heart', if deemed fit and proper.

MD. ASHRAFUL KAMAL, J:

76. মাননীয় জ্যেষ্ঠ বিচারপতি মইনুল ইসলাম চৌধুরীর মতামতের সাথে একমত পোষণ করিয়া আমার নিজস্ব কিছু অভিমত এখানে সংযোজন করিতেছি।

77. যেহেতু মাননীয় জৈষ্ঠ্য বিচারপতি মইনুল ইসলাম চৌধুরী অত্র মোকদ্দমার সংক্ষিপ্ত ঘটনা এবং উভয় পক্ষের বিজ্ঞ আইনজীবীদ্বয়ের যুক্তিতর্ক বিস্তারিতভাবে আলোচনা করিয়াছেন, সেইহেতু আমি পুনরায় সেইসব এইখানে বর্ণনা করা হইতে বিরত bj¢Lmjz

78. প্রথমেই 'অপারেশন ক্লিনহার্ট' নামে আইন শৃঙ্খলা বাহিনী নামানোর পর তৎকালীন সময়কার কিছু চিত্র যা বিভিন্ন পত্র-পত্রিকায় বিস্তারিতভাবে প্রকাশিত হইয়াছিল যাহা দরখাস্তকারী অত্র দরখাস্তের সহিত সংযুক্ত করিয়াছেন সেইসব হইতে কয়েকটি নিম্নে অনুলিখন করা হইলঃ -

প্রথম আলো
অক্টোবর ২৩, ২০০২

আওয়ামী লীগের তথ্য ও গবেষণা কেন্দ্রে সেনা তল্লাশি
শেখ সেলিম ও সাবের চৌধুরীকে পুলিশ রিমান্ডে এনে জিজ্ঞাসাবাদ

সেনাসদস্যরা গত রোববার রাতে ঢাকায় আওয়ামী লীগ সাংসদ, যুবলীগ চেয়ারম্যান ও সাবেক মন্ত্রী শেখ ফজলুল করিম সেলিম এবং বিরোধীদলীয় নেত্রীর রাজনৈতিক সচিব ও সাবেক উপমন্ত্রী সাবের হোসেন চৌধুরীকে গ্রেপ্তার করেছে। এ দুজনকেই আদালতের মাধ্যমে পুলিশ রিমান্ডে এনে জিজ্ঞাসাবাদ করা হচ্ছে। এ দুই নেতাকে গ্রেপ্তারের পর গত সোমবার বিকেলে সেনাসদস্যরা ধানমন্ডির চার নম্বর সড়কে অবস্থিত আওয়ামী লীগের তথ্য ও গবেষণা কেন্দ্রে (সিআরআই) তল্লাশী চালায়।

সাবের হোসেন চৌধুরীকে আটকের বিরুদ্ধে তার স্ত্রী রেহানা চৌধুরী গত সোমবার হাইকোর্টে রিট করলে আদালত সময়ের বিবেচনায় অপরিপক্ব অভিহিত করে এর শুনানি সাময়িকভাবে স্থগিত করেন। আজ বুধবার এ রিট আবেদনের শুনানী হয় তবে আদালত তাকে যেন নির্যাতন না করা হয় সে ব্যাপারে খেয়াল রাখতে ডেপুটি অ্যাটর্নী জেনারেলকে নির্দেশ দিয়েছেন।

সেলিম ও সাবেরকে গ্রেপ্তারের প্রতিবাদের আওয়ামী লীগ ও যুবলীগের উদ্যোগে গত সোমবার ও NaLjm jwNmhjI h‰hå H¢i¢eEI cm£u Ljর্যালয়ের সামনে বিক্ষোভ মিছিল ও সমাবেশ হয়। সমাবেশ থেকে আগামীকাল বৃহস্পতিবার ঢাকায় অর্ধদিবস হরতাল আহবান করা হয়েছে।

গত রোববার রাত ১১টার দিকে জিয়া আন্তর্জাতিক বিমানবন্দর থেকে সেনাসদস্যরা সাবের হোসেন চৌধুরীকে আটক করে। এ সময় তিনি চিকিৎসাধীন অসুস্থ পিতাকে দেখতে সস্ত্রীক লন্ডন যাচ্ছিলেন। একই রাত ৩টায় সেনাসদস্যরা শুলশানের বাসা থেকে শেখ সেলিমকে আটক করে। শেখ সেলিমের ওই রাতেই দেশের বাইরে যাওয়ার কথা ছিল বলে পুলিশ জানিয়েছে। গ্রেপ্তারের পর প্রথমে সাবের হোসেন চৌধুরীকে আর্মি স্টেডিয়ামে এবং শেখ সেলিমকে ক্যান্টমেন্টে নিয়ে জিজ্ঞাসাবাদ করা হয়। সোমবjI বিকেলে শেখ সেলিমকে গুলশান থানায় এবং সাবের চৌধুরীকে রমনা থানায় হস্তান্তর করা হয়। পুলিশ দুজনকেই ৫৪ ধারায় আটক করে আদালতে পেশ করে এবং রিমান্ডে আনে। পুলিশের ১০ দিনের রিমান্তের আবেদনের শুনানী শেষে পৃথক আদালত শেখ সেলিমকে তিন দিনের এবং সাবের চৌধুরীকে দুই দিনের রিমান্ড মঞ্জুর করেন।

শেখ সেলিম এবং সাবের হোসেন চৌধুরীর বিরুদ্ধে রাষ্ট্রবিরোধী সন্ত্রাসী কর্মকান্ডের পরিকল্পনা করার অভিযোগ আনা হয়েছে। রিমান্ড আবেদনে পুলিশ উল্লেখ করেছে, ঢাকাসহ সারা দেশের সন্ত্রাসীদের সংগে তাদের সম্পৃক্ততা রয়েছে। সন্ত্রাসী কর্মকান্ডের মাধ্যমে তারা চক্রান্তমূলকভাবে রাজনৈতিক স্বার্থ হাসিলের জন্য নানান ষড়যন্ত্রে লিপ্ত।

এই দুই নেতাকে গেপ্তারের পর সেনাসদস্যরা গত সোমবার বিকেলে ধানমন্ডিতে আওয়ামী লীগের তথ্য ও গবেষনা কেন্দ্রে (সিআরআই) অভিযান চালায়। অভিযানকালে তারা কেন্দ্রের কম্পিউটার, ফাইলপত্র, বইপত্র, গভেষনার কাগজপত্র তছনছ করে। এবং কিছু কাগজপত্র নিয়ে গেছে বলে জানা গেছে। গতকাল মঙ্গলবার সিআরআইর প্রধান উপদেষ্টা আবুল মাল আব্দুল মোহিত সেনা সদস্যদের দ্বারা প্রতিষ্ঠানটি থেকে তথ্য ও টাকা জব্দ এবং অফিস সিলগালা করার বিষয়ে ধানমন্ডি থানায় সাধারন ডায়রী করেন। এতে বলা হয় সিআরআই তে সংরক্ষিত নানা তথ্য সম্বলিত ৩০০ টি ফাইল এবং নগদ ২৮, ৫০০/- ViLj ®pej pcpÉIi নিয়ে যায়। এছাড়া তারা ১৩ টি কম্পিউটারের মারাত্মক ক্ষতি সাধন করে। রোববার ৩টার দিকে সেনা সদস্যরা তার বাসায় তল্লাশি চালায় এবং গ্রেফতার করে। তিনি সেনা সদস্যদের কাছে

গ্রেফতারী পরোয়ানা দেখতে চাইলে তারা তা দেখাতে ব্যর্থ হন। তিনি বলেন, একজন সংসদ সদস্য হিসেবে কোন সুনির্দিষ্ট অভিযোগ ছাড়া তাকে গ্রেফতারের কোন এখতিয়ার নেই।

পুলিশ শেখ সেলিমকে ১০ দিনের রিমান্ডের আবেদন জানালে আদালত তিন দিনের রিমান্ড মঞ্জুর করেন। এ সময় শেখ সেলিমের আইনজীবিরা হাকিমের আদেশের বিরুদ্ধে আপীল করতে হাইকোর্টে যাবেন উল্লেখ করে আদেশটি স্থগিত রাখার আবেদন জানান। আদালত তাদের এই আবেদনটি নামঞ্জুর করে।

প্রায় একই সময়ে রমনা থানা পুলিশ সাবের হোসেন চৌধুরীকে মহানগর হাকিম মামুন আল রশিদের আদালতে হাজির করে। এ সময় অনুমতি নিয়ে সাবের হোসেন চৌধুরী আদালতকে বলেন, অসুস্থ পিতাকে তিনি দেখতে লন্ডন যাচ্ছিলেন বিমান বন্দরে ব্যাগেজ চেক করার এক পর্যায়ে সেনা pcpÉl¡ *তাকে আটক করে। তিনি এসময় সেনা সদস্যদের বলেছিলেন জানামতে সেনা বাহিনীকে ম্যাজিস্ট্রেসি ক্ষমতা দেওয়া হয়নি। এ অবস্থায় সেনা সদস্যরা তাকে গ্রেফতার করতে পারেন না। কিন্তু সেনা সদস্যরা তাকে জানান উপরের নির্দেশে তাকে গ্রেফতার করা হচ্ছে। সেনা সদস্যরা তার কাছে থাকা ফ্লিমহীন* HL‰V *ক্যামেরা ও ব্যক্তিগত ব্যবহারের ল্যাপটপ কম্পিটার জব্দ করে।*

গত সোমবার এই দুই নেতার রিমান্ড আবেদনের শুনানী চলাকালে আদালতে সাংসদ আসাদুজ্জামান নুর এবং শেখ সেলিম ও সাবের চৌধুরীর আত্মীয় স্বজন আওয়ামীলীগ ও এর অংগ সংগঠনের কয়েকশ নেতা কর্মী উপস্থিত ছিলেন।

এদিকে সাবের হোসেন চৌধুরীকে আটকের বিরুদ্ধে তার স্ত্রী রেহানা চৌধুরী গত সোমবার হাইকোর্টে রীট করলে আদালত সময়ের বিবেচনায় অপরিপক্ব হিসেবে অভিহিত করেন। এর শুনানী সাময়িকভাবে স্থগিত করেন। আজ বুধবার বিচারপতি এম এ আজিজ ও বিচারপতি মমতাজ উদ্দিন আহমেদের সমন্বয়ে গঠিত হাইকোর্ট বেঞ্চে রীট আবেদনটি শুনানী হইবে।

রিট আবেদনের বিরোধীতা করে অতিরিক্ত অ্যাটনী জেনারেল ব্যারিস্টার ফিদা এম কামাল বলেন, গ্রেপ্তারের পর এখনও ২৪ ঘন্টা পার হয়নি। তাই সময়ের বিবেচনায় আবেদনটি অপরিপক্ব। আটাকাদেশের কোন কপিও নাই। তাই এ আবেদনের শুনানী চলতে পারে না।

আবেদনকারীর পক্ষে অ্যাডভোকেট মাহবুবে আলম বলেন, সাবের চৌধুরী সাধারন আইনশৃঙ্খলা বাহিনীর হাতে নন, তিনি আছেন বিশেষ সংস্থার হাতে। সেখানে তার ওপর নির্যাতনের আশঙ্কা করা হচ্ছে।

জবাবে আদালত বলেন, বিশেষ সংস্থার চেয়ে আদালতের হাত খাটো নয়। কিন্তু অপরিপক্ব আবেদন öe¡e£ pñh euz

প্রথম আলো

অক্টোবর, ২৮, ২০০২

Mme¡u ®pe¡ হেফাজতে অসুস্থ যুবলীগ নেতার ঢাকায় মৃত্যু

খুলনা নগরীতে সেনা হেফাজতে গুরুতর অসুস্থ যুবলীগ নেতা ঠিকাদার মাসুম বিশ্বাস(৩৮) চিকিৎসাধীন অবস্থায় গতকাল রোবার দুপুরে ঢাকা মেডিকেল কলেজ হাসপাতালে মারা গেছেন। গত ২২ অক্টোবর খুলনার কে রোডের রোজ মার্কেটের বাসভবন থেকে সেনারা তাকে (অস্পষ্ট) জিজ্ঞাসাবাদের এক পর্যায়ে তিনি অসুস্থ হয়ে পড়েন।

মাসুমের স্বজনরা জানান, মাসুমকে সেনারা নগরীর শেখ রাসেল স্টেডিয়ামের ক্যাম্পে নিয়ে যায়। পরদিন মারত্মক আহতঅবস্থায় পুলিশের মাধ্যমে তাদের কাছে হস্তান্তর করা হলে তাকে খুলনা মেডিকেল কলেজ হাসপাতালে নিয়ে ভর্তি করা হয়। অবস্থার অবনতি হওয়ায় সেখান থেকে গত ২৫ অক্টোবর ঢাকা মেডিকেল কলেজ হাসপাতালের সার্জারি বিভাগের আট নম্বর ওয়ার্ডে স্থানান্তর করা হয়। সেখানে গতকাল দুপুর দেড়টার দিকে তিনি মারা যান।

মাসুমের ভাবি আনজুমান আরা বেগম অভিযোগ করেছেন, বাসা থেকে সেনারা তাকে ধরে নিয়ে বেধড়ক পেটায়। এতে তার দুই পা থেতলে যায়। (অস্পষ্ট) তিনি জানান মাসুম খুলনা নগরীর যুবলীগের সভাপতি। তার পিতার নাম আবুল হাশাম বিশ্বাস। চার ভাই এক বোনের মধ্যে তিনি দ্বিতীয়।

মাসুম আওয়ামী লীগ সাংসদ শেখা হেলালউদ্দিনের মামাতো ভাই। শেখ হেলাল আওয়ামী লীগের সভানেত্রী ও সংসদের বিরোধীদলীয় নেত্রী শেখ হাসিনার চাচাতো ভাই।

আজ সোমবার ঢাকা মেডিকেল মর্গে মাসুমের লাশের সুরতহাল রিপোর্ট তৈরি হওয়ার পর ময়নাতদন্ত সম্পন্ন হবে।

আমাদের খুলনা অফিস জানায়, মাসুমের মৃত্যু খবর ছড়িয়ে পড়লে গতকাল সন্ধায় আওয়ামীলীগ, যুবলীগ ও ছাত্রলীগ খুলনা নগরীতে বিক্ষোভ মিছিল বের করে। এতে আওয়ামী লীগের অঙ্গসংগঠনের কর্মীদের মাঝে শোকের ছায়া নেমে আসে।

The Daily Star
October 28, 2002

Sheikh Helal's cousin dies following interrogation. Army recovers pistols from former justice's house

Masum Biswas, a Jubo League leader and counsin of Awami League lawmaker Sheikh Helal Uddin, who was picked up by the army for interrogation in Khulna died at the Dhaka Medical College Hospital (DMCH) yesterday.

The 38 year old was admitted to the hospital on Friday morning after being rushed in from Khulna in critical condition.

The morning before the army left him at the Khulna Medical College Hospital after Masum had fallen sick during interrogation at the Mir Nasir Stadium army camp. He was picked up from his second floor residence at Hiraj Market on the Clay Road in the early hours of Tuesday.

`It was the tenth death related to army interrogation in eleven days since the countrywide crackdown on criminals began on October 17.

Also yesterday, the army recovered there pistols and 30 rounds of bullet from the Humayun Road residence of former justice Mahfuzur Rahman in the city's Mohammadpur's area. Two people including justice Rahman's brother-in-law Jafrul Hasan penny a local BNP leader were arrested in this connection.

Our Khulna rorrespondent said accoring to Ashish Kumar Kundu caretaker of the building Masum .....

Sheikh Helal's cousin

lived in an army team went to Masum's house at around 1:00 am and knocked on the door. As Masum opened the door he was asked about his profession and his political background.

Another employee, Ekhlas, told The Daily Star that the army team tied and blindfolded Masum and asked him to hand over illegal fire arms.

When he said he was not in possession of any weapon, the troops started beating him. They also searched the house.

At one stage, Masum said there was a licensed firearm in his brother Shawkat Biswas residence, which was a couple of minutes walk away. The troops then took him to his brother's house. As Shawkat was not home, the army team asked his wife Anjuman Ara Biswas whether there was any firearm in the house.

When she said no they said they would contine to beat her brother in law untill the firearm was handed over to them.

Later, Masum was taken to the army camp at the Sheikh Nasir Stadium.

Next morning, Anjuman Ara handed over a licensed gun to the army, Rommef Biswas, Masum's younger brother told the Daily Star. However, Masum was not released.

On thursday morning the 38 year old Jubo League leader fell sick and was left at the KMCH premises unattended. Next morning as his condition deteriorated his family took him to the DMCH where he died yesterday.

Masum's body was sent to the DMCH morgue for autopsy.

Several photoournalists who went the hospital to take his photograph said the lower part of Masum's body bore marks of severe torture and was damaged.

Masum was not even implicated in any case anywhere in the country his mother told our khulna .....recovery of firearms in Chittagong due to what army sources called change in tactices.
In Mymensingh three people Abul Kalam Azad, Jogindra Chandra Hrishi and Barun Hrishi were arrested in the early house of yesterday.
In Madaripur two leaders of the Jatiyatabadi Chhatra Dal (JCD) Shentu Khan and Mizan Sikder were arrested.
Seventy-two criminals were hauled up during a joint drive in the southwestern districts of Barisal, Bhola, Jhalakathi, Patuakhali, Barguna and Shariatpur.
Of them 14 each were arrested from Barisal and Bhola, three from Jhalakathi nine from Patuakhali 11 from Barguna, nine from Shariatpur and 12 from Madaripur . In Sylhet 13 people including an identified criminal were arrested. In Gaibandha 16 people were hauled up in the last two days. Also arrested was a Jubo Dal leader from Bogra.
So far, the army has arrested 2,928 people including 1,027 listged criminals and seized 302 firearms alongwith 7,456 rounds of ammunition since the drive began on October 17.

79. Aaxfl তৎকালীন রাষ্ট্রপতি কর্তৃক যৌথ অভিযান দায়মুক্তি অধ্যাদেশ, ২০০৩ জারীর পরবর্তী সময়ে পত্র- f¢œLiu যেসব রিপোর্ট প্রকাশিত হইয়াছিল যাহা দরখাস্তকারী অত্র দরখাস্তের সহিত সংযুক্তি করিয়াছেন সেইসব হইতে কয়েকটি নিম্নে A¢hLm Ae¢m¢Me qCmx-

SeLã, a¢lMx Sieuj l¦ 10.2003
অবশেষে ক্লিনহার্টের ইনডেমনিটি দেয়া ।
যৌথ অভিযানে মৃত্যু-নির্যাতন নিয়ে মামলা করা যাবে না
অধ্যাদেশ জারি

আহমেদ দীপু

বাংলাদেশের ইতিহাসে এ নিয়ে দু বার এই দায়মুক্তি (ইনডেমনিটি) অধ্যাদেশ জারি করা হলো। প্রথমবার করা হয়েছিল জাতির জনক বঙ্গবন্ধু হত্যার পর তার খুনীদের রোহাই দেয়ার জন্য। The Indemnity Ordinance, 1975 (L of 1975, kiqi XLX of 1975 নম্বরে মুদ্রিত), অতঃপর উক্ত Ordinance বিগত আওয়ামী লীগ সরকারের আমলে অবশ্য সংসদে তা বাতিল কিরে বঙ্গবন্ধুর খুনীদের বিচারের পথ উন্মুক্ত করে দেয়া হয়। The Indemnity (Repeal) Act, 1996 এখন অপারেশন ক্লিনহার্ট এর ৮৫ দিনের মাথায় এই অভিযান চলাকালে মৃত্যু ও নির্যাতনের বিচারের হাত থেকে সংশ্লিষ্টদের রেহাই দেয়ার জন্য ¢àaL¡ য়ে ইনডেমনিটি অধ্যাদেশ জারি করা হলো তাও চ্যালেঞ্জযোগ্য বলে আইনজীবীরা মত দিয়েছেন। দেশের শীর্ষস্থানীয় আইনজীবী ড. কামাল হোসেন গত রাতে বিবিসিকে বলেছেন, যে কেউ আদালতে এই অধ্যাদেশ চ্যালেঞ্জ করতে পারেন। সংবিধান বিশেষজ্ঞ ব্যারিস্টার রোকনউদ্দিন মাহমুদ এই ইনডেমনিটিকে pw¢hdjeh¢ হর্ভূত বলে আখ্যায়িত করে জনকন্ঠকে বলেন, আইনগত ভিত্তি ছাড়াই সেনাবাহিনী নামানো হয়েছে এবং যাদের কর্মকান্ডের আইনগত ভিত্তিই নেই তারা ইনডেমনিটি পেতে পারে না ।

অধ্যাদেশে যা রয়েছে

যৌথ অভিযান কৃত যাবতীয় কার্যাদির জন্য দায়মুক্তি। আইন শৃঙ্খলা বাহিনী ও তার সদস্যগণ সম্পর্কিত সকল BCepq আপাতত বলবত অন্য কোন আইনে বা আদালতে কোন রায়ে যাই থাকুক না কেন, অধ্যাদেশে বর্ণিত বিষয় প্রযোজ্য হবে।

যৌথ অভিযানে কৃত যাবতীয় কার্যাদির জন্য দায়মুক্তি সংক্রান্ত অধ্যাদেশের দফা (ক) তে বলা হয়েছে ১৬ অক্টোবর ২০০২ থেকে ৯ জানুয়ারী ২০০৩ কার্যদিবস পর্যন্ত সময়ের মধ্যে দেশের আইনশৃঙ্খলা Mmj lrjl প্রয়োজনে বেসামরিক প্রশাসনকে সহায়তা প্রদানের জন্য সরকার কর্তৃক ১৬ অক্টোবর তারিখে প্রদত্ত আদেশ এবং তৎপরবর্তী সময়ে প্রদত্ত সকল আদেশ, উক্ত আদেশসমুহ বাস্তবায়নের জন্য কৃত যাবতীয় কার্য এবং উক্ত আদেশসমুহ বলে ও অনুসারে যৌথ অভিযানে নিয়োজিত শৃঙ্খলা বাহিনীর কোন সদস্য বা যৌb অভিযানের অন্য কোন সদস্য বা দায়িত্বপ্রাপ্ত অন্য কোন ব্যক্তি কর্তৃক উক্ত সময়ের মধ্যে তাহার দায়িত্ব

বিবেচনায় প্রদত্ত আদেশ,প্রয়োজনে বিচার বিভাগকে এ ব্যাপারে স্বতঃ প্রণোদিত হয়ে উদ্যোগ নিতে তিনি অনুরোধ করেন।

SeLã
11, Sjeuj l‡, 2003

ইনডেমনিটি জারি করে সরকার জাতির সংগে বেইমানি করেছে, সংবিধান রক্ষায় একাট্টা হোন। ড. কামাল

যে সরকার সংবিধান লঙ্ঘন করে সংবিধানকে নিষ্ক্রিয় কার চেষ্টা করে সে সরকার একটি বেয়াদব সরকার। বেইমান সরকার সংবিধান লঙ্ঘন করে যেনতেনভাবে একটি ঘোষনা দিয়ে সংবিধানকে ভুলুণ্ঠিত করার জন্য চেষ্টা চালানো হচ্ছে। তিনি দেশবাসীর প্রতি দেশ বাঁচাও, সংবিধান বাঁচাও স্লোগান তুলে, এ স্লোগানের পতাকাতলে বৃহত্তর ঐক্য গড়ার ঘোষনা দেন।
তিনি বলেন, সংবিধান ৪৬ ও ২৭ অনুচ্ছেদ অহরহ লঙ্ঘন চলছেই। ৫৪ ধারার নামে যেভাবে গণহারে গ্রেফতার করা হচ্ছে, তা সংবিধানে সম্মত কি-না তিনি প্রশ্ন রাখেন। এ ৫৪ ধারার অপপ্রচার তিনি অবিলম্বে বন্ধের জন্য সরকারের প্রতি আহবান জানান। সংবিধান লঙ্ঘন হলে জনগনেণর জানমালের নিরাপত্তা থাকবে না বলে উল্লেখ করেন। বর্তমান জোট সরকার আইনশৃঙ্খলা উন্নতি করবে বলে ক্ষমতায় এসে কি করছে? সরকার শপথ পালন করার কথা বলে শপথ ভঙ্গ করছে।

SeLã
Sjeuj l‡-11, 2003

ইনডেমনিটি অধ্যাদেশ সম্পর্কে বিভিন্ন মহলে ক্ষুব্ধ প্রতিক্রিয়াঃ
যৌথ অভিযানকে দায়মুক্ত করে জারি করা ইনডেমনিটি অধ্যাদেশ বিরোধীদল তো বটেই আইনজীবি মহলেও বিরুপ প্রতিক্রিয়া ও বিতর্কের সৃষ্টি করেছে। তাঁরা বলেছেন, মানুষ খুনের লাইসেন্স দেয়ার এই আইন সভ্য সমাজের উপযোগী নয় এবং তা খারাপ দৃষ্টান্ত হয়ে থাকবে। দেশের শীর্ষস্থানীয় আইনজীবিরা বলেছেন, এই অধ্যাদেশ চ্যালেঞ্জযোগ্য এবং এর মাধ্যমে যে দায়মুক্তি দেয়ার কথা বলা হয়েছে তা অন্তত সুপ্রীমকোর্টের ক্ষেত্রে প্রযোজ্য নয়। ফলে এই অধ্যাদেশটি সুপ্রীমকোর্টে চ্যালেঞ্জের মুখে পড়তে পারে বলে আভাস পাওয়া গেছে।
এদিকে যৌথ অভিযান ইনডেমনিটি অর্ডিন্যান্সের কঠোর সমালোচনা করে জাতীয় সংসদের বিরোধীদলীয় নেত্রী শেখ হাসিনা বলেছেন, দেশ চালাতে ব্যর্থ হওয়ার পর সেনাবাহিনীকে দিয়ে যে অপকর্ম করানো হয়েছে অধ্যাদেশ জারির মাধ্যমে তার দায় থেকে রেহাই পাওয়া যাবে না। এই অধ্যাদেশকে সংবিধান পরিপন্থি এবং মানবাধিকারের চরম লঙ্ঘন বলে অভিযুক্ত করে তিনি বলেন, যৌথ অভিযানের নামে ৫০ জনকে হত্যা এবং প্রায় ৪ হাজার মানুষকে চিরদিনের জন্য পঙ্গু করে দেয়ার দায়দায়িত্ব প্রধনমন্ত্রীকেই নিতে হবে। এই অধ্যাদেশ সংসদে উত্থাপন করা হলে আওয়ামী লীগ এর বিরুদ্ধে দলীয় অবস্থান নেবে বলেও তিনি উল্লেখ করেন। বঙ্গবন্ধুর স্বদেশ প্রত্যাবর্তন দিবসের কর্মসূচীতে যোগ দিতে ঢাকা থেকে টুঙ্গিপাড়া যাওয়ার পথে ফেরিতে অবস্থানকালে শেখ হাসিনা সাংবাদিকদের এসব কথা বলেন। এছাড়া ঢাকায় বিভিন্ন রাজনৈতিক দল ও সামাজিক, সাংস্কৃতিক সংগঠন যৌথ অভিযান দায়মুক্তি অধ্যাদেশের কঠোর সমালোচনা করে বলেছেন, এই অধ্যাদেশ সংবিধানবিরোধী, মানুষ হত্যার লাইসেন্স।
আইনমন্ত্রী ব্যারিস্টার মওদুদ আহমদ অধ্যাদেশটি জারির দিন বৃহস্পতিবারই সাংবাদিকদের বলেছেন, সংবিধানের ৪৬ অনুচ্ছেদ অনুযায়ী এই অদ্যাদেশ জারি করা হয়েছে। কিন্তু ওই অনুচ্ছেদ অনুযায়ী এ ধরনের অধ্যাদেশ জারি করা যায় কিনা তা নিয়ে আইনজীবীদের মধ্যে বিরোধী ও বিতর্ক রয়েছে। তবে এটি যে চ্যালেঞ্জযোগ্য তা নিয়ে কারও দ্বিমত নেই। প্রবীন আইনজীবী, সাবেক এ্যাটর্নি জেনারেল ব্যারিস্টার রফিকুল হক এ ধরনের ইনডেমনিটি দেয়া ছাড়া সরকারের কোন উপায় ছিল না বলে মন্তব্য করার পরও বলেছেন, এটি আদালতে চ্যালেঞ্জ করা যেতে পারে শুক্রবার জনকণ্ঠের সঙ্গে আলাপকালে তিনি আরও বলেন, আইন করে যৌথ অভিযানের সকল কর্মকান্ডকে বিচারের উর্ধে রাখা হলেও ক্ষতিপূরন চেয়ে সরকারের বিরুদ্ধে ক্ষতিগ্রস্তদের মামলা করার সুযোগ সব সময়ই রয়েছে।
শীর্ষস্থানীয় আইনজীবী, সংবিধান বিশেষজ্ঞ ব্যারিস্টার রোকনউদ্দিন মাহমুদ জনকণ্ঠকে বলেন, ক্ষতিগ্রস্তরা শুধু ক্ষতিপূরন চেয়ে মামলাই নয়, তারা অধ্যাদেশটি চ্যালেঞ্জ করে সুপ্রীমকোর্টে মামলা করলে তা শক্ত মামলা হবে। অধ্যাদেশটির তীব্র সমালোচনা করে তিনি বলেন, এর মাধ্যমে দুটি বিষয় প্রকাশ পেল। প্রথমত, সরকার স্বীকার করে নিল যে, যৌথ অভিযানের আওতায় কিছু অপরাধ সংঘটিত হয়েছে, যা নিয়ে ভবিষ্যত ফৌজদারী

মামলা হতে পারত, দ্বিতীয়ত, এই অধ্যাদেশের মাধ্যামে মানুষ খুন করার লাইসেন্স দেয়া হলো, যা খুবই খারাপ উদাহরণ হয়ে থাকবে। তিনি আরও বলেন, সংবিধান রাষ্ট্রপতিকে অধ্যাদেশ জারি করার ক্ষমতা দিয়েছে ঠিকই, তবে একই সংবিধান সংক্ষুব্ধ কারও আবেদনের পরিপ্রেক্ষিতে সুপ্রীমকোর্টকে যে কোন অধ্যাদেশ বা আইনের বৈধতা নির্ধারনের এখতিয়ারও দিয়েছে। তিনি বলেন, এখন যে অধ্যাদেশ জারি করা হয়েছে সেটিসহ কোন অধ্যাদেশ বা আইনই সুপ্রীমকোর্টের এই এখতিয়ারকে খর্ব করতে পারে না। উল্লেখ্য দেশের শীর্ষ আইনজীবি ড. কামাল হোসেন ইতোমধ্যেই বলেছেন, যে কোউ চাইলেই এই অধ্যাদেশ চ্যালেঞ্জ করতে পারেন। সাবেক আইনমন্ত্রী, আওয়ামী লীগ নেতা এ্যাডভোকেট আব্দুল মতিন খসরু সময়ই আওয়ামী লীগ সভানেত্রী বলেছিলেন, সংবিধান ও মানবাধিকার সমুন্নত রেখে এ অভিযান পরিচালিত হলে তা সমর্থনযোগ্য। কিন্তু বাস্তবে দেখা গেছে সেনাবাহিনীকে নিরপেক্ষভাবে কাজ করতে দেয়া হয়নি, বরং দলীয় স্বার্থে ব্যবহারের চেষ্টা করা হয়েছে। তিনি বলেন, খুন কখনও বিচারের হাত থেকে দায়মুক্তি পেতে পারে না খুনের লাইসেন্স দিয়ে আইন প্রণয়নের ক্ষমতাও সংবিধান কাউকে দেয়নি। তিনি আরও বলেন, সেনাবাহিনী জাতীয় সম্পদ তাদের বিরুদ্ধে আমাদের কোন অভিযোগ নেই আমাদের অভিযোগ কতিপয় অপরাধের বিরুদ্ধে। এসব অপরাধকে মাফ না করে উপযুক্ত তদন্তের মাধ্যমে বিচার করা হলে সেনাবাহিনীর ভাবমূর্তি ক্ষুন্ন না হয়ে বাড়বে বলে মন্তব্য করেন তিনি। সাবেক আইনমন্ত্রী বলেন, সন্ত্রাস দমনের লক্ষ্যে কঠোর পদক্ষেপ আমরা সব সময়ই সমর্থন করি, তবে তা সংবিধান মৌলিক ও মানবাধিকারসম্মত হতে হবে। বর্তমান আইনমন্ত্রীর দাবি অনুযায়ী সংবিধানের ৪৬ অনুচ্ছেদের আওতায় আলোচ্য ইনডেমনিটি অধ্যাদেশটি জারির বৈধতা নিয়েই বিতর্ক রয়েছে। এ ব্যাপারে ব্যারিষ্টার রোকন, এ্যাডভোকেট মতিন খসরুর বক্তব্য আগেই উল্লেখ করা হয়েছে। এমনকি দেশের অপর এক সংবিধান বিশেষজ্ঞ ড. জহির অধ্যাদেশটি ভালমতো পড়ে দেখার আগে এ বিষয়ে কোন মন্তব্য করতে না চাইলেও এটি সংবিধানের ওই অনুচ্ছেদসম্মত কিনা তা নিয়ে তারও সন্দেহ রয়েছে বলে জানান। তবে ব্যারিষ্টার রফিকুল হকের মতে, বঙ্গবন্ধু শেখ মজিব হত্যা কান্ডকে যে ইনডেমনিটি দেয়া হয়েছিল তা ৪৬ অনুচ্ছেদ সম্মত ছিল না, কিন্তু এখন যেটা করা হয়েছে তার আইনগত ভিত্তি রয়েছে। তিনি বলেন, ইনডেমনিটি দেয়া ছাড়া সরকারের বিকল্প কিছু ছিল না কারণ খুনের অভিযোগ মাথায় নিয়ে সেনাবাহিনী ব্যারাকে ফিরত না। পাশাপাশি তিনি বলেন, আর্মি এ্যাক্টে এমনিতেই এ ধরনের ইনডেমনিটি বিধান রয়েছে, তা নটিফাই করলেই চলত, নতুন করে ইনডেমনিটি অধ্যাদেশ জারি করার প্রয়োজন ছিল না। সরকার সম্ভবত তা জানে না তিনি মন্তব্য করেন। তবে তিনি এ কথাও বলেন, যে অধ্যাদেশ জারি করা হয়েছে তা সব সময়ই চ্যালেঞ্জযোগ্য। আর নিহত ও নির্যাতিতদের পরিবারের তরফে ক্ষতিপূরন চেয়ে সরকারের বিরুদ্ধে মামলার সুযোগ ও সবসময়ই রয়েছে।

B/J f¡lœ²u¡

যৌথ অভিযান দায়মুক্তি অধ্যাদেশ সম্পর্কে নিজের প্রতিক্রিয়া ব্যক্ত করতে গিয়ে সফর সঙ্গী সাংবাদিকদের কাছে শেখ হাসিনা আরও বলেন, বিচার পাওয়া প্রতিটি মানুষের সাংবিধানিক অধিকার। অধ্যাদেশ জারির মাধ্যমে সেই অধিকার হরন অবশ্যই সংবিধান বিরোধী এবং মানবাধিকারের সুস্পষ্ট লংঘন। তিনি বলেন, সেনা অভিযানে যেসব মা-বাবা তাদের সন্তান হারিয়েছে, যে বোন তার ভাইকে হারিয়েছে, যে স্বামী তার স্ত্রীকে হারিয়েছে তাদের বিচার চাওয়ার অধিকার রয়েছে। অধ্যাদেশ জারির মাধ্যমে তাদের বিচার পাওয়ার পর কেউ রুদ্ধ করতে পারে না। বর্তমান সরকারকে দেশ পরিচালনায় ব্যর্থ উল্লেখ করে তিনি বলেন, সন্ত্রাস দমনের নামে বিরোধী দলীয় নেতা কর্মীদের নির্যাতন করা ছাড়াও অনেক নিরীহ মানুষকে হত্যা করা হয়েছে। এসব হত্যার দায় এড়াতেই জারী করা হয়েছে অধ্যাদেশ। মূলত অবৈধভাবে সেনাবাহিনী নামানোর পরও তারা সন্ত্রাস দমনে সম্পূর্ণ ব্যর্থ হয়েছে।

ইনডেমনিটি অধ্যাদেশের প্রতিক্রিয়ায় বাংলাদেশের ওয়াকার্স পার্টির সভাপতি রাশেদ খান মেনন ও সাধারন pÇf¡cL ¢hjm ¢বশ্বাস এক বিবৃতিতে বলেছেন, যৌথ অভিযানে হত্যা ও নিপিড়নের দায় থেকে নিজের চামরা বাঁচানোর অপপ্রায়াসের অংশ হিসেবেই জোট সরকার এই অধ্যাদেশ জারির ব্যবস্থা করছে। আইন শৃঙ্খলা রক্ষার নামে সামরিক বাহিনী নিয়োগ ও তারা যেভাবে কাজ করেছে জোট সরকার কখনও সেটার ®L¡e BCeNa ®hd ¢ভত্তি দেখাতে পারেনি। এই অধ্যাদেশের মাধ্যমে সেই বেআইনী কাজের বিরুদ্ধে জনগনের অভিযোগ করার ও বিচার চাওয়ার অধিকার হরন করা হলো। বিবৃতিতে তারা এটাকে সংবিধান ও মানবাধিকার পরিপন্থী এবং মানুষ হত্যার লাইসেন্স উল্লেখ করে বলেন বিএনপি জামায়াত জোট এদেশের জনগনের রক্তে হাত রঞ্জিত করেই রাজনৈতিক প্রতিষ্ঠা পেয়েছে। এই অধ্যাদেশের মাধ্যমে তাদের মানুষ হত্যার রাজনীতির ক্ষেত্রে নতুন অধ্যায় সংযোজিত হলো মাত্র। তারা অবিলম্বে এই কালো অধ্যাদেশ প্রত্যাহার এবং সেনা অভিযানে হত্যা ও নিপিড়নের ঘটনাবলী তদন্তের মাধ্যমে বিচার করার দাবি জানান।

বাংলাদেশের কমিউনিষ্ট পার্টির সভাপতি মঞ্জুরুল আহসান খান ইনডেমনিটি অধ্যাাদেশকে সংবিধান বিরোধী উল্লেখ করে অবিলম্বে এটা বাতিলের দাবি জানিয়েছেন। পার্টির মাসব্যাপী জনজাগরন কর্মসূচীর অংশ হিসেবে

öœ²hi¡l Yi¡L¡ -চট্টগ্রাম মহাসড়কের বিভিন্ন স্থানে আয়োজিত পথসভায় তিনি বলেন এ অধ্যাদেশ আইনের ni¡pe J NZai¢¿L hÉhÙ¡ f¤ë¤ষ্ঠার পথে অন্তরায় সৃষ্টি করবে।

প্রথম আলো
S¡eu¡l¢ 10, 2003

যৌথ অভিযান দায়মুক্তি অধ্যাদেশ জারি

মৃত্যসহ ক্ষতি ও অধিকার ক্ষুণ্নের প্রশ্নে আদালতে মামলা চলবে না, ----------

প্রায় তিন মাস সন্ত্রাসের বিরুদ্ধে পরিচালিত যৌথ অভিযানে নিয়োজিত সেনাবাহিনী, নৌবাহিনী, বিডিআর, f¢mn, Ai¡nসারসহ আইনশৃঙ্খলা বাহিনীর সদস্যদের সকল কর্মকান্ডকে দায়মুক্ত করা হয়েছে (ইনডেমনিটি)। গতকাল বৃহস্পতিবার রাতে রাষ্ট্রপতি প্রফেসর ড. ইয়াজউদ্দিন আহম্মেদ যৌথ অভিযান দায়মুক্তি অধ্যাদেশ ২০০৩ জারি করেছেন। এর ফলে যৌথ অভিযানকালে সংঘটিত কোনো ঘটনার ব্যাপারে কোনো আদালত কোনো মামলা বা কোনো প্রশ্ন তোলা যাবে না।

একই সংগে সেনাবাহিনীকে শনিবার অপরাহ্নের মধ্যে জেলা ও উপজেলা থেকে প্রত্যাহারের সিদ্ধান্ত হয়েছে। গতকাল বৃহস্পতিবার সংশ্লিষ্ট সব বাহিনীকে এ সিদ্ধান্ত জানিয়ে দেওয়া হয়।

এর আগে দুপুরে অনুষ্ঠিত মন্ত্রিসভার বিশেষ বৈঠকে এ অধ্যাদেশ অনুমোদন এবং যৌথ অভিযানে সেনাবাহিনী ও নোবাহিনীর ভূমিকা পুনর্নির্ধারণের সিদ্ধান্ত হয়।

যৌথ অভিযানে সন্ত্রাস হ্রাস ও আইনশৃঙ্খলা পরিস্থিতির দৃশ্যত উন্নতি হলেও সে সময় সেনাদের হাতে গ্রেপ্তারের পর ৪৩ ব্যক্তির মৃত্যু, অনেকের ওপর নির্যাতন ও আইনের সীমার অতিরিক্ত সময় আটক রাখা প্রভৃতি মানবাধিকার লঙ্ঘনের অভিযোগ ওঠে।

জারি করা অধ্যাদেশে গত ১৬ অক্টোবর ২০০২ থেকে গতকাল ৯ জানুয়ারী ২০০৩ কার্যদিবস পর্যন্ত ৮৬ দিন যৌথ অভিযানে নিয়োজিত সেনাবাহিনী নৌবাহিনী বিডিআর পুলিশ এবং আনসার বাহিনীর সদস্যের কর্মকান্ডেকে দায়মুক্ত করা হয়।

আইন ও সংসদ বিষয়ক মন্ত্রী মওদুদ আহমেদ অবশ্য বলেছেন, পরিধি ও প্রক্রিয়া পুনর্নির্ধারণ করে যৌথ অভিযান চলবে। গতকাল সংবাদ ব্রিফিংয়ে তিনি অধ্যাদেশকে সংবিধানসম্মত অভিহিত করে বলেন, সংসদে পাস করানোর সময় তিনি অধ্যাদেশ জারির কারণ বিস্তারিত ব্যাখ্যা করবেন।

গতকাল অনুষ্ঠিত মন্ত্রীসভার বিশেষ বৈঠকে অপারেশন ক্লিনহার্ট নামে পরিচালিত (অস্পষ্ট) সভাপতিত্বে বৈঠকে মন্ত্রিসভার সদস্য ও সংশ্লিষ্ট সচিবরা উপস্থিত ছিলেন।

আদেশে যা আছেঃ গতকাল রাতে জারি করা অধ্যাদেশে বলা হয়েছে দেশের আইনশৃঙ্খলা রক্ষার প্রয়োজনে বেসামরিক প্রশাসনকে সহায়তা প্রদানের জন্য সরকার কর্তৃক ১৬ অক্টোবর দেওয়া আদেশ এবং পরবর্তী সময়ে দেওয়া সকল আদেশ বাস্তবায়নে যৌথ অভিযানে নিয়োজিত আইনশঙ্খলা বাহিনীর সদস্য বা দায়িত্বপ্রাপ্ত বাক্তিদের তাদের দায়িত্ব বিবেচনায় দেওয়া আদেশ, আটক, গ্রেপ্তার, তল্লাশি ও জিজ্ঞাসাবাদসহ সকল প্রকার কাজ ও গৃহীত ব্যবস্থা থেকে সম্পুর্ণ দায়মুক্ত করা হলো। প্রচলিত আইন ও আদেশসমুহে যাই থাকুক এ দায়মুক্তি (অস্পষ্ট) জানমালের কোন ক্ষতি হলে কারো অধিকার ক্ষুণ্ন হলে কেউ আর্থিকভাবে ক্ষতিগ্রস্থ হলে, কেউ শারীরিক বা মানসিকভাবে ক্ষতিগ্রস্ত হলে বা কেউ অন্য কোনোভাবে সংক্ষুব্ধ হলে তার জন্য আদেশ প্রদানকারী বা কার্যনির্বাহী বা শৃঙ্খলা বাহিনীর কোনো সদস্য বা সরকারি কর্মকর্তার বিরুদ্ধে কোনো আদালতে কোনো প্রকার দেওয়ানি বা ফৌজদারি মামলা করা যাবে না বা কোনো আদালতে কোনো প্রকার দেওয়ানী বা ফৌজদারী মামলা করা যাবে না বা কোনো আদালতে কোনো প্রকার আইনগত কার্যধারা চলবে না। এ সম্পর্কে কোনো আদালতের কাছে কোনো অভিযোগ বা প্রশ্ন উত্থাপন করা যাবে না। এ ব্যাপারে কোনো মামলা হলে বা কোনো রায় বা আদেশ বা সিদ্ধান্ত দেওয়া হলে তা বাতিল, অকার্যকর হবে বা হয়েছে বলে গণ্য হবে। (অস্পষ্ট) বর্তমান সরকার কাজ শুরু করে আইনশৃঙ্খলার উন্নতির জন্য সরকার বেশ কিছু প্রশাসনিক ও আইন প্রণয়ন সংক্রান্ত পদক্ষেপ গ্রহণ করে।

তিনি বলেন সরকার আইশৃঙ্খলার উন্নতি করতে বদ্ধপরিকর অবনতিশীল আইনশৃঙ্খলার প্রেক্ষাপটে পুলিশের সীমাবদ্ধতার কারণে অভ্যন্তরীণ নিরাপত্তা জনগণের নিরাপত্তা, সন্ত্রাস দমন ও অবৈধ অস্ত্র উদ্ধারের জন্য বিশেষ পদক্ষেপ গ্রহণ অপরিহার্য হয়ে পড়ে।

আইনমন্ত্রী বলেন, সরকার জনস্বার্থে ১৬ অক্টোবর, ২০০২ আদেশবলে বেসাবরিক প্রশাসনকে সহায়তা প্রদানের জন্য প্রতিরক্ষা বাহিনী, বিডিআর, পুলিশ আনসার বাহিনীসহ বেসারিক প্রশাসনের সংগে সমন্বয়ের মাধ্যমে যৌথ অভিযান(অস্পষ্ট)।

SeLã
S¡eu¡l¢ 10, 2003

সেনা নামনোই ছিল অবৈধ তার আবার দায়মুক্তি কিসের

যৌথ অভিযানে বিভিন্ন মৃত্যুর ঘটনার প্রেক্ষপটে বৃহস্পতিবার জারিকৃত দায়মুক্তি অধ্যাদেশে বা ইনডেমনিটি অর্ডিন্যান্সের প্রতিবাদ জানিয়েছে বিভিন্ন মহল। দেশের শীর্ষ সংবিধান বিষেশজ্ঞ ড. কামাল হোসেন বলেছেন, কেউ চাইলে অবশ্যই অধ্যাদেশটির আইনগত বৈধতা চ্যালেঞ্জ করতে পারেন। প্রধান বিরোধী দল আওয়ামী লীগের সাধারণ সম্পাদক আব্দুল জলিল বলেছেন এই অধ্যাদেশ দেশের সাংবিধান ও মৌলিক অধিকার পরিপন্থী। এর মাধ্যমে মানুষের আইনের আশ্রয় নেয়ার সাংবিধানিক অধিকার খর্ব হলো। গণতান্ত্রিক দল হিসাবে আমরা এ ধরনের অধ্যাদেশ সমর্থন করতে পারি না।

তিনি বলেন, আর মাত্র কয়েক দিন পরই জাতীয় সংসদে অধিবেশন। সরকার চাইলে সেখানে আলোচনা করেই এ ব্যাপারে একটা সিদ্ধান্ত নিতে পারত। তা না করে এখন অধ্যাদেশ জারি করায় প্রমাণিত হলো যে, ক্ষমতাসীনরা সংসদীয় গণতন্ত্রে বিশ্বাস করে না এবং বা সংসদকে কার্যকর করতে চায় না। জারিকৃত অধ্যাদেশের বিরুদ্ধে তারা কি ধরনের পদক্ষেপ নেবে জানতে চাইলে আওয়ামী লীগের নতুন এই সাধারণ সম্পাধক বলেন, দলীয় ফোরামে আলোচনা করেই আমরা সেই সিদ্ধান্ত নেব। এ ছাড়া সংসদের আসন্ন A¢ধবেশনে বিষয়টি উত্থাপিত হলে আমরা আলোচনায় অংশ নেব এবং সরকারের এই পদক্ষেপের প্রতিবাদ জানাব। জাতীয় সমাজতান্ত্রিক দল জাসদ একাংশের সভাপতি হাসানুল হক ইনুও বুধবার জারিকৃত দায়মুক্তি অধ্যাদেশের সমালোচনা করেছেন। তিনি বলেন, এর ফলে মানুষ আইনের আশ্রয় লাভের সাংবিধানিক অধিকার থেকে বঞ্চিত হবে।

এদিকে বাংলাদেশের সংবিধান প্রণেতাদের অন্যতম ড. কামাল হোসেন এ প্রসংগে বিবিসিকে দেয়া তাৎক্ষণিক এক প্রতিক্রিয়ায় বলেছেন, বিশেষ কিছু পরিস্থিতিতে এ ধরনের দায়মুক্তি দেয়ার বিধান সংবিধানের ৪৬ ধারায় দেয়া রয়েছে। কি কি অবস্থায় এ ধরনের ব্যবস্থা নেওয়া যেতে পারে তার সীমারেখাও নির্দিষ্ট করা রয়েছে তাতে। সরকার যদি এ ধরনের ব্যবস্থা গ্রহনের প্রয়োজনীয়তা অনুভব করে থাকে তাহলে তা সংসদে আলোচনার মাধ্যমেই করতে পারত। সেখানকার আলোচনায়ই স্পষ্ট হয়ে যেত যে ব্যাপারটা ৪৬ ধারা সীমারেখার মধ্যে আছে কিনা। অধ্যাদেশ জারির মাধ্যমে তো এমন কিছু করার কথা নয়। তিনি বলেন, সরকারের দায়িত্ব ছিল যেসব মৃত্যুর ঘটনা ঘটেছে সেগুলো তদন্ত করে সেই তদন্ত রিপোর্টের আলোকে ব্যবস্থা নেয়া। মানুষ ছিলও এমন কিছুর অপেক্ষায়। এক প্রশ্নের জবাবে তিনি বলেন, জারীকৃত অধ্যাদেশের আইনগত বৈধতা চ্যালেঞ্জ করা যেতে পারে। কেউ চাইলে তা করতে পারবে। বাংলাদেশ সুপ্রীমকোর্টের আরেক শীর্ষ আইনজ্ঞ ব্যারিষ্টার রোকন উদ্দিন মাহমুদ বলেছেন, সেনাবাহিনীকে যে কাজে নামানো হয়েছিল তা ছিল অবৈধ, তার কোন আইনগত ভিত্তি ছিল না। এ কাজের কোন দায়মুক্তি হতে পারে না। কারণ সেনাবাহিনীকে কারও বাড়ীতে তল্লাশি, কাউকে গ্রেফতার, নির্যাতন বা কোন ঘটনা তদন্তের এখতিu¡l ®cu¡ qu¢ez আইনশৃঙ্খলা রক্ষার কথা বলে তাদের ব্যবহার করা হয়েছে। এই কাজ করতে গিয়ে তারা কিছু লোককে মেরে ফেলে, এটা সাধারণ অপরাধ। আইনগত ক্ষমতার বাইরে তারা এ কাজ করেছ। এ ধরনের কাজের জন্য তাদের দায়মুক্তি দেয়া যায় না।

80. এই রুলটিতে একমাত্র প্রশ্ন উত্থাপিত হইয়াছে তথা HLj¡œ ¢hQ¡k ¢hou qCm HC ®k, ®k‡b A¢ik¡e c¡uj¢š² BCe, ২০০৩ সংবিধানের বিধি বিধান সাপেক্ষে প্রণীত হইয়াছে কিনা?

81. প্রথমেই আমাদের সংবিধানের প্রথম ভাগের অনুচ্ছেদ ১ দেখা অতীব গুরুত্বপূর্ণ বলিয়া নিম্নে অনুলিখন হইল।

f§¡a¿	১। *বাংলাদেশ একটি একক, স্বাধীন ও সার্বi‡j f§¡a¿, k¡q¡ "গণপ্রজাতন্ত্রী বাংলাদেশ" নামে পরিচিত হইবে।*

82. অনুচ্ছেদ ১ টি সরলভাবে পাঠ করিলে ইহা কাঁচের মত স্বচ্ছ যে, এই দেশটি গণপ্রজাতন্ত্রী বাংলাদেশ। অর্থাৎ এই দেশটি qCm SeNe à¡l¡ n¡¢oa HL¢V l¡ø£

83. অতঃপর সংবিধাœl 7 Aeচ্ছদটি পর্যালোচনা করা Aa¡h ...l¦afZ h¢mu¡ ¢eম্নে অনুলিখন করা হইলঃ

pw¢hd¡নের প্রাধান্য	*7z(1) f§¡aজ্রের সকল ক্ষমতার মালিক জনগণ; এবং জনগণের পক্ষে সেই r ja¡l f§¡N কেবল এই সংবিধানের অধীন ও কর্তৃত্বে কার্যকর হইhz*

> *(2) SeNণের অভিপ্রায়ের পরম অভিব্যক্তিরূপে এই সংবিধান প্রজাতন্ত্রের pর্বোচ্চ আইন এবং অন্য কোন আইন যদি এই সংবিধাel p¢qa Apj"p qu, a¡q¡ qCলে সেই আইনের যতখানি অসামঞ্জস্যপূর্ণ, ততখানি বাতিল হই-বে।*

84. উপরোক্ত অনুচ্ছেদ ৭(১) পর্যালোচনায় ইহা পরিস্কার যে, গণপ্রজাতন্ত্রী বাংলাদেশে সকল ক্ষমতার মালিক জনগন এবং জনগন তাহাদের এই ক্ষমতা প্রয়োগ এবং কার্যকর করিবেন এই সংবিধানের অধীন ও কর্তৃত্বে। অর্থাৎ আমাদের এই দেশে সর্বোচ্চ আইন তথা মূল আইন তথা মৌলিক আইন তথা সর্বশ্রেষ্ঠ আইন হইল আমাদের এই সংবিধান। সকল আইনের উপর এই সংবিধানের প্রাধান্য থাকিবে। সকল আইনের উৎস স্থল এই সংবিধান। বাংলাc®nl p£j¡e¡l j¡ধ্যে সর্বাচ্চ আইন হইল আমাcl HC pw¢hd¡ez HC ®cn¢V f¢lQ¡¢ma qCবে শুধুমাত্র এই সংবিধানের অধীন ও কতর্তৃত্বে। অর্থাৎ এই সংবিধাel Ad£e J Laত্বে এই প্রজাতন্ত্রের সকল কার্যক্রম পরিচালিত হইhz Cq¡l ®L¡e hÉaÉu O¢Vবে না।

85. এই পর্যায়ে সংবিধানের প্রস্তাবনার ৪র্থ প্যারাটি আলোকপাত করা প্রয়োজন বিধায় নিম্নে অনুলিখন হইলঃ

> *" আমরা দৃঢ়ভাবে ঘোষণা করিতেছি যে, আমরা যাহাতে স্বাধীন সত্তায় সমৃদ্ধি লাভ করিতে পারি Hhw j¡ehS¡¢al fË¡N¡anf£m Bn¡-BL¡wM¡l p¢qa p‰¢a l r¡ L¢lu¡ B¿¡S¡¢aL n¡¢¿ J সহযোগিতার ক্ষেত্রে পূর্ণ ভূমিকা পালন করিতে পারি, সেই জন্য বাংলাদেশের জনগZl অভিপ্রায়ের অভিব্যক্তিস্বরূপ এই সংবিধানের প্রাধান্য অক্ষুন্ন রাখা এবং ইহার রক্ষণ, সমর্থন ও নিরপত্তাবিধান আমাদের পবিত্র কর্তব্য।"*

86. উপরে বর্ণিত প্রস্তাবনার ৪র্থ প্যারা মোতাবেক বাংলাদেশর জনগZl A¢ih¢š²ül¦f HC pw¢hd¡নের প্রাধান্য অক্ষুন্ন l¡M¡ Hhw Cq¡l lrZ, pjbe J ¢el¡fš¡¢hd¡ন এই দেশের প্রতিটি নাগরিকের অবশ্য পবিত্র কর্তব্য । অর্থ্যাৎ এই দেশের প্রতিটি সাংবিধানিক পদাধিকারী, প্রজাতন্ত্রের সকল কর্মকর্তা কর্মচারী এবং সর্বোপরি প্রতিটি নাগরিকের পবিত্র কর্তব্য হইল এই সংবিধানের সকল বিধান রক্ষা করা, ইহাকে পূর্ণ সমর্থন করা এবং এই সংবিধানকে কেহ যাহাতে লংঘন করিতে না পারে তাহার ¢el¡fš¡ fËcje LL¡ z pLm p¡w¢hd¡¢eL fc¡¢dL¡l£NZ ab¡ l¡øÊf¢a, fËd¡ej¿»£, Øf£L¡l, fËd¡e ¢hQ¡lf¢a Hhw ¢hQ¡lf¢aNZ, ®Xf¢V Øf£L¡l, j¿»£, fËäj¿»£,fËd¡e ¢eh¡Qe L¢jne¡l Hhw ¢eh¡Qe L¢jne¡lNZ, jq¡ ¢qp¡h-¢el£rL J নিয়ন্ত্রক, সরকারী কর্ম কমিশনের সদস্যগণ শপথ নেওয়ার সময় এই শপথ পাঠ করেন যে, তাঁহারা যে কোন মূল্যে বাংলাদেশের এই সংবিধানের রক্ষন, সমর্থন ও নিরাপত্তা বিধান করিবেন।

87. রাষ্ট্রের তিনটি অঙ্গ যথা- ¢eh¡q£ ¢hi¡N, BCep¡i¡ Hhw ¢hQ¡l ¢hi¡Nz HC ¢ae¢V A‰C pw¢hd¡e à¡l¡ pøz Ab¡v এই তিনটি অঙ্গের কেহই সার্বভৌম নয়। প্রত্যেকটি অঙ্গ এই সংবিধানের বিধি বিধান স্বাপেক্ষে স্বাধীন। শ্রেষ্ঠত্ব শুধুমাত্র এই সংবিধানের। সংবিধানের শ্রেষ্ঠত্ব মানে জনগণের শ্রেষ্ঠত্ব। জনগনের আশা-আকাঙ্খাকে ধারন করে জনগণের পক্ষে "Constituent Assembly" দেশ পরিচালনার এই দলিল "গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধান" প্রনয়ন করিয়াছিলেন। অনুচ্ছেদ ৭(২) মোতাবেক জনগণের অভিপ্রায়ের পরম অভিব্যক্তিরুপে এই সংবিধান প্রজাতন্ত্রের সর্বোচ্চ আইন। অর্থাৎ জনগণের অভিপ্রায় বা ইচ্ছার প্রতিফলন এই সংবিধান। অনুচ্ছেদ ৭(১) মোতাবেক প্রজাতন্ত্র তথা এই দেশের সকল ক্ষমতার মালিক জনগণ।এবং অনুচ্ছেদ ৭(২) মোতাবেক সেই জনগণের অভিপ্রায় বা ইচ্ছার পরম অভিব্যক্তিরুপে বা প্রতিফলন স্বরুপ পবিত্র দলিল "গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধান" । নির্বাহী বিভাগ, আইনসভা এবং বিচার বিভাগ এই সংবিধানের বিধি বিধান মানিয়া চলিতে বাধ্য।

88. অপরদিকে অনুচ্ছেদ ৭(২) অনুসারে জনগণের অভিপ্রায়ের পরম অভিব্যক্তিরুপে এই সংবিধান প্রজাতন্ত্রের সর্ব্বোর্চ BCe Hhw অন্য কোন আইন যদি এই সংবিধানের সহিত অসামঞ্জস্য হয়, তাহা হইলে সেই আইনের যতখানি সংবিধানের সহিত অসামঞ্জস্যপূর্ণ, ততখানি বাতিল হইয়া যাইবে। অর্থাৎ এই সংবিধান কার্যকর হওয়ার তারিখ হইতে এই সংবিধানের বিধি বিধানের পরিপন্থী কোন আইন থাকিবে না এবং প্রণয়ন করা যাইবে না। এতদ্‌সত্ত্বেও যদি কোন আইন এই সংবিধানের পরিপন্থীরুপে প্রণীত হইয়া যায় তবে তাহা হইলে উক্ত আইন ততখানি বাতিল বলিয়া গণ্য হইবে যতখানি তাহা এই সংবিধানের সহিত অসামঞ্জস্যপূর্ণ। যখনই কোন আইন সংবিধানের কোন বিধি বিধানের পরিপন্থী রুপে প্রণীত হইবে তথা লংঘন করে প্রনয়ন করা হইবে তাহা হইলে Bc¡mতের পবিত্র কর্তব্য হইবে উক্ত আইনটিকে বাতিল বলিয়া ঘোষনা করা। কারণ বিচারকগণ তাহাদের দায়িত্ব গ্রহনের পূর্বে এই মর্মে শপথ পাঠ করিয়া থাকেন যে, তাঁহারা এই সংবিধানের রক্ষন, সমর্থন ও নিরাপত্তা বিধান করিবেন।

89. প্রসঙ্গক্রমে, প্রধান বিচারপতি বা বিচারকগণ কর্তৃক যে শপথ (বা ঘোষনা) পাঠ করিয়া থাকেন তাহা নিম্নে অনুলিখন qCmx-

6z fËie ‡hQ¡lf‡a h¡ ‡hQ¡lLz -প্রধান বিচারপতির ক্ষেত্রে রাষ্ট্রপতি কর্তৃক এবং সুপ্রীম কোর্টের কোন বিভাগের কোন বিচারকের ক্ষেত্রে প্রধান বিচারপতি কর্তৃক নিম্নলিখিত ফরমে শপথ (বা ঘোষণা)- fvW পরিচালিত হইবেঃ

"B‡j, ... প্রধান বিচারপতি (বা ক্ষেত্রমত সুপ্রীম কোর্টের আপীল/হাইকোর্ট বিভাগের বিচারক) নিযুক্ত হইয়া সশ্রদ্ধচিত্তে শপথ (বা দৃঢ়ভাবে ঘোষণা) করিতেছি যে, আমি আইন-Aek¡u‡ J বিশ্বস্ততার সহিত আমার পদের কর্তব্য পালন করিব;

আমি বাংলাদেশের প্রতি অকৃত্রিম বিশ্বাস ও আনুগত্য পোষণ করিব;

B¡j বাংলাদেশের সংবিধান ও আইনের রক্ষণ, সমর্থন ও নিরাপত্তাবিধান করিব;

এবং আমি ভীতি বা অনুগ্রহ, অনুরাগ বা বিরাগের বশবর্তী না হইয়া সকলের প্রতি আইন-Aek¡u‡ kb¡‡hqa BQIZ L‡Ihz"

(শব্দাদির নিচে টানা রেখা আমার দেওয়া)

90. এখন আমরা দেখব জাতীয় সংসদের আইন প্রনয়নের এখতিয়ার সম্পর্কে আমাদের সংবিধান কি বলিয়াছে। এই ক্ষেত্রে সংবিধানের অনুচ্ছেদ ৬৫ (১) উল্লেখ করা বিশেষ প্রয়োজন বলিয়া নিম্নে অনুলিখন হইলঃ

pwpc fËaù¡ 65(1) "S¡a‡u pwpc" নামে বাংলাদেশের একটি সংসদ থাকিবে এবং এই সংবিধানের বিধানাবলী-সাপেক্ষে প্রজাতন্ত্রের আইনপ্রণয়ন-ক্ষমতা সংসদের উপর ন্যস্ত হইবে;

91. উপরের অনুচ্ছেদ ৬৫(১) পর্যালোচনা করিলে ইহা স্বচ্ছ কাচের মত পরিস্কার হয়ে উঠে যে, আমাদের মহান জাতীয় সংসদ এই সংবিধানের 'বিধানাবলী সাপেক্ষে' প্রজাতন্ত্রের সকল আইনপ্রনয়ন- ক্ষমতা সংরক্ষন করেন। প্রজাতন্ত্রের সকল আইন আইনপ্রনয়ন ক্ষমতা শুধুমাত্র সংসদের এবং এই আইন প্রনয়নের ব্যপারে সংসদ স্বাধীন । এতদসত্ত্বেও, এই আইন প্রনয়ের ক্ষেত্রে সংসদের কিছু সুনির্দিষ্ট সীমাবদ্ধতা আছে। অর্থাৎ সংসদকে আইন প্রনয়ন করিতে হইবে সংবিধানের 'বিধানাবলী সাপেক্ষে'z জাতীয় সংসদ কোন ভাবেই সংবিধানের বিধানাবলীর পরিপন্থী কোন আইন প্রনয়ন করিবেন না। জাতীয় সংসদ আইন প্রনয়নের ক্ষেত্রে অপরিসীম ক্ষমতাবান নন। জাতীয় সংসদকে কখনই ভুল করা কিংবা ভুলিলে চলিবে না যে, তাঁহাদের ক্ষমতা সংবিধানে অন্যান্য বিধি বিধান দ্বারা সীমাবদ্ধ। কারণ সংবিধান লিখিত। অর্থাৎ বাংলাদেশের জনগণ সকলকেই এই সংবিধানের বিধি বিধান মোতাবেক চলার নির্দেশনা দিয়েছেন। জনগনের এই নির্দেশনা সম্বলিত এই সংবিধানই qCm ®cn f‡IQ¡me¡l jm Q¡‡mLint‡š² এবং আমাদের এই মহান পবিত্র সংবিধান ইহার সহিত অসামঞ্জস্য সকল আইনকে নিয়ন্ত্রণ করে।

92. এ পর্যায়ে সংবিধানের অনুচ্ছেদ ২৬ উল্লেখ করা বিশেষ প্রয়োজন বলিয়া নিম্নে অনুলিখন হইলঃ

মৌলিক অধিকারের p‡qa Apj"p BCe h¡‡am

26(1) এই ভাগের বিধানাবলীর সহিত অসমঞ্জস্য সকল প্রQ‡ma BCe kaM¡‡e Ap¡j"pÉfZ, HC pwhdje-প্রবর্তন হইতে সেই সকল আইনের ততখানি বাতিল হইয়া যাইবে।

(২) রাষ্ট্র এই ভাগের কোন বিধানের সহিত অসমঞ্জস কোন আইন প্রণয়ন করিবেন না এবং অনুরূপ কোন আইন প্রণীত হইলে তাহা এই ভাগের কোন বিধানের সহিত যতখানি অসাঞ্জস্যপূর্ণ, ততখানি বাতিল হইয়া যাইবে।"

93. অনুচ্ছেদ ২৬(১) পর্যালোচনায় এটা কাঁচের মত স্বচ্ছ যে, বাংলাদেশের সীমানার মধ্যে প্রচলিত সকল আইন যতখানি সংবিধানের তৃতীয় ভাগে বর্ণিত মৌলিক অধিকার এর সহিত অসামঞ্জস্যপূর্ণ বা p¡wO‡oL h¡ ®hf‡IaÉ¡jmL HC pwhd¡e fËae তথা সংবিধান কার্যকরী হওয়ার তারিখ হইতে সেই সকল প্রচলিত আইনের ততখানি বাতিল হইয়া গিয়াছে।

94. অপরদিকে, অনুচ্ছেদ ২৬ (২) এর বিধান মোতাবেক রাষ্ট্র এই সংবিধানের তৃতীয় ভাগের কোন বিধানের সহিত অসামঞ্জস্যপূর্ণ কোন আইন প্রনয়ন করিবেন না। এতদ্ সত্ত্বেও রাষ্ট্র যদি তৃতীয় ভাগের কোন বিধানের সহিত অসামঞ্জস্য কোন আইন প্রনয়ন করিয়া থাকে তাহা হইলে উক্ত আইন এই ভাগের বিধানের সহিত যতখানি অসামঞ্জস্যপূর্ণ ততখানি বাতিল হইয়া যাইবে ।

95. সুতরাং জাতীয় সংসদকে আইন প্রণয়ন করিবার সময় তাহার উপর সংবিধান কর্তৃক অর্পিত দায়-c¡‡ua ab¡ p£j¡hÜa¡ কঠোরভাবে প্রতিপালন করিয়া আইন প্রনয়ন করিতে হইবে। কারণ সংবিধানের উক্ত তৃতীয়ভাগে বর্ণিত মৌলিক অধিকার সমূহের সহিত অসামঞ্জস্যপূর্ণ কোন আইন প্রণীত হইলে সেই আইন যতখানি অসামঞ্জস্য ততখানি বাতিল হইয়া যাইবে। সুতরাং জাতীয় সংসদ সংবিধানের তৃতীয়ভাগে প্রদত্ত মৌলিক অধিকার সমূহ হরণ করিয়া কোন আইন প্রনয়ন করিতে পারিবে না। যদি সংসদ তৃতীয় ভাগের মৌলিক অধিকারের সহিত অসামঞ্জস্য বা পরিপন্থী কোন আইন করিয়া থাকে তবে তা অসাংবিধানিক তথা

void abinitio hi শুরুতেই বাতিল বলিয়া গণ্য হইবে। সুতরাং এটা সুস্পষ্ট যে, জাতীয় সংসদ এই সংবিধানের তৃতীয়ভাগে বর্ণিত মৌলিক অধিকার সমূহের সহিত অসামঞ্জস্য কোন আইন প্রনয়ন করিলে তাহা শুরুতেই বাতিল বলিয়া গণ্য হইবে। যখনই কোন আইন সংবিধানের তৃতীয় ভাগের কোন বিধানের সহিত অসামঞ্জস্য পূর্ণভাবে প্রণীত হইবে এবং তাহা আদালতের নজরে আসিবে তখনই আদালতের পবিত্র কর্তব্য হইবে সেই আইন বাতিল বলিয়া ঘোষনা করা।

96. এ প্রসংগে বিখ্যাত মামলা মারবারি বনাম ম্যাডিসন [Marbury v. Madison, 5 U. S. 137 (1803)] HI যুগান্তকারী রায়টি উল্লেখযোগ্য। উক্ত মামলায় আমেরিকার প্রধান বিচারপতি মার্শাল বলিয়াছিলেন যে,

> *"Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument."*

97. এতদ্‌বিষয়ে বিখ্যাত মামলা খন্দকার দেলোয়ার হোসেন বনাম ইটালিয়ান মার্বেল ওয়ার্কস ৬২ ডিএল আর (এডি) (2010)-298-এ মাননীয় প্রধান বিচারপতি মোঃ তোফাজ্জল ইসলাম অভিমত প্রকাশ করেন যে,

> *"Accordingly we hold that since the Constitution is the Supreme Law of the land and the Martial Law Proclamations, Regulations and Orders promulgated/made by the userpers, being illegal, void and non-est in the eye of law, could not be retified or confirmed by the Second Parliament by the fifth Amendment, as it itself had no such power to enact such laws as made by the above Proclamations, Martial Law Regulation or Orders."*

98. এ বিষয়ে বিচারপতি মার্শালের একটি উক্তি বিশেষভাবে উল্লেখযোগ্য (যাহা ৪৯ ডিএলআর এর পৃষ্ঠা ১৫৫-a EÜa LI¡ হইয়াছে) যাহা নিম্নে অনুলিখন করা হইলঃ

> *"Every branch of Government i.e. executive as well as legislature, has the right to look to the Constitution to find its meaning but the ultimate authority to day what the law is, is the Court and it is for the Court to say whether the executive or the legislature has overstepped its bounds."*

99. এখানে আমরা বিশ্লেষন করিব তর্কিত যৌথ দায়মুক্তি আইন, ২০০৩ সংবিধানের তৃতীয় ভাগে বর্ণিত মৌলিক অধিকার সমূহের কোন বিধানের সহিত সাংঘর্ষিক বা অসামঞ্জস্যপূর্ণ কিনা।

100. এ পর্যায়ে যৌথ দায়মুক্তি আইন, ২০০৩ দেখা বিশেষ প্রয়োজন বিধায় নিম্নে অনুলিখন হইল ঃ

যৌথ অভিযান দায়মুক্তি আইন, ২০০৩

২০০৩ সনের ১নং আইন

[24 ®ghËi¡l¢, 2003]

অভ্যন্তরীণ নিরাপত্তা, জনগনের নিরাপত্তা বিধান, সন্ত্রাস দমন এবং অবৈধ অস্ত্র উদ্ধারের মাধ্যমে দেশে শৃঙ্খলা রক্ষার প্রয়োজনে বেসামরিক প্রশাসনকে সহায়তা প্রদানের জন্য সরকার কর্তৃক প্রতিরক্ষা বাহিনীকে ১৬ই অক্টোবর, ২০০২ তারিখে প্রদত্ত আদেশ এবং তৎপরবর্তী সময়ে প্রদত্ত আদেশসমূহ প্রদান ও ঐ সকল আদেশসমূহ বাস্তবায়নের জন্য কৃত যাবতীয় কার্য এবং উক্ত আদেশসমূহ বলে ও অনুসারে ১৬ই অক্টোবর, ২০০২ তারিখ হইতে ৯ই জানুয়ারী, ২০০৩ তারিখ কার্যদিবস পর্যন্ত সময়ের মধ্যে যৌথ অভিযানের সহিত সম্পৃক্ত কোন সদস্য বা ব্যক্তি বা শৃঙ্খলা বাহিনীর সদস্যগণ কর্তৃক যৌথ অভিযানে কৃত যাবতীয় কার্যাদির জন্য তাহাদিগকে দায়মুক্ত করিবার লক্ষ্যে প্রণীত আইন।

যেহেতু অভ্যন্তরীণ নিরাপত্তা, জনগনের নিরাপত্তা বিধান, সন্ত্রাস দমন এবং অবৈধ অস্ত্র উদ্ধানেরর মাধ্যমে দেশে শৃঙ্খলা রক্ষার প্রয়োজনে বেসামরিক প্রশাসনকে সহায়তা প্রদানের জন্য সরকার কর্তৃক প্রতিরক্ষা বাহিনীকে ১৬ই অক্টোবর, ২০০২ তারিখে প্রদত্ত আদেশ এবং তৎপরবর্তী সময়ে

প্রদত্ত আদেশসমূহ প্রদান ও ঐ সকল আদেশসমূহ বাস্তবায়নের জন্য কৃত যাবতীয় কার্য এবং উক্ত আদেশসমূহ বলে ও অনুসারে ১৬ই অক্টোবর, ২০০২ তারিখ হইতে ৯ই জানুয়ারী, ২০০৩ তারিখ কার্যদিবস পর্যন্ত সময়ের মধ্যে যৌথ অভিযানের সহিত সম্পৃক্ত কোন সদস্য বা ব্যক্তি বা শৃঙ্খলা বাহিনীর সদস্যগণ কর্তৃক যৌথ অভিযানে কৃত যাবতীয় কার্যাদির জন্য তাহাদিগকে দায়মুক্ত করা জনস্বার্থে সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্দ্বারা নিম্নরুপ আইন করা হইলঃ-

সংক্ষিপ্ত শিরোনাম ও প্রবর্তন *১। (১) এই আইন যৌথ অভিযান দায়মুক্তি আইন, ২০০৩ নামে অভিহিত হইবে।*

(২) ইহা ৯ই জানুয়ারী, ২০০৩ তারিখ হইতে কার্যকর হইয়াছে বলিয়া গণ্য হইবে।

pw ‘ i *২। বিষয় বা প্রসংগের পরিপন্থী কিছু না থাকিলে, এই আইনে,-*

(L) ‘Bc¡ma’ অর্থ শৃঙ্খলা বাহিনী ও উহার সদস্যগণ সম্পর্কিত আইনের অধীন গঠিত আদালত J VËhÉe¡m hÉa£a pfËÏ ®L¡Vpq ®k ®L¡e ®cJu¡e£ h¡ ®g£Sc¡l£ A¡c¡ma h¡ VËhÉe¡m;

(M) ‘®k£b A¢i k¡e’ অর্থ সরকার কর্তৃক ১৬ই অক্টোবর, ২০০২ তারিখের আদেশবলে প্রতিরক্ষা বাহিনী, বাংলাদেশ রাইফেলস, পুলিশ বাহিনী, আনসার ও বেসামরিক প্রশাসন সমন্বয়ে পরিচালিত L¡k¤¢j;

(N) ‘fËaÏr¡ h¡¢qe£’ অর্থ গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের চতুর্থ ভাগের ৪র্থ পরিচ্ছেদে উল্লিখিত প্রতিরক্ষা কর্মবিভাগেl BJa¡ iš² Ùm, ®e£ J ¢hj¡e h¡¢qe£;

(O) ‘n¨Mm¡ h¡¢qe£’ অর্থ গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের অনুচ্ছেদ ১৫২ (১) এ সংজ্ঞায়িত n¨Mm¡ h¡¢qe£z

৩। যৌথ অভিযানে কৃত যাবতীয় কার্যাদির জন্য দায়মুক্তি।- n¨Mm¡ h¡¢qe£ J Eq¡l pcpÉNZ pÇf¢La pLm BCe hÉa£a Bf¡aax hmhv AeÉ ®L¡n আইনে বা আদালতের কোন রায়ে k¡q¡ ¢LRC b¡LL e¡ ®Le,-

(ক) ১৬ই অক্টোবর, ২০০২ তারিখ হইতে ৯ই জানুয়ারী, ২০০৩ তারিখ কার্যদিবস পর্যন্ত সময়ের মধ্যে দেশের শৃঙ্খলা রক্ষার প্রয়োজনে বেসামরিক প্রশাসনকে সহায়তা প্রদানের জন্য সরকার কর্তৃক ১৬ই অক্টোবর, ২০০২ তারিখে প্রদত্ত আদেশ এবং তৎপরবর্তী সময়ে প্রদত্ত সকল আদেশ, উক্ত আদেশসমূহ বাস্তবায়নের জন্য কৃত যাবতীয় কার্য এবং উক্ত আদেশসমূহ বলে ও অনুসারে যৌথ অভিযানে নিয়োজিত শৃঙ্খলা বাহিনীর কোন সদস্য বা যৌথ অভিযানের অন্য কোন সদস্য বা দায়িত্বপ্রাপ্ত অন্য কোন ব্যক্তি কর্তৃক উক্ত সময়ের মধ্যে তাহার দায়িত্ব বিবেচনার প্রদত্ত আদেশ, La BVL, ®NËga¡l, aõ¡n£ J ¢S ‘¡p¡h¡cpq pLm fËÏl L¡k J Nq£a hÉhÙ¡, fËÏma আইনে ও আদেশসমূহে যাহাই থাকুক না কেন, ১৬ই অক্টোবর, ২০০২ তারিখ প্রদত্ত আদেশ প্রদানকারী এবং উক্ত আদেশবলে ও অনুসারে আদেশ প্রদানকারী এবং কার্য সম্পাদনকারী এবং যৌথ অভিযানে নিয়োজিত শৃঙ্খলা বাহিনীর সদস্যগণকে তজ্জন্য দায়মুক্ত করা হইল;

(খ) দফা (ক) এ উল্লিখিত ১৬ই অক্টোবর, ২০০২ তারিখে প্রদত্ত আদেশ বা তৎপরবর্তী সময়ে প্রদত্ত কোন আদেশ বা কার্যের দ্বারা কাহারও প্রাণহানি ঘটিলে, কাহারও জান বা মালের কোন ক্ষতি হইলে বা কাহারও কোন অধিকার ক্ষুন্ন হইলে বা কেহ আর্থিক, শারীরিক বা মানসিকভাবে ক্ষতিগ্রস্ত হইলে বা কেহ অন্য কোনভাবে সংক্ষুব্ধ হইলে তজ্জন্য সংশ্লিষ্ট সকল আদেশ প্রদানকারীর বিরুদ্ধে বা কার্য নির্বাহীর বিরুদ্ধে বা উক্ত দফায় উল্লেখিত কোন সদস্য বা ব্যক্তি বা শৃঙ্খলা বাহিনীর সদস্যগণের বিরুদ্ধে বা তাহাদিগকে আদেশ প্রদানকারীর বিরুদ্ধে বা উক্ত বাহিনীর কোন কর্মকর্তার ¢hরুদ্ধে বা যৌথ অভিযানে নিয়োজিত শৃঙ্খলা বাহিনীর অন্য কোন সদস্যের বিরুদ্ধে বা সরকার বা সরকারের কোন সদস্যের বিরুদ্ধে বা সরকারের কোন কর্মকর্তার বিরুদ্ধে কোন আদালতে কোন fËÏl ®cJu¡e£ h¡ ®g£Sc¡l£ ®j¡LÝj¡ h¡ L¡kd¡l¡ h¡ AeÉ ®L¡e fËÏl BCeNa L¡kd¡l¡ চলিবে না বা তৎসম্পর্কে কোন আদালতের নিকট কোন মোকদ্দমা বা কার্যধারা কোন আদালতে দায়ের করা হইলে বা এই ধরনের কোন মোকদ্দমায় বা কার্যধারায় বা প্রশ্নের ভিত্তিতে কোন রায়, আদেশ বা সিদ্ধান্ত দেওয়া হইলে তাহা বাতিল, অকার্যকর হইবে বা হইয়াছে বলিয়া গণ্য হইবে।

l¢qaL lZ *৪। যৌথ অভিযান দায়মুক্তি অধ্যাদেশ, ২০০৩ (অধ্যাদেশ নং ১, ২০০৩ এতদ্দ্বারা এইরুপে রহিত করা হইলে যেন উহা জারী করা হয় নাই।*

101. উক্ত দায়মুক্তি আইন ২০০৩ পর্যালোচনায় ইহা প্রতীয়মান যে, ১৬ ই অক্টোবর ২০০২ তারিখ হইতে ৯ই জানুয়ারী ২০০৫ পর্যন্ত কার্যদিবসে যৌথ অভিযানে নিয়োজিত শৃঙ্খলা বাহিনীর কোন সদস্য বা যৌথ অভিযানে অন্যকোন সদস্য বা দায়িত্বপ্রাপ্ত কোন ব্যক্তি কর্তৃক তাহাদের দায়িত্ব পালনরত অবস্থায় সংসদ আইন প্রণয়ন করিয়াছে এইভাবে যে, কাহারও প্রাণহানি ঘটিলে কাহারও জানমালের কোন ক্ষতি হইলে কাহারও কোন অধিকার ক্ষুন্ন হইলে বা কেহ আর্থিক, শারীরিক বা মানসিকভাবে ক্ষতিগ্রস্ত হইলে বা কেহ অন্য কোনভাবে সংক্ষুব্ধ হইলে সরকারের কোন কর্মকর্তার বিরুদ্ধে কোন আদালতে কোন প্রকার দেওয়ানী বা ফৌজদারী মোকদ্দমা বা কার্যধারা বা অন্য কোন প্রকার আইনগত কার্যধারা চালাইতে পারিবে না।

102. এখন আমরা দেখিব উপরে বর্ণিত দায়মুক্তি সংবিধানের তৃতীয় ভাগের কোন বিধানের সহিত সাংঘর্ষিক কিe¡? এ পর্যায়ে সংবিধানের অনুচ্ছেদ ৩১ এবং ৩২ উল্লেখ করা বিশেষ প্রয়োজন বিধায় নিম্নে অনুলিখন করা হইল।

আইনের আশ্রয়লাভের A‡dLi l	*৩১। আইনের আশ্রয়লাভ এবং আইনানুযায়ী ও কেবল আইনানুযায়ী ব্যবহারলাভ যে কোন স্থানে অবস্থানরত প্রত্যেক নাগরিকের এবং সাময়িকভাবে বাংলাদেশে অবস্থানরত অপরাপর ব্যক্তির অবিচ্ছেদ্য অধিকার এবং বিশেষতঃ আইনানুযায়ী ব্যতীত এমন কোন ব্যবস্থা গ্রহণ করা যাইবে না, যাহাতে কোন ব্যক্তির জীবন, ü¡d‡ea¡, ®cq, সুনাম বা সম্পত্তির হানি ঘটে।*
S‡he J h‡Š² ü¡d‡ea¡ l A‡dLi l Ire	*৩২। আইনানুযায়ী ব্যতীত জীবন ও ব্যক্তিস্বাধীনতা হইতে কোন ব্যক্তিকে বঞ্চিত করা যাইবে না।*

103. সংবিধানের ৩১ এবং ৩২ ধারা পর্যালোচনায় ইহা সুস্পষ্ট যে, যে কোন ব্যক্তির জীবন, স্বাধীনতা, দেহ, সুনাম বা সম্পত্তির অধিকার তাঁর মৌলিক অধিকার। এবং আইনের আশ্রয়লাভ এবং আইনানুযায়ী ব্যবহার লাভ প্রত্যেক নাগরিকের অবিচ্ছেদ্য অধিকার। এবং আইনানুযায়ী ব্যতীত এমন কোন ব্যবস্থা গ্রহন করা যাইবে না যাহাতে কোন নাগরিকের জীবন, স্বাধীনতা, দেহ, সুনাম ও সম্পত্তির হানি ঘটে। সুতরাং দায়মুক্তি আইন, ২০০৩ সংবিধানের অনুচ্ছেদ ৩১ এবং ৩২ এর সহিত pl¡p¢l p¡W¢oL ab¡ Ap¡j”pÉfZz It was born dead and had no legal existence Ab¡v HC BCe¢V f‡Eu‡eC ছিল বেআইনী তাই ইহার জন্মই হইয়াছিল বেআইনী তথা বাতিল আইন হিসাবে।

104. জাতীয় সংসদ আইন প্রনয়নকালে রাষ্ট্র পরিচালনার মূলনীতি সমূহ অনুসরন করিবে। সংবিধানের দ্বিতীয় ভাগের অনুচ্ছেদ ১১ মোতাবেক রাষ্ট্র পরিচালনার অন্যতম মূলনীতি হইল গণতন্ত্র ও মানবাধিকার। প্রজাতন্ত্র হইবে একটি গণতন্ত্র, যেখানে মৌলিক মানবাধিকার ও স্বাধীনতার নিশ্চয়তা থাকিবে, মানবসত্তার মর্যাদা ও মূল্যের প্রতি শ্রদ্ধাবোধ নিশ্চিত হইবে। কিন্তু দায়মুক্তি আইন, ২০০৩ রাষ্ট্র পরিচালনার অন্যতম মূলনীতি তথা অনুচ্ছেদ ১১ এর পরিপন্থী।

105. এতদসত্ত্বেও ১৯৪৮ সালের ১০ই ডিসেম্বর জাতিসংগের সাধারন পরিষদ মানবাধিকারের যে সার্বজনীন ঘোষণা পত্র গ্রহন ও জারী করিয়াছিল তাহার মুখবন্ধে বর্ণিত ঘোষণা, ধারা ৩, ৪, ৫, ৬, ৭, 8, 9, 10 Hhw 11 ®cM¡ Aa‡h …l¦afZ ‡hd¡u তাহা নিম্নে অনুলিখন হইলঃ

যেহেতু মানব পরিবারের সকল সদস্যের সহজাত মর্যাদা ও সম অবিচ্ছেদ্য অধিকারসমূহের স্বীকৃতি বিশ্বে স্বাধীনতা, ন্যায়-‡hQ¡l J n¡¢¿l ‡i‡š;

যেহেতু মানবিক অধিকাসমূহের প্রতি অবজ্ঞা ও ঘৃণা মানবজাতির বিবেকের পক্ষে অপমaeSeL বর্বরোচিত কার্যকলাপে পরিণতি লাভ করেছে এবং সাধারণ মানুষের সর্বোচ্চ আশা-আকাঙ্খার প্রতীক হিসেবে এমন একটি পৃথিবীর সূচনা ঘোষিত হয়েছে যেখানে মানুষ বাক ও বিশ্বাসের স্বাধীনতা এবং ভয় ও অভাব থেকে নিষ্কৃতি ভোগ করবে;

যেহেতু চূড়ান্ত পদক্ষেপ হিসেবে মানুষকে অত্যাচার ও নিপীড়নের বিরুদ্ধে বিদ্রোহী হতে বাধ্য করা না হলে মানবিক অধিকাসমূহ অবশ্যই আইনের শাসনের দ্বারা সংরক্ষিত করা উচিত;

যেহেতু জাতিসমূহের মধ্যে বন্ধুত্বপূর্ণ সম্পর্কের উন্নয়নে সহায়তা করা আবশ্যক;

যেহেতু জাতিসংঘভুক্ত জনগণ সনদের মাধ্যমে মৌল মানবিক অধিকারসমূহ, মানুষের মর্যাদা ও মূল্য Hhw e¡l‡i J পুরুষের সম-অধিকারের প্রতি আস্থা পুনর্ব্যক্ত করেছে এবং সামাজিক অগ্রগতি ও ব্যাপকতর স্বাধীনতায় উন্নততর জীবনমান প্রতিষ্ঠাকল্পে দৃঢ়প্রতিজ্ঞ;

যেহেতু সদস্যরাষ্ট্রসমূহ জাতিসংঘের সহযোগিতায় মানবিক অধিকার ও মৌল স্বাধিকারসমূহের প্রতি সার্বজনীন শ্রদ্ধা ও মান্যতা বৃদ্ধি অর্জনে অঙ্গীকারবদ্ধ;

যেহেতু সকল অধিকার ও স্বাধিকারের ব্যাপারে একটি সাধারণ সমঝোতা উক্ত অঙ্গীকার সম্পূর্ণরুপে আদায় করার জন্য সর্বাপেক্ষা গুরুত্বপূর্ণ;

dj l¡ -1.....

dj l¡-2.....

dj l¡ -3

প্রত্যেকেরই জীবন ধারণ, স্বাধীনতা ও ব্যক্তি নিরাপত্তার অধিকার রয়েছে।

dj l¡-4.....

dj l¡-5

কাউকে নির্যাতন অথবা নিষ্ঠুর, অমানুষিক অথবা অবমাননাকর আচরণ অথবা শাস্তি ভোগে বাধ্য করা চলবে না।

dj l¡-6

আইনের সমক্ষে প্রত্যেকেরই সর্বত্র ব্যক্তি হিসেবে স্বীকৃতিলাভের অধিকার রয়েছে।

dj l¡-7

আইনের কাছে সকলেই সমান এবং কোনরুপে বৈষম্য ব্যতিরেকে সকলেরই আইনের দ্বারা সমভাবে l¢ra হওয়ার অধিকার রয়েছে। এই ঘোষণাপত্র লঙ্ঘনকারী কোনরুপ বৈষম্য বা এই ধরনের ষৈম্যের কোন উস্কানির বিরুদ্ধে সমভাবে রক্ষিত হওয়ার অধিকার সকলেরই আছে।

dj l¡-8

যে কার্যাদির ফলে শাসনতন্ত্র বা আইন কর্তৃক প্রদত্ত মৌল অধিকারসমূহ লঙ্ঘিত হয় সে সবের জন্য উপযুক্ত জাতীয় বিচার আদালতের মারফত কার্যকর প্রতিকার লাভের অধিকার প্রত্যেকেরই রয়েছে।

dj l¡-9

কাউকে খেয়ালখুশীমত গ্রেফতার, আটক অথবা নির্বাসন করা যাবে না।

dj l¡-10

প্রত্যেকেরই তার অধিকার ও দায়িত্বসমূহ এবং তার বিরুদ্ধে আনীত যে কোন ফৌজদারী অভিযোগ নিরুপণের জন্য পূর্ণ সমতার ভিত্তিতে একটি স্বাধীন ও নিরপেক্ষ বিচার- Bc¡লত ন্যায্যভাবে ও প্রকাশ্যে শুনানী লাভের অধিকার রয়েছে।

dj l¡-11

L যে কেউ কোন দন্ডযোগ্য অপরাধে অভিযুক্ত হলে তার আত্মপক্ষ সমর্থনের নিশ্চয়তা দেয়া হয়েছে Hje NZ-আদালত কর্তৃক আইন অনুযায়ী দোষী সাব্যস্ত না হওয়া পর্যন্ত নির্দোষ বলে বিবেচিত হওয়ার অধিকার রয়েছে।

M কাউকেই কোন কাজ বা ত্রুটির জন্য দন্ডযোগ্য অপরাধে দোষী সাব্যস্ত করা চলবে না যদি সংঘটনকালে তা জাতীয় বা আন্তর্জাতিক আইন অনুযায়ী দন্ডযোগ্য অপরাধ বলে গণ্য না হয়ে থাকে। আবার দন্ডযোগ্য অপরাধ সংঘটনকালে যতটুকু শাস্তি প্রযোজ্য ছিল তার চেয়ে অধিক শাস্তি প্রয়োগ চলবে না।

dj l¡-12.....

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106. উপরেল্লিখিত জাতিসংঘের সাধারন পরিষদের মানবাধিকারের সার্বজনীন ঘোষণাপত্রের মুখবন্ধ এবং ধারা -3, 5, 6, ৭, ৮, ৯, ১০ ও ১১ সমূহ সরল পাঠে ইহা সুস্পষ্ট যে, দায়মুক্তি আইন, ২০০৩ উক্ত ধারাসমূহের সহিতJ pl¡p¢l pi¡W0¢oLz

107. বাংলাদেশের ইতিহাসে এই নিয়ে দুই বার দায়মুক্তি (ইনডেমনিটি) অধ্যাদেশ জারি করা হইয়াছে। প্রথমবার (The Indemnity Ordinance, 1975 (L of 1975, kjqj XLX of 1975) Si l£ Ll¡ qCu¡¢Rm Si¢al SeL h‰hå

হত্যার পর তাঁর এবং তাঁর পরিবারের সদস্যদের হত্যাকারীদের রেহাই দেয়ার জন্য। অতxfl ES² Ordinance ‡V The Indemnity (Repeal) Act, 1996 এর মাধ্যমে জাতীয় সংসদ বাতিল করিয়া জাতীর জনক বঙ্গবন্ধু শেখ মুজিবুর রহমান এবং তাঁর পরিবারের সদস্যদের হত্যাকারীদের বিচারের পথ উন্মুক্ত করিয়া দেওয়া হয়। ফলশ্রুতিতে জাতী স্বাধীন বাংলাদেশের স্থপতি এবং সর্বকালের সর্বশ্রেষ্ঠ বাঙ্গালী জাতীর জনক বঙ্গবন্ধু শেখ মুজিবুর রহমান এবং তাঁর পরিবারের সদস্যদের হত্যাকারীদের বিচার সুষ্ঠুভাবে সম্পন্ন করিয়া এবং উক্ত² বিচারের রায় কার্যকরী করিয়া দেশ এবং জাতীকে কলঙ্কমুক্ত² করিতে prj qCu¡¢Rmz

108. *এ পর্যায়ে সংবিধানের ৪৬ অনুচ্ছেদটি গুরুত্বপূর্ণ বিধায় নিম্নে অনুলিখন হইলঃ*

c¡uj¢Š²-বিধানের

rja¡ *"৪৬। এই ভাগের পূর্ববর্ণিত বিধানাবলীতে যাহা বলা হইয়াছে, তাহা সত্ত্বেও প্রজাতন্ত্রের কর্মে নিযুক্ত কোন ব্যক্তি বা অন্য কোন ব্যক্তি জাতীয় মুক্তি-সংগ্রামের প্রয়োজনে কিংবা বাংলাদেশের রাষ্ট্রীয় সীমানার মধ্যে যে কোন অঞ্চলে শৃঙ্খলা-রক্ষা বা পুনর্বহালের প্রয়োজনে কোন কার্য করিয়া থাকিলে সংসদ আইনের দ্বারা সেই ব্যক্তিকে দায়মুক্ত করিতে পারিবেন কিংবা ঐ অঞ্চলে প্রদত্ত কোন দন্ডাদেশ, দন্ড বা রাজেয়াপ্তির আদেশকে কিংবা অন্য কোন কার্যকে বৈধ করিয়া লইতে পারিবেন।"*

109. Aeচ্ছেদ ৪৬ পর্যালোচনায় এটা কাঁচের মত স্বচ্ছ যে, সংসদ আইন প্রনয়নের মাধ্যমে কোন ব্যক্তিকে দায়মুক্তি প্রদান করিতে পারিবে নিম্নে বর্ণিত দুইটি অবস্থাধীন

(১) জাতীয় মুক্তি সংগ্রামের প্রয়োজনে এবং

(২) বাংলাদেশের রাষ্ট্রীয় সীমানার মধ্যে যে কোন অঞ্চলে শৃঙ্খলা রক্ষা বা পুনর্বহালের প্রয়োজনেz

110. যেহেতু যৌথ দায়মুক্তি আইন, ২০০৩ জাতীয় মুক্তি সংগ্রামের প্রয়োজনে করা হয় নাই, সেইহেতু প্রথম অবস্থাটি এখানে প্রযোজ্য হইবে না।

111. এখন আমরা দেখিব দ্বিতীয় অবস্থাটি যেখানে বলা হইয়াছে যে রাষ্ট্রীয় সীমানার মধ্যে যে কোন অঞ্চলের শৃঙ্খলা রক্ষা বা পুনর্বহালে প্রয়োজনে কোন কার্য করা হইলে । প্রথমেই আমাদের বুঝিতে হইবে, এই দ্বিতীয় অবস্থাটি কোন ভাবেই দেশে সাধারণ পরিস্থিতি বিরাজ করিবার সময়ে কোন কার্যের বিষয়ে বলা হয় নাই। অর্থাৎ এই দ্বিতীয় অবস্থাটি হইতে হইলে বাংলাদেশের রাষ্ট্রীয় সীমানার মধ্যে যে কোন অঞ্চল বা এলাকায় আইন শৃঙ্খলার অবনতি হইতে হইবে।

112. অন্যভাবে বলা যায় আইনশৃঙ্খলা রক্ষা বা পুনর্বহাল এর প্রশ্ন তখনই আসে যখন আইনশৃঙ্খলা পরিপূর্ণভাবে ধ্বংস তথা লোপ পায়। আইনশৃঙ্খলা ধ্বংস বা আইন শৃঙ্খলাহীন অবস্থা বলিতে এমন এক পরিস্থিতিকে বুঝায় যেখানে প্রকৃতপক্ষে একটি নৈরাজ্যজনক অবস্থা সৃষ্টি হইয়াছে। জনসাধারন সমষ্টিগতভাবে বেপরোয়া হইয়া পড়িয়াছে। কেহই আইনের তোয়াক্কা করিতেছে না। যে যার খুশি মত চলিতেছে। সকলেই আইন নিজ নিজ হাতে তুলিয়া নিতেছে। কেহই আইনের ধার ধরিতেছে না। অথবা দেশে গৃহযুদ্ধ শুরু হইলে অথবা অন্য দেশের সহিত যুদ্ধ শুরু করিলে।

113. বর্তমান মামলার নথি পত্র এবং পেপার ক্লিপিং থেকে এটা স্পষ্ট যে, যৌথ দায়মুক্তি আইন যেই সময়ের জন্য করা হইয়াছে উক্ত সময়ে দেশে এমন কোন ভয়াবহ আইন শৃঙ্খলার অবনতি হয় নাই বা দেশে ব্যাপক কোন নৈরাজ্য সৃষ্টি হয় নাই বা দেশে আইন শৃঙ্খলার অবনতি হয় নাই বা লোপ পায় নাই। কিংবা সে সময় দেশ গৃহযুদ্ধ নিপতিত হয় নাই কিংবা অন্য দেশের সহিত যুদ্ধে লিপ্ত হয় নাই। সুতরাং যেহেতু আইন শৃঙ্খলার যেখানে অবনতি হয় নাই সেখানে পুনর্বহালের প্রশ্নই আসে e¡z Bl যেখানে পুনর্বহালের প্রশ্ন আসে না সেখানে পুনর্বহালের নিমিত্ত কোন কার্য হইয়াছে বলিয়া ধরা হইবে না। আর যেখানে পুনর্বহালের নিমিত্তে কোন কার্য হয় নাই সেখানে অনুচ্ছেদ ৪৬ আওতায় দায়মুক্তির প্রশ্নই আসে e¡ z

114. অনুচ্ছেদ ৪৭ (৩) মোতাবেক গণহত্যাজনিত অপরাধ, মানবতাবিরোধী অপরাধ বা যুদ্ধাপরাধ এবং আন্তর্জাতিক আইনের অধীন অন্যান্য অপরাধের জন্য কোন সশস্ত্র বাহিনী বা প্রতিরক্ষা বাহিনী বা সহায়ক বাহিনীর সদস্য বা অন্য কোন ব্যক্তি, ব্যক্তি সমষ্টি বা সংগঠন কিংবা যুদ্ধবন্দীকে আটক, ফৌজদারীতে সোপর্দ কিংবা দন্ডদান করিবার বিধান -pwh¢ma ®Lje BCe hj আইনের বিধান এই সংবিধানের কোন বিধানের সহিত অসমঞ্জস্য বা তাহার পরিপন্থী, এই কারণে বাতিল বা বেআইনী বলিয়া গণ্য হইবে না কিংবা কখনও বাতিল বা বেআইনী হইয়াছে বলিয়া গণ্য হইবে না।

115. অর্থাৎ আমাদের সংবিধান যুদ্ধকালীন সময়েও গণহত্যাজনিত অপরাধ, মানবতাবিরোধী অপরাধ বা যুদ্ধাপরাধ এবং আন্তর্জাতিক আইনের অধীন অপরাধের জন্য কোন দায়মুক্তিকে সমর্থন করে না। বরং যুদ্ধকালীন সময়েও উক্তরূপ অপরাধের জন্য BCe fËue L¢lu¡ pnÙ hj¢qe£ hj fËal r¡ hj¢qe£ hj pqjuL hj¢qe£l pcpÉ hj Ae£ ®Lje h£¢Š² , h£¢Š² pj¢ø hj সংগঠনের যেই সব ব্যক্তি উক্তরুপ অপরাধের সহিত জড়িত হইবে তাহাদের শাস্তির বিধান ব্যবস্থা করিতে সংবিধান রাষ্ট্রকে নির্দেশনা দেয়। এবং এই ধরনের শাস্তির বিধান সম্বলিত কোন আইন প্রণীত হইলে সেই আইন সংবিধানের কোন বিধানের সহিত অসমঞ্জস্যপূর্ণ কিংবা পরিপন্থীরুপে হইলেও তাহা বাতিল বলিয়া গণ্য হইবে না। সুতরাং ইহা দৃঢ় এবং দ্ব্যর্থহীনভাবে বলা যায় যে, গণহত্যাজনিত অপরাধ, মানবতাবিরোধী অপরাধ করিলে যেখানে যুদ্ধকালীন সময়ও দায়মুক্তি পায় না সেখানে দেশে সাধারন অবস্থা বিরাজের সময়-উক্তরুপ দায়মুক্তির প্রশ্নই আসেনা।

116. অনুচ্ছেদ ৪৭ক (১) মোতাবেক যে ব্যক্তির ক্ষেত্রে এই সংবিধানের ৪৭ অনুচ্ছেদের (৩) দফায় বর্ণিত কোন আইন প্রযোজ্য হয়, সেই ব্যক্তির ক্ষেত্রে এই সংবিধানের ৩১ অনুচ্ছেদ, ৩৫ অনুচ্ছেদের (১) ও (৩) দফা এবং ৪৪ অনুচ্ছেদের অধীন নিশ্চয়কৃত অধিকারসমুহ প্রযোজ্য হইবে না। এবং অনুচ্ছেদ (২) মোতাবেক যে ব্যক্তির ক্ষেত্রে এই সংবিধানের ৪৭ অনুচ্ছেদের (৩) দফায় বর্ণিত কোন আইন প্রযোজ্য হয়, এই সংবিধানের অধীন কোন প্রতিকারের জন্য সুপ্রীমকোর্টে আবেদন করিবার কোন অধিকার সেই ব্যক্তির থাকিবে না।

117. অর্থাৎ সশস্ত্র বাহিনী বা প্রতিরক্ষা বাহিনী বা সহায়ক বাহিনীর সদস্য বা অন্য কোন ব্যক্তি, ব্যক্তি সমষ্টি বা সংগঠনের কোন ব্যক্তি গণহত্যাজনিত অপরাধ, মানবতাবিরোধী অপরাধ বা যুদ্ধাপরাধ এবং আন্তর্জাতিক আইনের অধীন অন্যান্য অপরাধ করিলে আমাদের সংবিধান এমনই কঠোর অবস্থানে যে, তাহাদের ক্ষেত্রে সংবিধানের ৩১, ৩৫(১) ও (৩) এবং ৪৪ অনুচ্ছেদের অধীন নিশ্চয়কৃত অধিকার সমূহ খর্ব করিয়া তাহাদেরকে উক্ত অধিকার সমূহ থেকে বঞ্চিত করা হইয়াছে। এমনকি তাহাদেরকে সংবিধানের অধীন কোন প্রতিকার প্রার্থনার জন্য সুপ্রীমকোর্ট আবেদনের সুযোগ থেকেও বঞ্চিত করিয়াছে ।

118. গণতন্ত্র, আইনের শাসন, মানবাধিকার ইত্যাদি ধারনার সাথে যে কোন ধরনের দায়মুক্তি সাংঘর্ষিক। আমাদের মহান মুক্তিযুদ্ধ এই চেতনার উপরেই সংগঠিত হইয়াছিল। মুক্তিযুদ্ধের মধ্যদিয়ে অর্জিত পবিত্র সংবিধান গণতন্ত্র, আইনের শাসন ও জনগনের মৌলিক ও মানবাধিকারের রক্ষা কবচ। একারনেও দায়মুক্তি আইনটি সংবিধানের সহিত সাংঘOLC öd eu, hlw Cqjl চেতনাবিরোধীও বটে।

119. সুতরাং উপরোক্ত আলোচনা হইতে আমরা এই মর্মে সুস্পষ্ট সিদ্ধান্তে উপনীত হইতে পারি যে, যেহেতু যৌথ দায়মুক্তি আইন, ২০০৩ এর মাধ্যমে আইন শৃঙ্খলা বাহিনীর হাতে প্রাণহানির কার্যকে দায়মুক্তি প্রদান করা হইয়াছে সেইহেতু উক্ত দায়মুক্তি pwবিধানের অনুচ্ছেদ ৩১, ৩২, ৪৬ , ৪৭(৩) এবং ৪৭ক এর বিধান মোতাবেক অসামঞ্জস্যপূর্ণ তথা সংবিধানের তৃতীয়ভাগের মৌলিক অধিকার সমূহের সহিত সাংঘর্ষিক ভাবে প্রণীত হইয়াছে তথা অসাংবিধানিকভাবে প্রণীত।

120. অতএব যেহেতু এই দায়মুক্তি আইনটি সংবিধানের বিধানাবলী সাপেক্ষে প্রনয়ন হয় নাই, সেহেতু আইনটি বাতিল এবং অসাংবিধানিক মর্মে ঘোষনা করা যথার্থ।

121. উপরোক্ত মতামত স্বাপেক্ষে আমি বিচারপতি জনাব মইনুল ইসলাম চৌধুরীর সহিত একমত পোষন করিতেছি।

7 SCOB [2016] HCD 40

High Court Division
(Criminal Appellate Jurisdiction)

Death Reference no. 22 of 2010

The State

Versus

1. Md. Nurul Amin Baitha,
2. Anjumanara Begum,
….. Condemned-accused.

Mr. Forhad Ahmed, D.A.G. with
Mr. Bashir Ahmed, A.A.G. and
Mr. Kazi Md. Mahmudul Karim, A.A.G.
.... For the State.
Mrs. Syeda Maimuna Begum, Advocate,
..... For the condemned accused.

Heard on: 07-05-2015, 10-05-2015, 12-05-2015, 13-05-2015
and
Judgment delivered on 14-05-2015

Present:
Mr. Justice Syed Md. Ziaul Karim
And
Mr. Justice Sheikh Md. Zakir Hossain

Fundamental principles of criminal jurisprudence and justice delivery system:
Fundamental principles of criminal jurisprudence and justice delivery system is the innocence of the alleged accused who should be presumed to be innocent until the charges are proved beyond reasonable doubt on the basis of clear, cogent and credible evidence and that onus of proving everything essential to the establishment of charge against the accused lies upon the prosecution which must prove charge substantially as laid to hilt and beyond all reasonable doubt on the strength of clear, cogent credible and unimpeachable evidence. In a criminal trial, the burden of proving the guilt of the accused beyond all reasonable doubts always rests on the prosecution and on its failure, it cannot fall back upon the evidence adduced by the accused in support of his defence to rest its case solely thereon. Proof of charge must depend upon judicial evaluation of totality of evidence, oral and circumstantial, and not by an isolated scrutiny. Prosecution version is also required to be judged taking into account the overall circumstances of the case with a practical, pragmatic and reasonable approach in appreciation of evidence. ... (Para-52)

We should bear in mind, credibility of testimony oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. When dealing with the serious question of guilt or innocence of persons charged with crime, the following principles should be taken into consideration.

a) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.

b) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused.

c) In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person suffer.

d) There must be clear and unequivocal proof of the corpus delicit.

e) The hypothesis of delinquency should be consistent with all the facts proved.

... (Para-54)

Evidence Act,1872
Section 106:
Presence of the accused Baitha at the material time is supported by the evidence on record. Thus the death of the deceased was in the special knowledge of the accused Baitha. He knew how she met with death. Ordinarily an accused has no obligation to account for the death for which he is placed on trial. But in a case like the present one where the accused has special knowledge of the death of the deceased, under section 106 of the Evidence Act, he is under obligation to explain how the deceased died. If he fails to explain the death of the deceased or if his explanation is found false the irresistible inference would be that none besides him caused the death of the deceased. ... (Para-59)

When it is established that the husband and wife were residing in the same house at the relevant time, the husband is duty bound to explain the circumstances how his wife met her death and in absence of any explanation coming from the husband, irresistible presumption is that it is the husband who is responsible for her death. ... (Para-63)

Nari-O-Shishu Nirjatan Daman Ain, 2000
Section 11(ka)
Penal Code, 1860
Section 302:
The case is hand, although, tried by a Tribunal constituted under the Ain of 2000 that Tribunal was, also, the court of Sessions. In the judgment, learned Judge was described as Additional District and Sessions Judge, as well as Nari-O-Shishu Nirjatan Daman Tribunal no.2. Judgment demonstrates that learned Additional District and Sessions Judge has been, also, exercising the power and Jurisdiction of the Nari-O-Shishu Nirjatan Daman Tribunal. Fate of the convicts and result of the case would have been the same whether it would have been tried either as a Nari-O-Shishu case by the Tribunal or as a sessions case by learned Sessions Judge and if section 11(ka) of the Ain of 2000 was not attracted in respect of convicts the offence of section 302 the Penal Code could be very much pressed into service against the convicts, and they could be conveniently tried and convicted for offence of section 302 of the Penal Code.
... (Para-74)

How weight to be attached to the testimony of witness:
The weight to be attached to the testimony of witness depends in a large measure upon various consideration some of which are in the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. In a word evidence of a witness is to be looked at from point of view of its credibility, it is quite unsafe to discard evidence of witness which otherwise appears reasonable and probable because of some suggestion against truthfulness of the witness. ... (Para-87)

With regard to the sentence imposed upon convicts we are of the view that sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that

the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under section 302 of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice. ... (Para-104)

Judgment

Syed Md. Ziaul Karim, J:

1. This death reference under Section 374 of the Code of Criminal Procedure (briefly as the Code) has been made by learned Judge of Nari-O-Shishu Nirjatan Daman Tribunal no.2, Sherpur (briefly as Tribunal), for confirmation of death sentences of condemned-accused.

2. The learned Judge by the impugned judgment and order of conviction and sentence dated 19-04-2010, in Nari-O-Shishu Nirjatan Daman Case no. 143 of 2005 convicted the condemned-accused Md. Nurul Amin Baitha under section 11(Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (briefly as Ain 2000) and condemned accused Anjumanara Begum under sections 11(Ka), 30 of the Ain, 2000 and sentenced both of them to death by hanging.

3. Condemned accused Md. Nurul Amin Baitha remained absconding since institution of the case and condemned accused Anjumanara Begum after being enlarged on bail remained absconding. Both the accused were represented by the State defence lawyer.

4. The prosecution case as projected in the first information report (briefly as FIR) and unfurled at trial are that Hasna Begum aged about fifty years, daughter of late Rustum Ali of village Basuralga, Police Station-Nakla, District-Sherpur (since deceased) (briefly as deceased) was married with Md. Nurul Amin Baitha (condemned accused) (briefly as accused) son of late Abdus Samad of the same village before thirty years. Since marriage she used to stay at her conjugal home i.e. husband house at village Basuralga (briefly as place of occurrence i.e. P.O.). During their wedlock two sons and two daughters were born and at then she was carrying for five months. Since marriage her accused husband used to demand dowry for Tk.50,000/-, on her failure to bring the same she was subjected to physical torture. Prior to the occurrence the accused married one Anjumanara Begum (condemned accused) as second wife. On 18-02-2005 corresponding to 6th Falgun, 1411 B.S. Friday at 4:00 p.m. she asked about the second marriage but her accused husband answered in a furious manner and again demanded Tk.50,000/- as dowry. On her again refusal to pay her accused husband and his second wife Anjumanara Begum inflicted fists blows causing severe injuries upon her person leaving her in a critical condition at the court-yard. Later, village doctor Aminul Islam was called for treatment and according to his advise on the following day at 8:00 a.m. she was admitted at Nakla health Complex wherein on 19-02-2005 at 11:30 a.m. she succumbed to the injuries. Then both the accused carried her dead-body at the P.O. and fled away. With these allegations on 26-02-2005 her younger brother Md. Abdul Mannan (P.W.2) as complainant filed a complaint in the Court of Magistrate (Cognizance), Sherpur which was referred to the local Police Station for investigation. Prior to it the relations of deceased reported the incident to Chandraghona Investigation Center wherein the incident was recorded as GDE no. 407 dated 19-02-2005. After inquiry and consultation of inquest and

post mortem report S.I. Md. Kazi Amirul Islam(P.W.1) as informant lodged the FIR which was recorded as Nakla P.S. Case no. 04 dated 05-04-2005 corresponding to G.R. no. 44 of 2005 under sections 11(Ka),30 of the Ain, 2000.

5. During investigation accused Anjumanara Begum was arrested on 11-04-2005 from village Raipura and on 12-04-2005 she made confession recorded under section 164 of the Code.

6. After investigation Police submitted charge-sheet accusing Md. Nurul Amin Baitha and Anjumanara Begum as accused.

7. Eventually, accused were called upon to answer the charge under Sections 11(ka), 30 of the Ain 2000, which was not read over to them as they were absconding.

8. In course of trial, the prosecution in all examined twelve witnesses out of seventeen charge-sheeted witnesses. The defence examined none.

9. After closure of the prosecution case, the accused were not examined under section 342 of the Code as they were absconding.

10. The defence case as it appears from the trend of cross-examination of the prosecution witnesses by the learned State defence lawyer are that of innocence and false implication. It is divulged in defence that the accused did not beat the deceased rather she met a natural death.

11. After trial the learned Judge of Tribunal by the impugned judgment and order of conviction and sentence convicted the accused holding :

(a) The prosecution successfully proved the charge against the accused by corroborative evidence;
(b) The evidence against the accused was consistent, uniform and corroborative in nature; and
(c) The accused failed to explain the cause of death of deceased.

12. The learned Deputy Attorney General appearing for the State supports the reference and submits that it is a wife killing case and all the prosecution witnesses by corroborative evidence proved that the victim Hasna Begum died at the custody of her husband in her conjugal home. So the accused is under obligation to explain the cause of death. He adds that the doctor in his postmortem report specifically opined the cause of death and the ocular evidence also indicates that the death was homicidal in nature as the body bore multiple injuries upon the cadaver. He further submits that P.Ws.1(ka)-7 were the eye witnesses of assaulting the victim and they also stated that prior to the occurrence the accused used to torture the victim for the cause of dowry. He submits that the circumstances also proved that the accused had the complicity with the crime of murder of his wife and the learned Judge of the Court below after considering the materials on record rightly convicted the accused which calls for no interference by this Court.

13. In support of his contentions he refers the following cases:

(a) In the case of Ramnaresh and others Vs. The State of Chhattisgarh (2012)4, Supreme Court cases -257 at paragraph 52 wherein it was observed:

″It is a settled principle of law that the obligation to put material evidence to the accused under Section 313 CrPC is upon the Court. One of the main objects of recording of a statement under this provision of CrPC is to give an opportunity to the accused to explain the circumstances appearing against him aswellas to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Section 313 CrPC, insofar as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law. ″

(b) In the case of State of U.P. Vs. Krishna Gopal and another (1988)4 Supreme Court Cases -302 wherein at paragraph -24 it was observed:
″It is trite that where the eye-witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the orality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudiced making any other evidence, including medical evidence, as the sole touch stone for the test of such credibility. The evidence must be tested for its inherent consistency and the interest probability of the story; consistency with the account of their witnesses held to be creditworthy ; consistency with the undisputed facts; the credit of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation. ″

(c) In the case of Dayal Singh and others Vs. State of Uttaranchal (2012)8 Supreme Court cases 263 wherein at paragraph 14 it was observed:
″ This Court has repeatedly held that an eyewitness version cannot be discarded by the court merely on the ground that such eyewitness happened to be a relation or friend of the deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, examine the possibility of discarding such statements. But where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the court to discard the statements of such related or friendly witness. ″

(d) In the case of Abul Kalam Azad alias Ripon (Md) Vs. State 58 DLR(AD)-26 held:
″ Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain (XVIII of 1995)
Section 10(1)
Even if there is no specific mention of demand of dowry in Material Exhibit I(c) but as the trial Court has observed on reading the writings in the diary in its entirety it cannot be said that the fact of torturing the victim for not meeting the demand of dowry was totally absent.

(e) In the case of Md. Abdul Majid Sarkar vs. The State 40 DLR-83 held:
″ Penal Code (XLV of 1860)
Section 300, Exception 4 read with Evidence Act (I of 1872)
Section 105

S. 105 of the Evidence Act casts a burden upon the accused to prove the existence of circumstances bringing the case within any special exception or provision contained in any other part of the Penal Code. There has been complete failure on the part of the defence to prove those circumstances.

14. The learned counsel sought to argue before us that Exception 4, to section 300 is attracted in the facts of the present case and as such the appellant ought to have been convicted for culpable homicide not amounting to murder. This argument can hardly be considered by us now when evidently no endeavor was made on behalf of the appellant to plead the aforesaid Exception at any stage earlier. Section 105 of the Evidence Act casts a burden upon the accused to prove ″ the existence of circumstances bringing the case.....within any special exception or proviso contained in any other part of the same (Penal) Code ″.

15. There has been a complete failure on the part of the defence to prove or bring on record those circumstances which would bring the case within the aforesaid Exception 4. Except the denied suggestion there is nothing on record to show that the offence was committed in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. In the absence of any foundation of fact it is now idle to suggest that Exception 4 is attracted. Indeed, as already noticed, it has never been argued before that the offence committed by the appellant was one of culpable homicide nor amounting to murder.

16. The learned counsel also made an argument that since the deceased died in the hospital admittedly 14 days after the occurrence, the nature of the injury was not obviously such as was likely to cause death and as such the appellant should have been convicted under section 304 Penal Code. ″

17. The learned Advocate appearing for the condemned accused opposes the reference and seeks to impeach the impugned judgment and order of conviction and sentence on five fold arguments:

18. **Firstly:** There is no specific evidence against the accused that he demanded dowry. Prior to the occurrence the victim did not disclose such facts of demanding dowry to her relations. So according to her, the demand of dowry to her was not proved by evidence.

19. **Secondly:** The prosecution although produced seven alleged eye witnesses namely PWs. 1(Ka)-7 but their presence at the P.O. were doubtful inasmuchas the other witnesses in their evidence did not support the presence of such alleged eye witnesses.

20. **Thirdly:** The prosecution failed to produce the independent witnesses and all the witnesses were inter related. So their evidence should not be relied and if the independent witnesses be examined they would not have supported the prosecution case.

21. **Fourthly** The evidence on record clearly indicates that their was no motive in committing such offence, rather, the murder was not premeditated.

22. **Fifth and lastly:** The judgment and order of conviction and sentence based on misreading and non consideration of the evidence on record which cannot be sustained in the eye of law.

23. In support of her contentions she refers the following cases:

(a) In the case of The State vs. Mofazzal Hossain Pramanik 43 DLR(AD) 64(A) held:

″ Burden of proving alibi in a wife-killing case-It is true that the burden of proving a plea of alibi or any other plea specifically set up by an accused-husband for absolving him of criminal liability lies on him. But this burden is somewhat lighter than that of the prosecution. The accused could be considered to have discharged his burden if he succeeds in creating a reasonable belief in the existence of circumstances that would absolve him of criminal liability, but the prosecution is to discharge its burden by establishing the guilt of the accused. An accused's burden is lighter, because the court is to consider his plea only after, and not before, the prosecution leads evidence for sustaining a conviction. When the prosecution failed to prove that the husband was in his house where his wife was murdered, he cannot be saddled with any onus to prove his innocence.″

(b) In the case of C.K. Raveendran Vs. State of Kerala 2000 Supreme Court Cases (crl.) 108 held:

″ Penal Code, 1860-Ss. 302 and 201- Uxoricide or suicide- The doctor issuing post-mortem certificate reserving his opinion as to the cause of death pending the result of chemic al analysis- In the final report issued on getting the report of Chemical Analyser, the doctor stating that it was not possible to say whether the injuries on the dead body were ante-mortem or post-mortem- The deceased was allegedly last seen in the company of the accused as long as 27 days before the dead body was found- In such circumstances, held, High Court erred to holding that the death was homicidal.″

(c) In the case of Atahar and others Vs. State 62 DLR-302 held:

″ Defence plea- There is a basic rule of criminal jurisprudence that if two views are possible on the evidence adduced in a case of circumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, the Court should adopt the view favorable to the accused. If we consider the entire evidence we can safely conclude that the prosecution has totally failed to prove its case, moreso the version put forward by the defence has a reasonable possibility of being true. Hence the accused is entitled to get benefit of doubt, not as a matter of grace but as a matter of right.

24. In the instant case, if we place defence version and its supporting evidence and circumstances and the prosecution case side by side in order to arrive at a correct decision, it will appear to us that the defence version of the case will come our prominently in order to defeat the prosecution case but the learned trial Court did not virtually outsider the defence version. If the defence put forward in alibi on behalf of the accused which seems to be true the accused is entitled to a verdict of benefit of doubt.

25. In order to appreciate their submissions we have gone through the record and given our anxious consideration to their submissions.

26. Let us now weigh and sift the evidence on record as adduced by the prosecution to prove the charge.

27. P.W.1 S.I. Kazi Amirul Islam, informant of the case. He deposed that on 05-04-2005 he was posted at Nakla Investigation Centre. He received an inquest report and post-mortem report in connection with General Diary no. 407 dated 19-02-05 regarding beating of victim by her husband within 18-02-2005 to 19-02-2005 at 11:30 a.m. There are two accused in this

case. One is Nurul Amin Baitha and another his second wife. Since marriage accused husband of victim used to torture for dowry. After serious beating she was sent to Nakla health complex wherein on 19-02-2005 at 11:30 she succumbed to the injuries. Accordingly S.I. Samir held inquest and after post mortem examination he lodged the F.I.R. (Exhbt.1) and his signature on it Exhbt. 1/1. The deceased used to stay at her conjugal home.

28. P.W.1(ka), Abdul Mannan Mia, younger brother of deceased and eye witness to the occurrence. He deposed that on 26-02-2005 he filed a complaint in the Court. In consequence of that case on 05-04-2005 FIR was lodged by S. I. Amirul Islam. His elder sister deceased Hasna Banu was married with Nurul Islam Baitha before 25/30 years. During their wedlock two sons and two daughters born. The occurrence took place on 18-02-2005 at 12:00 p.m. to 4:00 p.m. Prior to four days of occurrence his sister was sent to their home for bringing for Tk.50,000/- as dowry. On her refusal her accused husband threatened for second marriage before 2/3 days of the occurrence. He (accused) married one Anjumanara Begum for the second time. On query by his deceased sister about second marriage, the accused again demanded dowry for Tk. 50,000/- and assaulted her by inflicting fists and blows. He was then ploughing at the boro field at south to P.O. and witnessed the occurrence. On hearing hue and cry he rushed to the scene and tried to rescue the deceased but he was chased by the accused. Then he rushed to Chairman and reported the incident who assured for proper justice. In the evening village doctor Aminul came and according to his advise she was taken to Nakla health Complex on the following day, wherein doctor declared her dead. Then his deceased sister was brought to her conjugal home from-where both the accused fled away. He caught hold accused Anjumanara Begum and produced her to the Police. He witnessed the occurrence. Nurul Islam Baitha and his second wife assaulted his deceased sister and other witnesses also witnessed the occurrence.

29. In cross-examination he stated that he was working 50 cubits away from the home of accused on the day of occurrence. He witnessed the beating to his sister. Both the accused were assaulted her at 12’0 clock. He denied the suggestion that he did not witness the occurrence and the accused did not demand dowry and deposing falsely.

30. P.W. 2, Rana Mia, a local witness and eye witness to occurrence. He deposed that on 18-02-2005 at 12 ’0 clock he was working in a boro field south to P.O. On hearing hue and cry he went there and found that the accused was inflicting fists and blows to victim Hasna Banu and his second wife was assisting him. He did not protest. He had no knowledge on which reason the accused was beating. At the P.O. Anjumanara, Gendu and Mannan were present. On the following day victim was taken to hospital wherein the doctor declared her dead.

31. In cross-examination he stated that he found Mannan at the P.O. who tried to rescue the deceased from beating, he did not hear about demanding dowry but subsequently heard it. He denied the suggestion that accused Anjumanara did not assist the accused for assaulting and he was deposing falsely.

32. P.W. 3 Gendu Mia, cousin of deceased and eye witness to occurrence. He deposed that the occurrence took place on 18-02-2005 at 1:00 p.m. At that time he was working at his agricultural field. On hearing alarm he went to the P.O. and found that accused Nurul Amin Baitha seriously beating his wife Hasna Banu. He did not notice Anjumanara Begum. The accused assaulted the deceased for the cause of dowry. Then he left the P.O. After sometime

he came back and found that accused Baitha and accused Anjumanara were pouring water on head of victim, at that time the other children were weeping. He was examined by the Police.

33. In cross-examination he stated that he was working at 400/500 cubits from the P.O. He found Munsur, Asaduzzaman, Manna, and Mizan member at P.O. The father of deceased used to give Tk.2/4/5 thousand to accused. After death of father of deceased her brother also gave money. He however did not see assaulting of deceased by Anjumanara. He denied the suggestion that Anjumanara and Baitha had no complicity for murdering deceased and deposing falsely.

34. P.W. 4 Asaduzzaman is cousin of deceased and eye witness to occurrence. He deposed that on 18-02-2005 at 12/1:00 O'clock he was working in irrigation pump. On hearing alarm he rushed to P.O. and found that Mannan was beating the victim Hasna Banu for cause of dowry for Tk. 50,000/-. Earlier father of deceased used to pay money to accused. On the same day at 4'0 clock he heard that accused also assaulted the deceased. Later the deceased was taken to hospital wherein she died. He was examined by the Police.

35. In cross examination he denied the suggestion that accused Baitha and Anjumanara assaulted the victim and he was deposing falsely.

36. P.W. 5 Md. Jarifuddin, a local witness and eye witness to occurrence. He deposed that on 18-02-2005 at 11/13 '0 Clock he found that accused Baitha was beating his wife, nobody came forward to rescue her. He found Azbahar, Akkas, Rana,Gendu, Asaduzzaman and Azahar were at the P.O. The victim was senseless and lying on the ground. Then victim was taken to hospital wherein she died. The second wife assisted for assaulting the victim.

37. In cross-examination he denied the suggestion that accused Baitha and Anjumanara did not assault the victim.

38. P.W. 6 Azahar Ali, a local eye witness of the occurrence. He deposed that on Friday at 11/12 '0 Clock the occurrence took place. He was ploughing at south side to accused Baitha. On hearing screaming he went to P.O. and found that accused Baitha was beating his wife. The victim was about to undress, many peoples assembled there. They tried to resist but accused Baitha did not allow any one to come forward. At afternoon he found the victim Hasna Banu in critical condition and she was taken to hospital wherein she died. The locals arrested second wife of Baitha. After second marriage accused Baitha used to demand dowry to victim.

39. In cross examination he stated that he heard about demanding of dowry from the brother of deceased. The deceased died after severe beating and second wife of Baitha assisted the accused for beating. He denied the suggestion that he was deposing falsely.

40. P.W. 7 Monsur Ali, a local eye witness. He deposed that he was working at the paddy field beside the P.O. On hearing alarm he went to P.O. at 10:30 a.m. and found that accused Baitha and Anjumanara were beating victim Hasna Banu. Then he left from P.O. again he happened there at 4'O clock and found that accused were beating the deceased. On the following day the deceased Hasna Banu was taken to hospital wherein she died. The deceased Hasna Banu was carrying for five months. After occurrence the dead-body of Hasna Banu was kept at P.O. and both the accused fled away.

41. In cross-examination he denied the suggestion that he did not see the occurrence and deposing falsely.

42. P.W. 8 A.S. Mainul Islam,Upazila Nirbahi Officer, Sherpur deposed that on 12-04-2005 he recorded the confession of accused Anjumanara after completion of all legal formalities. He proved the same as Exhbt. 3 and his signature on it Exhbt. 3/1.

43. In cross- examination he denied the suggestion that at the pressure of Police the accused made confession.

44. P.W. 9 Dr. Jatindra Chandra Mondal. He deposed that on 20-02-2005 he was attached as Residential medical officer(RMO) in the Sherpur sadar hospital and held autopsy upon the cadaver of deceased Hasna Banu and found the following injuries:

1. Multiple ecchymosis on the both sided face. On the both lips, on the nose, on the both mandiblular both sub mandiblular region. On the anterior aspect of the neck, on the both lateral aspect of upper and middle part of the neck, on the posterior aspect of the neck, on the right side forehead, on the anterior aspect of the upper and middle part of the right side of the chest.
2. Multiple ecchymosis on the left fronto partial region of the head, on the upper and middle part of the back on the left arm, left fore arm on the dorsum of the left hand of the right forearm, on the middle of the arterial aspect of both thighs, on the anterial aspect of the right side of upper abdominal region.

45. He opined that death was due to asphyxia, resulting of suffocation from above mentioned injuries which were antimortem and homicidal in nature. He proved the post mortem report as Exhbt. 4 and his signature on it as Exhbt. 4/1.

46. In cross- examination he denied the suggestion that he did not held autopsy correctly.

47. P.W. 10 S.I. Md. Sahidullah, He deposed that he recorded the FIR and filled up its form. He proved his signature as Exhbt. ½ and 1/3 and inquest was held by S.I. Sagiruddin and after then he retired. He proved the signature of S.I. Sagir as Exhbt. 2/2.

48. P.W. 11 S.I. Kazi Amirul Islam. He deposed that on 05-04-2005 he was attached at Nakla Station Investigation Centre and the case was entrusted to him for investigation. He visited the P.O. , prepared the sketch map with index, recorded the statement of witnesses under section 161 of the Code. After investigation he submitted charge-sheet accusing Nurul Amin Baitha and Anjumanara as accusesd.

49. In cross examination he denied the suggestion that without proper investigation and in perfunctory manner submitted charge-sheet.

50. These are all of the evidence on record as adduced by the prosecution to prove the charge.

51. Now the question calls for consideration how far the prosecution could proved the charge against the appellants. Such question along with the submissions of the defence should be answered in the following manner:

> In approaching and answering to the points drawn up, the cardinal principles of criminal jurisprudence in awarding conviction followed by sentence upon an indicted

person demands meditation. A legal survey of law, appraisal of evidence, browsing eye on materials brought on record, analysis of fact and circumstance of the case, inherent infirmities disturbing and striking facts of prosecution case are also required to be taken into consideration. Rival contentions surged forward from both sides shall be also addressed and considered by us.

52. Fundamental principles of criminal jurisprudence and justice delivery system is the innocence of the alleged accused who should be presumed to be innocent until the charges are proved beyond reasonable doubt on the basis of clear, cogent and credible evidence and that onus of proving everything essential to the establishment of charge against the accused lies upon the prosecution which must prove charge substantially as laid to hilt and beyond all reasonable doubt on the strength of clear, cogent credible and unimpeachable evidence. In a criminal trial, the burden of proving the guilt of the accused beyond all reasonable doubts always rests on the prosecution and on its failure, it cannot fall back upon the evidence adduced by the accused in support of his defence to rest its case solely thereon. Proof of charge must depend upon judicial evaluation of totality of evidence, oral and circumstantial, and not by an isolated scrutiny. Prosecution version is also required to be judged taking into account the overall circumstances of the case with a practical, pragmatic and reasonable approach in appreciation of evidence.

53. It is always to be remembered that justice delivery system cannot be carried away by heinous nature of crime or by gruesome manner in which it was found to have been committed and graver the charge is greater is the standard of proof required. It should also bear in mind that if the accused can create any doubts by adducing evidence or cross examining the PWs in the prosecution case, the accused is entitled to get benefit of doubt. It is conveniently observed that though sad, yet is a fact that in our country there is a tendency on the part of the people to rope in as many people as possible for facing trial in respect of any criminal case. It has been even found that innocent person, including aged infirm and rivals, are booked for standing on dock. Some are acquitted by the Court of first instance and some by appellate Court, but only having been in incarceration for years. Such efforts on the part of relatives of victim and other interested persons invariably is done and thus it becomes difficult on the part of a Court to find out the real culprit. Under such circumstances and in view of the prevalent criminal jurisprudential system, a judge is to find out the truth from a bundle of lies and to shift the grain out of chaff. A Judge does not preside over a criminal trial merely to see that no innocent person is punished. A Judge, also presides to see that guilty man does not escape. Both are public duties. Law therefore, cannot afford any favour other than truth and only truth.

54. We should bear in mind, credibility of testimony oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. When dealing with the serious question of guilt or innocence of persons charged with crime, the following principles should be taken into consideration.

a) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.

b) The evidence must be such asto exclude to a moral certainty every reasonable doubt of the guilt of the accused.

c) In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person suffer.

d) There must be clear and unequivocal proof of the corpus delicit.

e) The hypothesis of delinquency should be consistent with all the facts proved.

55. Inspite of the presumption of truth attached to oral evidence under oath if the Court is not satisfied, the evidence inspite of oath is of no avail.

56. On going to the materials on record it transpires that the prosecution in all examined twelve witnesses, of them P.W. 1 and P.W. 11 are the same person who deposed as informant and investigation officer respectively of this case. P.W. 1(Ka) is brother of deceased. P.W. 2 is local witness. P.Ws. 3 and 4 are cousins of deceased, P.Ws. 5, 6 and 7 are also local witnesses. P.Ws. 1(Ka), 2, 3,4,5, 6 and 7 are the eye witnesses of the occurrence. They were working beside the P.O. and happened at scene on hearing screaming from the homestead of accused Nurul Alam Baitha. P.W. 8 is Magistrate, first Class, recorded the confession of accused Anjumanara, P.W. 9 held autopsy upon the cadaver of the deceased, P.W. 10 recording officer of the case.

57. On meticulous examination of the evidence on record we find that instant case is absolutely rest upon the evidence of P.W. 1(ka). Abdul Mannan Mia, younger brother of deceased, an eye witness of occurrence. P.Ws. 2,3,4,5,6,7 are also eye witnesses, they were examined along with other official witnesses to corroborate P.W.1(ka). He deposed that on the day of occurrence he was ploughing at boro field beside south of P.O. On hearing alarm he rushed to there and found that Baitha along with his second wife Anjumanara were mercilessly beating his elder sister victim Hasna Banu wife of accused Baitha. He along with other witnesses tried to resist the accused but the accused chased them. He, then reported the incident to local Chairman. P.W. 1(ka), 3, 4, 5, 6, and 7 categorically in one voice stated that accused Baitha and his second wife Anjumanara Begum mercilessly beat his first wife victim Hasna Banu. They inflicted fists blows at her vital organ for which she subsequently on the following day succumbed to the injuries at hospital. P.W. 9 Dr. Jatindra Chandra Mondal who held autopsy upon the cadaver of deceased also found that the body bore multiple injuries which were antimortem and homicidal in nature and death was due to such injuries. Althogh P.Ws. 3 and 4 did not state anything about the accused Anjumanara relating to beating of deceased but on close analysis of their evidence it appears to us that the occurrence took place since morning to evening and those witnesses came after beating by both the accused.

58. It is pertinent to point out that the accused Baitha mercilessly assaulted his first wife deceased Hasna Banu at 12-0 clock then also at 4:00 p.m. So in both the time second wife of Baitha Anjumanara participated and assisted his husband Baitha. So it is very unsafe to say that both the accused had no premeditated/preplaned for assaulting the victim to death.

59. Undisputedly the deceased, who was the first wife of accused Baitha, met with death in the conjugal home, while she was living with her accused husband. Presence of the accused in the house at the material time is not disputed. No plea of alibi has been taken. Moreover presence of the accused Baitha at the material time is supported by the evidence on record. Thus the death of the deceased was in the special knowledge of the accused Baitha. He knew how she met with death. Ordinarily an accused has no obligation to account for the death for which he is placed on trial. But in a case like the present one where the accused has special knowledge of the death of the deceased, under section 106 of the Evidence Act, he is under obligation to explain how the deceased died. If he fails to explain the death of the deceased or if his explanation is found false the irresistible inference would be that none besides him caused the death of the deceased. With this regard reliance may be placed in the cases of (1) Abdul Motaleb Howlader vs. State 5 MLR (AD) 362= 6 BLC(AD)1, (2) Elais

Hossain vs. State, 54 DLR (AD) 78, (3) Golam Mortuza, vs. State, 2004 BLD (AD)201=9 BLC (AD)229, (4) Gouranga Kumar Shaha, vs. State 2 BLC (AD) 126, (5) Dipak Kumar Sarker, Vs. State 40 DLR (AD), 139, (6) State Vs. Mofazzal Pramanik, 43 DLR(AD)65, (7) State Vs. Shafiqul Islam, 43 DLR(AD) 92, (8) State Vs. Kalu Bepari, 43 DLR(AD) 249, (9) Shamsuddin vs. State, 45 DLR 587, (10) Abdus Salam vs. State, 1999 BLD 98, (11) Abdus Shukur Miah vs. State 48 DLR 228, (12) State vs. Afazuddin Sikder, 50 DLR 121, (13) Abul Kalam Molla vs. State 51 DLR 544, (14) Joynal Bhuiyan vs. State 52 DLR 179, (15) Fazar Ali vs. State, 5 MLR 351= 5 BLC 542, (16) State Vs. Azizur Rahman 2000 BLD 467= 5 BLC 405.

60. In the case of Abul Hossain Khan vs. State 8 BLC(AD) 172, it is held-

> "The un-denied position is that death of petitioner's wife occurred in the house of the petitioner. It is not the case of the petitioner that he was away from the home while death occurred to his wife or that some miscreants whom he could not resist caused death of his wife. The petitioner tried to explain the cause of death by stating that the deceased committed suicide by hanging. The explanation offered as to how death occurred to the petitioner's wife was found to be not correct because of the evidence of P.Ws. 12 and 13, the Medical Officers who held post-mortem examination of the dead-body of petitioner's wife. The Medical Officers have stated that cause of death of the victim was homicidal and not suicidal. Since death to the wife was caused while she was residing in the house of her husband, the convict petitioner, is competent to say how death occurred to his wife and that the explanation which he offered having been found untrue, the conviction and sentence that was passed by the learned Sessions Judge has rightly been affirmed by the High Court Division.

61. The facts and circumstances of the above case are fully consistent with those of the case in our hand and as such the principle of law enunciated in that case is applicable in this case.

62. It is pertinent to point out that the accused has no obligation to account for the death for which he is placed for trial. The murder having taken place while the wife was with the custody of her husband, then the accused husband under Section 106 of the Evidence Act, is under obligation to explain how his wife had met with her death. In absence of any explanation coming from his side it seems, none other than the accused husband was responsible for causing death.

63. It is well settled that when it is established that the husband and wife were residing in the same house at the relevant time, the husband is duty bound to explain the circumstances how his wife met her death and in absence of any explanation coming from the husband, irresistible presumption is that it is the husband who is responsible for her death. In this regard reliance can be placed in the case of State Vs. Aynul Huq 9 MLR 393= 9 BLC 529. This view receives support in the case of Gouranga Kumar Saha vs. State 2 BLC (AD) 126. Abdul Mutaleb Howlader vs. State 5 MLR(AD)92= 6 BLC(AD)1, Dipok Kumar Sarkar vs. State reported in 40 DLR(AD) 139 and Sudhir Kumar Das alias Khudi Vs. State 60 DLR-261.

64. In the case State vs. Azam Reza 62 DLR(AD) 406 held:

> "Wife killing case- The deceased was the wife of the accused who met with death in the bed-room of the accused, while she was living with the accused. The presence of the accused in the house of the material time is not disputed rather is supported and proved by evidence on record and the death of the deceased was within the special knowledge of the accused."

65. On appraisal of the evidence on record therefore, we find that the evidence of the prosecution witnesses regarding staying of the victim with her accused husband at her conjugal home are consistent, uniform and corroborative with each other. There is absolutely no reason to disbelieve those competent witnesses, therefore, the same are invulnerable to the credibility.

66. It is very significant to us that all the eye witnesses categorically stated about assaulting/ beating the victim at the relevant time of occurrence by both the accused for which she met with the tragic end of life but from their evidence we failed to discover any such events of demanding dowry to her before such occurrence. P.W. 1Ka i.e. younger brother of the deceased also failed to disclose such facts and other witnesses had no direct knowledge of demanding dowry for confirmation of marriage between accused Baitha and deceased. Therefore, the prosecution failed to prove the charge of demanding dowry as provided in Ain 2000, but there are consistent, uniform and corroborative evidence in murdering the deceased by those accused.

67. The condemned accused stood charged and convicted for offence of sections 11(ka), 30 of the Ain 2000. Section 11(ka) enjoins that if the husband of a woman or father, mother, guardian, relation or any other person on behalf of the husband for dowry cause death to a woman or ventures to cause death or causes hurt or have a try to cause hurt that husband, father, mother, guardian, relation or the person (a) shall stand sentenced to death for causing death or shall stand sentenced to imprisonment for life for mounting endeavour to cause death and in both the counts he shall be, also, liable to pay fine and (b) shall be sentenced to imprisonment for life causing hurt or be sentenced to rigorous imprisonment for a period not more than 14(fourteen) years and less than 5(five) years for striving to cause hurt and in both counts shall be liable to fine.

68. In order to attraction 11(Ka) of the Ain 2000, it is to be proved that death was caused in view of demand of dowry put forward from the side of husband or father, mother, guardian, or relation of the husband or any person for and on behalf of husband.

69. From circumstantial evidence it has come to light that convicts had caused the death of deceased and a clear case of murder had been brought home to the door of convicts.

70. This takes us to a legal debate of fundamental character, which is,

i. Whether the convicts can be graced with a verdict of acquittal when charge of section 11(ka) of the Ain of 2000 could not be pressed against him;

ii. When a clear case of murder has been established by circumstantial and medical evidence against them whether the convicts can be convicted for the offence of murder punishable under section 302 of the Penal Code.

iii. Whether the case is required to be sent back to Tribunal or Court of sessions for fresh-trial.

71. Section 25 of The Ain of 2000 postulates that Tribunal defined in section 2(Gha) shall be treated as Court of Sessions and Tribunal shall be able to exercise all powers of Sessions Court in holding trial of an offence.

72. Section 26 of The Ain 2000 enshrines that Tribunal so constituted shall be recorded as Nari-O--Shishu Nirjatan Daman Tribunal and shall be constituted with one Judge and Judge of Tribunal shall be appointed from amongst District and Sessions Judge to the Government, if necessary, shall appoint any District and Sessions Judge as Tribunal Judge in addition to his charge. Section 20 further enjoins that under the section Additional District and Sessions Judge shall, Also, stand included as District and Sessions Judge.

73. From the above it becomes manifestly clear that a Tribunal trying a case under the Ain of 2000 is, also, a Court of District and Sessions Judge. When a Judge sits in a Tribunal or Special Tribunal Case holding trial of an offence under a Statute or Special Statute is a Tribunal or Special Tribunal and a Judge when sits in Sessions Case trying an offence punishable under Penal sections of Penal Code sits as Sessions Judge.

74. The case is hand, although, tried by a Tribunal constituted under the Ain of 2000 that Tribunal was, also, the court of Sessions. In the judgment, learned Judge was described as Additional District and Sessions Judge, as well as Nari-O-Shishu Nirjatan Daman Tribunal no.2. Judgment demonstrates that learned Additional District and Sessions Judge has been, also, exercising the power and Jurisdiction of the Nari-O-Shishu Nirjatan Daman Tribunal. Fate of the convicts and result of the case would have been the same whether it would have been tried either as a Nari-O-Shishu case by the Tribunal or as a sessions case by learned Sessions Judge and if section 11(ka) of the Ain of 2000 was not attracted in respect of convicts the offence of section 302 the Penal Code could be very much pressed into service against the convicts, and they could be conveniently tried and convicted for offence of section 302 of the Penal Code.

75. In the case of Asiman Begum vs. The State 51 DLR(AD)-18 held:

> "When it is found after a full trial that there was a mis-trial or trial without jurisdiction, the Court of appeal before directing a fresh trial by an appropriate Court should also see whether such direction should at all be given in the facts and circumstances of a particular case.
>
> It is found that there was no legal evidence to support the conviction then in that case it would be wholly wrong to direct a retrial because it would then be a useless exercise. Further, the prosecution should not be given a chance to fill up its lacuna by bringing new evidence which it did not or could not produce in the first trial."

76. As regards remand of the case, we may profitably refer the above decision in the case of Asiman Begum vs. state reported in 51 DLR(AD) 18 wherein it has been decided that the remand order for trial of the case as a Sessions case in the particular circumstances of the case will be a mere formality because Nari-O-Shishu Case no.2 of 1996, although tried under Bishes Bidhan Ain, 1995 by a Bishesh Adalat, the presiding officer was no other than the Sessions Judge himself and, as such, it was unlikely that the result would be anything different if the case was tried by him as a Sessions case. Appellate Division, thus sent the appeal to High Court Division to consider the case on merit and to pass whatever order or orders it might think appropriate in the interest of justice.

77. In State vs. Abul Kalam , 5 BLC 230 one Abul Kalam stood convicted for offence of section 10(1) of The Ain of 1995 for murder of his wife for dowry by learned Sessions Judge and Special Tribunal no.1, Noakhali. Consequential sentence was death. Condemned-prisoner preferred Jail appeal and, also, regular Criminal appeal before High Court Division. There had been, also, Death Reference. A Division Bench of High Court Division heard Death Reference, Jail appeal and Criminal appeal together and disposed of those by a common Judgment. High Court Division found that there had not been cogent evidence asto committing murder for dowry and no evidence had been led as to the real cause of killing of wife by husband and held that the case did not come under section 10(1) of The Ain of 1995 and the case comes under section 302 of the Penal Code. The High Court Division further held that Sessions Judge, in fact, was the Special Tribunal no.1 who tired the case and for no fault of the accused the case had been tried as Special Tribunal case. High Court Division instead of sending the case back for fresh trial under Section 302 of The Penal Code by learned Sessions Judge disposed of the appeal. High Court Division altered conviction from section 10(1) of The Ain,1995 to one under section 302 of the Penal Code. Sentence of death was altered to one of imprisonment for life. The High Court Division in rendering decision took into account the case of Asiman Begum vs. State (Supra).

78. In the case of Shibu Pada Acharjee vs. State reported in 56 DLR 285, accused-appellant was convicted for offence of section 4© of The Ordinance of 1983 for commission of rape upon victim Ratna Rani but ingredients of section 4© of the Ordinance of 1983 could not be brought home to accused-appellant. In the case is had been laid down:

> "To take the prosecution out of Court on a question of technicality, will be a travesity of Justice and technicality must bend to cause of justice inasmuch as ends of law is Justice."

79. Accused-appellant can be fastened for offence of section 376 of the Penal Code and conviction under section 4(c) of the Ordinance of 1983 can be altered to one of section 376 of The Penal Code.

80. In the said case conviction under section 4(c) of The Ordinance of 1983 was altered to one of section 376 of the Penal Code.

81. In the case of The State vs. Mahbur Sheikh alias Mahabur ILNJ 139 i.e. I The Lawyers & Jurist 139 held:

> " Since offence of murder punishable under section 302 of Penal Code was carried to the door of convicts they can be very much convicted for offence of Sections 302, 34 of the Penal Code and as such we convert the offence of section 11(Ka) of the Ain 2000 to offence of sections 302, 34 of the Penal Code. Convicts, thus stands convicted for offence of sections 302, 34 of the Code.

82. In the event of sending the case either to Tribunal or Court of Sessions for fresh trial proceeding would be protracted which cannot be allowed in the interest of true dispensation of criminal Justice.

83. Since offence of murder punishable under section 302 of the Penal Code was carried to the door of convicts they can be very much convicted for offence of sections 302, 34 of the Penal Code and as such we convert the offence of section 11(ka) of The Ain of 2000 to offence of sections 302, 34 of Penal Code. Convicts, thus stands convicted for offence of sections 302, 34 of the Penal Code.

84. Legal debate stands solved in the following terms and language:

i. Convicts cannot be graced with a verdict of acquittal;

ii. Convicts can be convicted for the offence punishable under sections 302, 34 of the Penal Code.

iii. Case is not required to be sent either to Tribunal or Court of Sessions for fresh trial.

85. We find that PWs. 1(Ka), 3 and 4 are the close relation of deceased. They were the eye witnesses of occurrence. Their evidences are uniform and corroborative with each other in murdering deceased by both convicts.

86. The credit to be given to the statement of a witness is a matter not regulated by rule of procedure, but depends upon his knowledge of fact to which he testifies his disinterestedness, his integrity and his veracity. Apportion of oral evidence depends on such variable in consistence which as a human nature can not be reduced as a set formula (40 DLR 58).

87. The weight to be attached to the testimony of witness depends in a large measure upon various consideration some of which are in the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. In a word evidence of a witness is to be looked at from point of view of its credibility, it is quite unsafe to discard evidence of witness which otherwise appears reasonable and probable because of some suggestion against truthfulness of the witness.

88. Evidence of close relations of the victim cannot be discarded more particularly when close relations does not impair the same. Straightforward evidence given by witness who is related to deceased cannot be rejected on sole ground that they are interested in prosecution. Ordinarily close relation will be last person to screen real culprit and falsely implicate a person. So relationship far from being ground of criticism is often a sure guarantee of its truth (40 DLR 58).

89. We also find that during investigation the accused Anjumanara made a confession (Exhbt. 3) wherein she stated that some facts which are not consistent with the prosecution case.

90. For the convenience of understanding the same reads as hereunder:

Sh¡eh¢c

অনুমান দেড় মাস আগে শুএক্রবার দুপুর অনুমান ১.০০ টার সময় আমার সতীনের লগে আমার স্বামী বৈঠা কাইজ¡ বাধাইছে। এই কাইজা বাধায় সতীনের ও বৈঠার মেয়ে জামাইরে টাহা পয়সা দেওয়া নিয়ে z ®hW¡ hলে শনিবারে মাছ বেইচ্যা টেকা পাঠায় ¢cjz ¢L¿ºসতীনের টেহা পাঠাই দিবার কয় । এই নিয়ে তাদের মধ্যে মোহামুহি হয় । সতীনে স্বামী বৈঠারে গালি গালাজ করে । স্বামী বৈঠা সতীনরে গালিগালাজ পাড়ে । আমি তাগো হাতে পায়ে ধরে মুহামুহি করতে না করি কিন্তু তারা শোনে নাই। বৈঠা সতীনরে দুই হাত দিয়ে ঘুষা ঘুষি করছে, মারছে আমি ঠেকাইতে গেছি আমারে ঠেলা দিয়ে বৈঠা ফেলাই দিছেz a¡lfl ®hW¡ আমার সতীনের চুলের মুঠি ধরে এপাশে ওপাশে মাটিতে আছড়াইছে । মারছে এক সময় আমার সতীন অজ্ঞান হইয়া গেছে । ®hW¡l ®R¡V ®f¡m¡(q¡¢hh) aqe আসে তার মার চুলের মুঠি ধরে উচু করে মাটিতে ছেরে দিল বলে, শুয়ারের বাচচা আমার বাপের লগে ঝগড়া কর। তারপর বৈঠা সতীনরে ঘরে নিয়ে গেল । আমাকে পানি আনতে কইলে পানি আনি । সতীনের মাথায় আমি পানি ঢালছি, বৈঠা কেরোসিন দিয়ে হাতে পায়ে মালিশ করতেছি । আমি বলি কেরুসিন মালিশ দিলে ভাল হইত না । HV¡ ডাক্তারের কাম । তার পর সেদিন রাত ৮.০০ টার সময় একজন ডাক্তার আনছে । ৫০০ পাওয়ারের সেলাইন দিছেz pa‡e ®Q¡M মেলে চাইছে। সে আমারে তার মাথাতে পানি ঢালতে বলে । এপাশ ওপাশ কাত করাতে বলে । রাতে সতীনের অবস্থা খারাপ qu z Lu Bj¡l X¡e¡ LC WÉ¡w LC z B¢j aMe X¡e¡ WÉÉe dরে দেখাই । পর দিন সকাল ৮.০০ টায় নকলা হাসপাতালে

নিয়ে আসে । ডাক্তার সেলাইন দিছে । অনুঃ বেলা শনিবার ১২.০০ টার সময় সতীন হাসপাতালে মারা যায় বৈঠা সতীনের লাশ নিয়ে বাড়ীতে এনে দহলে রাখে । রুটি খায় । কিছু কাগজ দেখায় বলে পুলিশে আমারে কি করবো । আমারে স্বামী বৈঠা বলে ভাগো । আমি কই আমি ভাগবো কেন তুমি মারছো, আমি বলি আমি ভাগবোনা। সতীনের বোনে ও ভাইয়ে আমাকে তাদের বাড়ীতে নিয়ে যায়। এই আমার জবানবন্দি ।

ৎVf‡pq ü¡/- ApØf‡ÛV
B ‘ u¡l¡ 12-04-05
(H, He, Hj, jDem Cpm¡j)
১ম শ্রেনীর ম্যাজিষ্ট্রেট, শেরপুর ।

91. On careful analysis of aforesaid confession. We find that the same are not in terms of prosecution case but there are sufficient ocular evidence against her in respect of beating /assaulting the deceased Hasna Banu. Those eye witnesses were extensively cross examined by the defence, in respect of participation of convict Anjumanara, but nothing could be elicitated to shake their credibility in any manner whatsoever.

92. It further appears to us from the above evidence on record regarding assaulting/beating the victim by both the convicts and subsequent at the P.O. by bringing the same from hospital are consistent, uniform, self independent and corroborative with each other with all materials particulars. There is absolutely no reason to disbelieve those competent witnesses in any manner whatsoever. So the same are invulnerable to the credibility.

93. From the evidence on record we further find that convict Baitha remained absconding since very beginning of the case, his first wife died, so he had the responsibilities to explain his position regarding further act and convict Anjumanara although appeared in the Court but later she also remained absconding. She had also some duty to explain her position, as there were severe allegations against her complicity into occurrence.

94. From the materials on record we find that soon after the occurrence the convicts fled away and remained absconding during trial, and trial was held in absentia. Abscondence of an accused is an incriminating circumstances connecting him in the offence and conduct of a person in abscondence after commission of crime is an evidence to show that he is concerned in the offence (Vide PLD 1965 Lah. 656). Therefore, anything, which tends to explain his conduct and furnishes a motive other than a guilty conscience, will be relevant under the Evidence Act. Failure to explain reason for absconding after occurrence fovours prosecution (39 DLR 437). Abscondence of accused is a relevant fact. Unless accused explain his conduct, abscondence may indicate guilt of accused (33 DLR 274). Where accused absconded immediately after occurrence and remained out of reach of hand of law for more than years without showing any convincing reason for his absence, it would be an important factor going against absconder accused (AIR-1998 SC-107). Abscondence immediately after incident and till today is a strong incriminating circumstances while can be considered sufficient corroboration of his participation in commission of crime(11 BLT 155).

95. From the materials on record, we failed to discover any express motive of accused in the crime of murder, for such cause prosecution will not fail, since motive is not ingredient of

offence, prosecution is not bound to prove the motive of the accused for committing the crime (42 DLR(AD)31; 10 MLR(AD)175}.

96. Motive does not play an effective role when premeditated and cold blooded murder is committed and established my irrefutable evidence. What is important is the nature of evidence and not the motive which may or may not be proved. None proof of motive cannot be a ground to discard the unimpeachable evidence (PLD 2001 SC 333}.

97. Proof of motive or previous ill feeling is not necessary to sustain conviction when court is satisfied that convicts are assailants of the victim, but once motive was setup it was to be proved by the prosecution beyond doubt and failure to furnish cogent and reliable evidence could lead to adverse inference against prosecution (PLD 2000 Kar 128). Absence of motive is not ground for acquittal (PLD 1999 Lah 56). Particularly when ocular evidence is reliable and corroborated by medical evidence (AIR 2003 SC 3975). Appellate Division repeated the same view { 57 DLR(AD)(2005)75}.

98. When offence proved motive is immaterial. Weakness of the motive alleged, though a circumstances to be taken into account, cannot be a ground for rejecting the direct testimony of ocular witness which is otherwise of a reliable character. If the offence has been satisfactory proved by direct evidence than it is immaterial as to whether the motive has been established or not (1968 P Cr. LJ 1251). 7 MLR (2002) 119. If there is no sufficient direct evidence motive may be matter for consideration specially when the case is based on circumstantial evidence (51 DLR 103).

99. Motive is a matter of speculation for what moves a person to take the life of another is within his special knowledge and does not constitute a necessary ingredient of the offence of murder,(1968 Cr.LJ 962).

100. In the case of Noor Md. Vs. State 1999 MLD (Pakistan Monthly Law Digest) -60 held:

> "Eye witnesses were natural witnesses of the occurrence who had not only furnished convincing account of incident in details, but had also withstood hard test of cross-examination successfully- No rancour had been ascribed to appellant-Relationship of eye witnesses with the deceased was not by itself sufficient to discredit their testimony – Record did not indicate any sign to support the idea of substitution of accused with real culprit, if any- ocular account was fully supported by medical evidence and attending circumstances-conviction of accused was upheld in circumstances.

101. In the case of Md. Azeem Vs. State 1998 Pakistan Criminal Law Journal-175 held:

> Eye–witnesses who had no ill-will or motive against the accused had plausibly explained their presence at the spot and had corroborated their version given in

their statements before the police-Ocular testimony was not in conflict with medical evidence- Prosecution had, thus, proved its case against accused beyond doubt- Conviction and sentence of death awarded to accused by trial Court were confirmed in circumstances

102. Therefore, we find that the prosecution successfully proved the charge of murder against the convicts by cogent, convincing, unimpeachable evidence and beyond all reasonable doubt.

103. At the event of aforesaid situation, we also find support of our views by the following decisions.

(1) When there is enough material to prove the commission of offence of murder by the accused and that the evidence of eyewitnesses, though declared hostile, was reliable to some extent, the accused could be convicted for murder – Deepak v. State 1989 Cr.L.J. 143(MP).

(2) If the evidence of the solitary witness to murder is corroborated by medical evidence and FIR is promptly filed and there is absence of any evidence of grave and sudden provocation, the accused can lawfully be convicted for murder- Radhakrishnan v State (1989)1 Crimes 721(Mad)(DB).

(3) If there is consistent evidence of two eyewitnesses and FIR is lodged quickly naming the accused and there is corroborative medical evidence, the Supreme Court will not interfere to disturb the conviction- Bikkar v State(1989) 2 Crimes 1(SC).

(4)If the evidence of the eyewitnesses is corroborated by the circumstantial evidence, the accused must be convicted for murder- Harish v State (1989) 2 Crimes 72 (Del) (DB).

(5) Supreme Court will not interfere in appeal against order of conviction for murder passed by Sessions Judge and upheld by the High Court, when prosecution case was consistent with medical evidence and there was no delay in lodging F.I.R.- Amrik Singh V. State of Punjab 1981 Cr.L.J. 634; AIR 1981 SC 1171; 1981 SCC (Cr.) 252; 1981 Cr.L.J.(SC) 158.

(6) If circumstantial evidence is absolutely conclusive and clinching, conviction for murder will not be set aside merely on ground that murder-spot and recovery of some ornaments were not proved- Murari Lal v State of U.P. 1980 Cr.L.J. 1408; AIR 1981 SC 363(1979) SCC 612.

(7) If the circumstantial evidence against the accused in a murder case is firmly established and the circumstances unerringly point to the guilt of the accused and form a complete chain proving the guilt, the Supreme Court will not interfere with the concurrent findings except in case of grave injustice- Ashok V State 1989 Cr.L.J. 2124, AIR 1989 SC 1890; (1989)2 Crimes 423.

104. With regard to the sentence imposed upon convicts we are of the view that sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under section 302 of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice.

105. Moreover, the impugned judgment and order of conviction and sentence so far as it relates to the Ain, 2000 is not well founded but murdering of the deceased Hasna Banu by the convicts have been proved by evidence. Therefore, we failed to discover any merit in the submissions advanced by the learned Counsel for the defence. On the contrary the submissions advanced by the learned counsel for the State in respect of evidence prevails and appears to have a good deals of force.

106. In the light of discussions made above and the preponderant Judicial views emerging out of the authorities referred to above we are of the view that the impugned Judgment and order of conviction and sentence under sections 11(ka) and 11(ka), 30 of the Ain 2000 suffers from legal infirmities, but the same will be proper under sections 302, 34 of the Penal Code. Therefore, the ends of justice will be met if the sentence is altered of sentence of imprisonment for life. The condemned accused Md. Nurul Amin Baitha and Anjumanara Begum thus stand sentenced to imprisonment for life.

107. In the result:-

(a) Death reference no. 22 of 2010 is rejected;

(b) The impugned judgment and order of conviction and sentence dated 19-04-2010 passed by the learned Judge of Nari-O-Shishu Nirjatan Damon Tribunal no.2, Sherpur, in Nari-O-Shishu Nirjatan Daman Case no. 143 of 2005 is modified to the effect that the condemned-accused Md. Nurul Alam Baitha and Anjumanara Begum each of them is convicted under sections 302, 34 of the Penal Code and sentenced to suffer imprisonment for life and also to pay a fine of Tk.10,000/-each in default to suffer rigorous imprisonment for six months more.

(c) As both the condemned accused are now absconding, the learned Judge of the Court below shall take appropriate step for securing their arrest and to commit them to jail to serve out their sentences.

108. The Office is directed to send down the records at once.

7 SCOB [2016] HCD 61

HIGH COURT DIVISION

CIVIL REVISION NO. 3196 OF 2002.

Md. Bazlur Rahman,
…. Defendant-Petitioner.

Versus

Shamsun Nahar and others.
….Plaintiff –Opposite- parties.

No one appears.
…..for the petitioner

Mr. Mohammad Abdullah,
Advocate.
…..for the opposite parties

Heard on: 25.02.2015 & Judgment on: 26.02.2015.

Present:
MR. JUSTICE S.M. EMDADUL HOQUE

Family Courts Ordinances, 1985
Section 9(6):
It appears that both the courts after proper consideration of the evidence on record rightly opined that since the petitioner himself received the summons so without filing any appeal against the *experte* judgment and decree he cannot get any relief. ...(Para 10)

The code of civil procedure, 1908
Section 115(1):
It is settled principle that the concurrent findings of facts cannot be interfered with in revisional jurisdiction under section 115(1) of the code of civil procedure. This principle support by the decision of the case of Sambunath Poddar and others-Versus-Bangladesh Railway reported in 43 DLR (AD)-82. ...(Para 11)

Judgment

S.M. EMDADUL HOQUE, J:

1. On an application of the petitioner Md. Bazlur Rahman under section 115 (1) of the Code of Civil Procedure the Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment of affirmance dated 02.05.2002 passed by the Joint District Judge, Tangail, in Family Appeal No. 1 of 2002 should not be set-aside.

2. Fact necessary for disposal of the Rule, in short, are the opposite party No.1 as plaintiff instituted Family Suit No. 10 of 2000 in the Court Assistant Judge, Basail, Tangail, against the defendant petitioner claiming dower Money and her maintenance along with the maintenance of her 2 minor children. The trial Court after consideration of the evidence on record decreed the suit *experte* and directing the petitioner to pay Taka 98,000/- as dower money and maintenance. Aagainst the said *experte* order the defendant petitioner filed miscellaneous case No. 28 of 2000 but since in the trial Court the defendant petitioner though appeared and prayed for time for filing written objection but ultimately he did not appeared and thus trial Court passed *experte* judgment on 21.08.2000. The petitioner without preferring

appeal filed an application under section 9(6) of the family Courts ordinances 1985 claiming that without any summons the *experte* decree was passed by the trial Court.

3. The trial court after consideration of the evidence on record found that the summons was duly served even the defendant himself admitted that he has received the summons.

4. Against the said order of the trial court the petitioner filed Family Appeal No. 1 of 2002 before the learned District Judge, Tangail. The said appeal was heard by the Joint District Judge, Artha Rin Adalat, Tangail, who after hearing the parties and considering the evidence on record upheld the order of the trial Court by its judgments and order dated 02.05.2002.

5. Being aggrieved by and dissatisfied with the impugned judgment of the courts below the petitioner filed this revisional application under section 115(1) of the Code of Civil Procedure and obtained the Rule.

6. Mr. Md. Abdullah, the learned Advocate enter appeared on behalf of the opposite parties through Vokalatnama to oppose the Rule.

7. The matter has come up in the daily cause list in a couple of days with the names of the learned Advocates of both the sides but none turned-up to press the Rule. Since this is a long pending case and against an order of affirmance, I am inclined to dispose of the matter on merit.

8. However Mr. Md. Abdullah the learned Advocate of the opposite parties argued that since the petitioner admitted that he received the summons and thus the trial Court rejected the application of the petitioner and the Appellate Court upheld the said order which is a findings of facts and the concurred findings of facts cannot be interfered with in revisional jurisdiction under section 115(1) of the Code of Civil Procedure.

9. It appears that the opposite party No.1 Mrs. Shamsun Nahar Rehana filed family suit No.10 of 2000 claiming his dower money and her maintenance along with the maintenance of her 2(two) minor children. The summons was duly served upon the defendant and the defendant filed application for adjournment of the suit in several times and prayed for time for filing written objection. But he did not filed written objection and thus the trial Court took the matter for *experte* hearing and accordingly passed the *experte* decreed directing the defendant to pay Tk. 98,000/- for the dower money and maintenance. Thereafter the petitioner filed application for recalling the judgment and decree of the Courts below dated 21.8.2000 under section 9(6) of the Family Courts Ordinances 1985, claiming that no summons was served upon him. The courts below found that in his deposition the present petitioner admitted that he received the summons and claimed that he was engaged to restore the law and order situation of the Hiltracks so, he could not appear when the matter was called on for hearing. The trial Court after consideration of the evidence on record and the Ain opined that since the summons was duly served and the petitioner obtained time for filing written objection as such rejected the application. Against which the petitioner filed Family Appeal No. 1 of 2002 and the Appellate Court after consideration of the evidence on record and on consideration of the admission of the petitioner that he received the summons thus upheld the order of the trial Court by its judgment and order dated 02.05.2002.

10. I have perused the judgment of the Courts below and the papers and documents as available on the record. It appears that both the courts after proper consideration of the evidence on record rightly opined that since the petitioner himself received the summons so without filing any appeal against the *experte* judgment and decree he cannot get any relief.

11. It is settled principle that the concurrent findings of facts cannot be interfered with in revisional jurisdiction under section 115(1) of the code of civil procedure. This principle support by the decision of the case of Sambunath Poddar and others-Versus-Bangladesh Railway reported in 43 DLR (AD)-82.

12. Considering the facts and circumstances of the case and the discussions made above, I find no merit in the Rule.

13. In the result the Rule is discharged without any order as to costs.

14. The order of stay granted earlier by this court is hereby recalled and vacated.

15. Send down the lower court's records at once.

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HIGH COURT DIVISION

CIVIL REVISION NO. 2218 OF 2010

Sree Paresh Chandra Pramanik
.... Petitioner

-Versus-

Md. Mokbul Hossain and others
... Opposite Parties

No One appear
..... For the Petitioner

Mr. Md. Harun-or-Rashid, with
Mr. Md. Enamul Huq Molla, Advocates
..... For Opposite Party no.1

Heard on:- 10.08.2015, 16.08.2015
Judgment dated : 17.08.2015

Present :
Mr. Justice Borhanuddin

State Acquisition and Tenancy Act, 1950
Sub-section 10 of section 96
And
Succession Act, 1925
Section 28:
Section 28 of the Indian Succession Act, 1925, provides mode of computing of degrees of kindred in the manner set forth in the table of kindred set out in schedule 1. From the table of schedule 1, annexed with the counter affidavit, it is evident that brother-in-law is not a relation within three degrees by consanguinity. Pre-emptee opposite party no.1 being not a relation within three degrees by consanguinity of the donor is not entitled to get protection of Sub-section 10 of section 96 of the State Acquisition and Tenancy Act.
... (Para-13)

Judgment

Borhanuddin, J:

1. This rule has been issued calling upon opposite party no. 1 to show cause as to why judgment and order dated 28.04.2010 passed by the learned Additional District Judge, Naogaon, in Civil Miscellaneous Appeal No. 10 of 2008 reversing judgment and order dated 24.01.1998 passed by the learned Senior Assistant Judge, Naogaon, in Pre-emption Case No. 3 of 2003 rejecting the case, should not be set aside 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 the rule are that opposite party no.1 as pre-emptor instituted Miscellaneous Case No. 3 of 2003 in the Court of learned Assistant Judge, Naogaon, under section 96 of the State Acquisition and Tenancy Act contending interalia that the preemptor is owner and possessor of plot nos. 1580, 1578 and 1571 which are adjacent to the case land as such, pre-emptor is a contiguous land holder; Pre-emptee opposite party no.2 secretly transferred the case land to pre-emptee opposite party no.1 by registered deed of gift

dated 08.10.2002; When preemptee opposite party no.1 went to take possession of the case land, the pre-emptor came to know about transfer of the land by deed of gift; Pre-emptee opposite party no.1 is not a relation of the pre-emptee opposite party no.2 within three degrees by consanguinity; Preemptor procured certified copy of the deed on 12.12.2002 and applied for preemption by depositing consideration money with compensation as per law.

3. Pre-emptee opposite party no.1 contested the case by filing written objection contending interalia that the case is not maintainable, barred by limitation and bad for defect of parties. Further contending that pre-emptee opposite party no.2 nourished and brought up pre-emptee opposite party no.1 from his childhood and after attaining majority transferred the case land in favour of the preemptee-opposite party no.1 vide registered deed of gift and delivered possession thereof; Pre-emptor is not a contiguous land holder; Preemption case is not maintainable since case land transferred by deed of gift; Case is liable to be rejected.

4. After hearing the parties and assessing evidence on record, learned Senior Assistant Judge, Atrai, Naogaon, rejected the case vide judgment and order dated 24.01.1998.

5. Being aggrieved, pre-emptor as appellant filed Miscellaneous Appeal No. 10 of 2008 in the Court of learned District Judge, Naogaon. On transfer, the appeal was heard and disposed of by the learned Additional District Judge, 1st Court, Naogaon, who after hearing the case and reassessing evidence on record allowed the appeal by his judgment and order dated 28.04.2010.

6. Having aggrieved by and dissatisfied with the judgment and order, pre-emptee-respondent as petitioner preferred this revisional application under Section 115(1) of the Code of Civil Procedure and obtained the present rule with an order of stay.

7. This matter has been posted in the cause list for the last few days with name of the learned Advocates but no one appears on behalf of the petitioner to press the rule.

8. Mr. Harun-or-Rashid with Mr. Md. Enamul Huq Molla, learned advocates appearing for the opposite party no.1 by filing a counter affidavit submits that the learned Senior Assistant Judge committed an illegality in holding that preemption Case under section 96 of the State Acquisition and Tenancy Act is not maintainable against deed of gift without considering sub-section 10(c) of section 96 of the State Acquisition and Tenancy Act which prevails at the time of execution and registration of the deed of gift. He also submits that it is evident that preemptee-opposite party no.1 is not a relation of the donor within three degrees by consanguinity as such, miscellaneous case under section 96 of the State Acquisition and Tenancy Act is very much maintainable. He next submits that after reassessing evidence on record, appellate court below arrived at a finding that exhibit '2' clearly shows that plot no.1578 owned by the pre-emptor is adjacent to the case land and as such, pre-emptor is a contiguous land holder. In support of his submissions, learned advocate referred to the case of Mir Amanullah-Vs- Mohammad Sharif and others, reported in 44 DLR 228 and the case of Golam Mostafa and others-Vs- Kazem Ali Khan and others, reported in 50 DLR 544.

9. Heard the learned advocate. Perused revisional application, judgment and order passed by the courts below alongwith lower courts record and decisions cited by the learned advocate.

10. I have gone through the judgment and order passed by the courts below. It appears that learned Senior Assistant Judge rejected the case on two counts firstly, miscellaneous case for pre-emption is not maintainable against transfer of land through deed of gift and secondly,

pre-emptor is not a contiguous land holder. Though the appellate court below after reassessing evidence on record arrived at a finding that pre-emptor is a contiguous land holder but did not revert finding of the trial court that the case for pre-emption is not maintainable since case land transferred by deed of gift. Whether pre-emption is maintainable against transfer through deed of gift is a question of law and there is hardly any dispute that a question of law can be raised at any stage of a proceeding.

11. Sub-section 10(c) of section 96 of the State Acquisition and Tenancy Act, before amendment by Act No. XXXIV of 2006, was as follows:

> ***"96. Right of Pre-emption-***
> *(10) Nothing in this section shall apply to;*
> *(a) .....*
> *(b).....*
> *(c) a transfer by bequest or gift (including Heba but excluding Heba-bil-Ewaj for any pecuniary consideration) in favour of the husband or wife or the testator or donor, or of any relation by consanguinity within three degrees of the testator or donor."*

12. The Pre-emptee No.1 who contested the case by filing written objection admitted himself that pre-emptee opposite party no.2 is his brother-in-law. The preemptee-opposite party no.1 deposed as OPW.1:

> *"নালিশী সম্পত্তির মূল মালিক আমার ভগ্নিপতি রাখাল চন্দ্র প্রাং ছিলেন। আমি আমার বোনের বিয়ের পর* i‡NÀa I¡Mim Q‰cËD-*এর বাড়ীতে লালিত পালিত হই।"*

13. Section 28 of the Indian Succession Act, 1925, provides mode of computing of degrees of kindred in the manner set forth in the table of kindred set out in schedule 1. From the table of schedule 1, annexed with the counter affidavit, it is evident that brother-in-law is not a relation within three degrees by consanguinity. Pre-emptee opposite party no.1 being not a relation within three degrees by consanguinity of the donor is not entitled to get protection of Sub-section 10 of section 96 of the State Acquisition and Tenancy Act. Learned Senior Assistant Judge committed an error of law resulting in an error in the decision occasioning failure of justice in holding otherwise. In the case of Golam Mustafa and others-Vs- Kazem Ali Khan and others, reported in 50 DLR 544, this Division held:

> *"A transaction by way of Hiba-bil-Ewaz without pecuniary consideration is covered by the exception mentioned under section 96(10)(c) and the land covered by such deed of HIba-bil-Ewaz is not pre-emptible. But such land would otherwise be pre-emptible if the donee is not a relation of the donor within three degrees by consanguinity".*

14. From schedule of exhibit '2' i.e registered sale deed dated 29.10.2001 it is apparent that plot no.1578 owned by the preemptor is adjacent to the case land described in schedule 6 of the deed of gift. As such, I cannot disagree with the finding of the appellate court below that the pre-emptor is a contiguous land holder.

15. Under the facts and circumstances of the case and for the reasons stated above, I do not find any reason to interfere with finding of the learned Additional District Judge.

16. Accordingly, Rule is discharged.

17. Judgment and order dated 28.04.2010 passed by the learned Additional District Judge, Naogaon, in Miscellaneous Appeal No. 10 of 2008 is maintained.

18. Order of stay granted at the time of issuance of the rule is hereby vacated.

19. Send down lower courts record along with a copy of this judgment to the court concern at once.

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High Court Division

(Criminal Miscellaneous Jurisdiction)

Criminal Miscellaneous Case No. 11456 of 2015

Mst. Anjuara Khanam @ Anju
……..Accused-petitioner

Versus

The State and another
…….Opposite parties

Mr. Raquibul Haque Mia with
Md. Mazedul Islam Patwary, Advocates
.….For the petitioner

Mr. Md. Harun-ar-Rashid with
Mr. M. Masud Alam Chowdhury, A.A.G
Mr. M.A. Qumrul Hasan Khan, AAG
.…. For the State

Heard on: 20.5.2015
And
Judgment on: 08.7. 2015

Present:
Mr. Justice M. Moazzam Husain
And
Mr. Justice Md. Ruhul Quddus
And
Mr. Justice Md. Badruzzaman

Nari-o-Shishu Nirjaton Damon Ain, 2000
Power of tribunal to entertain *naraji*:
The Ain has made the Code applicable to filing, investigation, trial and disposal of the *nari-o-shishu nirjatan* cases and as abundant caution has equipped Tribunal with all the powers of the Court of Session in matters of trial of offences under the Ain. Nothing is there indicating exclusion of *naraji* rather the Tribunal is obviously better placed than the Court of Session in matters of control and supervision of investigation so that it enjoys an additional power to take steps for changing the investigating officer on the basis of an application, irrespective of *naraji,* or on information received from any source whatsoever. ... (Para-20)

Nari-o-Shishu Nirjaton Damon Ain, 2000
Section 18 and 27:
The Tribunal has been clothed with power wide enough to cover all the power of a Magistrate and of the Sessions judge rolled together in ignoring investigation-report with concomitant power to entertain *naraji* and sending back the case for further investigation or, (where practicable) judicial inquiry. Sub-section (1) and (1Ga) of section 27 read with section 18 goes to show that the Tribunal is further equipped with power more robust than that of an ordinary criminal court in taking cognizance absolutely on its own satisfaction, *albeit* by assigning reason, gathered from any materials, irrespective of *naraji,* or information received in disregard of the final report submitted by police or the person authorized by the Government in this behalf. The enormously unqualified power of the Tribunal to take cognizance of offences on its own satisfaction in total disregard of everything means by necessary implication that the Tribunal enjoys power to take into consideration anything including the naraji-petition for its satisfaction without any formality attached to it in general law. ... (Para-22)

Nari-o-Shishu Nirjaton Damon Ain, 2000

Non-examination of *naraji* petitioner under section 200 of CrPC does not furnish any ground for quashing:

The Nari-o-Shishu Nirjaton Damon Ain, 2000, is a special and stringent legislation made with intent to detect the persons alleged to have committed crimes against women and/or children and to suitably punish them through speedier investigation, inquiry and trial. With the end in view the Ain, unlike the Code, has taken care to equip the Tribunal, as far as possible, with unqualified power to take cognizance of offences on its own satisfaction gathered from any materials (*naraji* or otherwise) regardless of what is said in the report. In the realm of almost unqualified power directed to achieving the object of law, *naraji* stands to lose its ordinary legal signification and is relegated merely to the status of a document supplying important information indicating flaws in the investigation or inquiry making the formalities in taking notice of it totally redundant. There is, therefore, no scope in the Ain, to ascribe the status of fresh complaint to *naraji*-petition. In the same vein, examination or non-examination of the informant/complainant under section 200 for taking *naraji*-petition into consideration is of no consequence. Examination of complainant, thus, being unnecessary, non-examination under section 200 does not furnish any ground for quashing. ... (Para-39)

<u>To sum up:</u>

1. ***Naraji* petition filed by the informant/complainant or any other person aggrieved against any report within the meaning of section 27 of the Ain, submitted by police, Magistrate or any person authorized by the Government or appointed by the Tribunal is maintainable and the Tribunal is competent to take notice of the *naraji*-petition for its own satisfaction about the acceptability of the investigation or inquiry-report and as an aid to the process taking cognizance.**

2. **The informant/complainant or person aggrieved filing *naraji* petition against investigation/inquiry report within the meaning of section 27 of the Ain is not required to be examined u/s 200 of the Code for any purpose.**

3. **On receipt of the complaint the Tribunal may, if thinks fit, withhold direction for inquiry as contemplated under sub-clause (Ka) of section 27(1Ka) and send the complaint-petition back to the police station for recording a regular case, with direction to cause the investigation to be made by any competent police officer, other than the one who refused to accept the complaint, or direct any other investigating agency to investigate.**

4. **Without prejudice to the findings made in the preceding paragraph, the Tribunal may, if it appears after receiving the inquiry-report that the facts are not as plain and obvious as narrated in the petition of complaint and an inquiry is not enough for discovery of truth behind the offence, send the complaint-petition to the local police station with direction to cause an investigation to be made by a competent police officer, other than the one who refused to accept the same, or otherwise direct any other investigating agency to investigate, and report. ... (Para-52)**

Judgment

M. Moazzam Husain, J:

1. This Rule, at the instance of one of the accused, was issued calling in question the legality of the proceedings in Petition (Nari-o-Shishu) Case No.71 of 2014 u/s 7, 9(1) read with section 30 of the Nari-o-Shishu Nirjatan Damon Ain, 2000, as amended up-to-date now pending in the Nari-o-Shishu Nirjatan Damon Tribunal No.1, Lalmonirhat. At the opening of the hearing of the Rule before a Division Bench it appeared that the basic question upon which the proceedings was challenged is the question of maintainability of a *naraji* petition within the scheme of section 27 of the Nari-o-Shishu Nirjaton Damon Ain,2000. Since the question already gave rise to conflicting decisions the matter was referred to the Hon'ble Chief Justice for constituting a Full Bench as per Rule 1 of Chapter VII of the Supreme Court of Bangladesh (High Court Division) Rules, 1973 so that the issue may be settled along with other related issues raised by the petitioner. Hon'ble Chief Justice in his turn was pleased to constitute this Bench for the purpose.

2. Back on facts, it appears that a victim of rape is the complainant. She first approached the local *thana* in order to lodge a complaint but having been refused therefrom took recourse to the second option and filed the instant complaint-petition in the Nari-o-Shishu Nirjatan Damon Tribunal (hereafter referred to as "the Tribunal") No.1, Lamonirhat. In the complaint-petition she said, *inter alia*, that she was a student of Haziganj BM College. On 10.6.2014 after attending classes she made a detour to visit the house of her friend Hosne Ara. On her way back home present petitioner Anjuara took her to Lalmonirhat by persuasion and from there to an unknown house at Rangpur. Other accused including accused Bipul Chandra Barmon, the principal accused, joined them on the way. At Rangpur accused Anju (present petitioner) compelled the victim under threat to stay with accused Bipul in a room at night. As the night advanced Bipul insisted her to have sex with him but failed at the face of resistance. As the night advanced the victim got growingly tired and exhausted under persistent pressure meted out to her. Taking the advantage Bipul finally overpowered and raped her at late hours of the night. Accused Bipul thereafter stayed in the same room with her following three nights and raped her on several occasions. On 13.6.2014 Bipul went away and remained untraced. He came back on 15.6.14 and took the victim to Dhaka and stayed there in a rented house with the victim as husband and wife. The victim gradually accepted the incident as *fait accompli* but kept pressing the accused to complete the formality of marriage. As the pressure mounted accused Bipul suddenly disappeared leaving her alone in the house. On 15.8.2014 the victim was recovered by her brother from there and brought back home.

3. The Tribunal having received the complaint- petition sent the same to the Upa Zila Vice-Chairman to inquire and submit report. The Vice-Chairman inquired into and submitted his report against five out of the six persons against whom, according to him, a *prima facie* case was found established. The sixth one is the petitioner whose release from the case was recommended. Soon thereafter a *naraji* petition was filed by the complainant. Learned Judge having heard the parties and perusing the records found a *prima facie* case against the petitioner also. He accordingly rejected the recommendation for release and took cognizance of offence against all the six accused persons named in the complaint petition including this petitioner. Learned Judge while taking cognizance against all the accused made the following observations:

Ïbw_ chv‡jvPbvq I mvweK wePv‡ePbvq †`Lv hvq †h Z`š— cwZ‡e`‡b gvgjvi ev`xi Awf‡hv‡Mi ev¯—e cwZdjb N‡U bvB| HCl²c Ae¯'vq AÎ UªvBey¨bv‡ji wbKU m‡šÍvmRbK cZxqgvb bv nIqvq Z`šKvix KgKZv KZK `vwLjx Avmvgx AvbRyqviv‡K gvgjvi `vq nB‡Z Ae¨nwZi mycvwik m¤^wjZ AskUzKz AMÖvn¨ Kiv nBj|Ó

4. The petitioner being the person grossly affected by the order obtained this Rule. The petitioner, in her bid to get the proceedings quashed raised basically three contentions. First**,** there is no scope for *naraji* petition within the scheme of section 27 of the Nari-o-Shishu Nirjaton Damon Ain, 2000 (hereinafter referred to as **"**the Ain"), therefore, the learned Judge, in taking cognizance of the offence on *naraji* petition committed an error of law occasioning failure of justice. Second, *naraji* petition is, for all practical purposes, a fresh complaint, therefore, taking cognizance without examining the complainant u/s 200 of the Code of Criminal Procedure (hereinafter referred to as "the Code") is illegal. Third**,** had there been scope under clause (1Ka) of section 27(1) for investigation by police or any other specialized agencies having knowledge and experience of investigation truth behind the allegation could have been discovered on sufficient materials and the learned judge would have been satisfied about the innocence of the petitioner and finally, the complaint petition does not disclose any offence, hence, initiation and continuation of the proceeding is nothing but an abuse of the process of court.

5. Before we embark upon the merit of the contentions it would be apt to turn back on three of the series of decisions handed down by different Benches of this Division touching upon various questions-all, someway or other, relatable to *naraji*.

6. In ***Abdul Halim (Md) v State***, 60 DLR 393, the victim lodged an information with the local police station alleging commission of rape. After investigation police submitted 'final report' (Referred to as such in the Police Regulations Bengal, 1943, when the investigation officer submits report recommending release of any or all of the accused having found no *prima facie* case justifying a sent-up for trial). The informant filed a *naraji* petition against the final report. Learned Judge of the Tribunal accepted the *naraji* petition and took cognizance of the offence. Trial was held and the accused was found guilty of the offence and accordingly sentenced to suffer imprisonment. In appeal no question of legality as to cognizance taken on *naraji* was directly raised. A Division Bench of this Division while deciding the appeal in the positive did not see anything wrong in *naraji* petition filed in a Nari-o-Shishu Case rather explained the position of final report and *naraji* petition by reference to a number of cases (mostly under the Penal Code decided in the context of the Code of Criminal Procedure) and held that 'on receipt of *naraji* petition the Tribunal may take cognizance of the offence if it is found reasonable and proper or direct further investigation. (*Underlines are mine*)

7. Next comes the case of ***Ruma Khatun v Md. Abdun Noor*** (unreported), Cr. Appeal No. 7782 of 2011, a case of rape. The victim having failed to persuade the local *thana* to accept her complaint filed a petition of complaint in the Nari-o-Shishu Nirjaton Damon Tribunal. The Tribunal sent the petition back to the police station for investigation. The investigation yielded negative report recommending release of the accused. The report was responded by a *naraji* petition. Upon the *naraji* petition further investigation was directed. Further inquiry yielded the same result recommending release of the accused. Naraji petition was also filed against the second final report. This time the Tribunal rejected the *naraji* petition and accepted the final report consequently the accused was discharged. A Division Bench of this Division, while disposing of the appeal that was preferred by the complainant, took no exception of *naraji* petition rather in view of the facts disclosed in the *naraji* petition

was satisfied about existence of a *prima facie* case to be tried and held that the Tribunal rejected the *naraji* petition mechanically on the report tainted with bias and in total disregard of the facts that there were enough materials on records, namely, medical report and affidavits sworn by the witnesses in support of the case. (*Underlines are mine*.)

8. In both the cases courts appear to have dealt with naraji-petitions in a manner as if the same were filed in a case under the Penal Code leaving an impression that, so far *naraji* petition is concerned, there is no difference between cases under the Penal Code and under a special law like Nari-o-Shishu Nirjatan Damon Ain. *Naraji*, in *nari-o-shishu* cases, has thus derived indirect approval in almost all the cases decided by different Benches of this Court as the question of maintainability of *naraji* never came up directly as an issue in the context of the Ain, as it did, in the case of Hafizur Rahman (*infra*).

9. In ***Hafizur Rahman v State***, (unreported), Cr. Miscellaneous Case No.27249 of 2013, the victim girl approached the local police station with an allegation of rape against the accused. The Officer-in-Charge refused to record a case on the complaint. The Tribunal sent the complaint-petition back to police station with a direction to treat the same as first information report and investigate. Police after investigation submitted final report recommending action against the alleged victim under section 17 of the Ain. This was followed by a *naraji* petition filed by the informant. In this case, amongst others, the question that came to the fore is the question of maintainability of *naraji* petition within the scheme of section 27 of the Ain. A Division Bench of this court upon a comprehensive discussion took the view that in cases initiated upon complaint Tribunal is not empowered to take cognizance upon *naraji* petition which being redundant in the context of the law. The Court proceeded further to hold that question of examination of the complainant does not arise nor the Tribunal is empowered to send the complaint to police for inquiry and in that view the report submitted by police is no report within the meaning of section 27(1Ka) (Ka) of the Ain. No cognizance, therefore, can lawfully be taken on such report. (*Underlines are mine*).

10. The cast-iron bar on the competence of the Tribunal to entertain *naraji* petition and of sending complaint petition to the police station with direction to record a case as put in *Hafizur Rahman* has virtually denuded the Tribunal of a time-honored practice recognized by the courts of this sub-continent as a mechanism to cure an otherwise flawed investigation and curtailed the inherent discretion of the Tribunal, as a court, to send the complaint-petition to police station for recording a regular case, should necessity arise. At the same time the judgment not being comprehensively focused on the total scheme of section 27 virtually allowed many other questions, often raised, specially touching upon power of the Tribunal in proceedings initiated on information given to the police station and in proceedings initiated on complaint, *vis-à-vis*, scope of *naraji* in the scheme of section 27, to remain unanswered. Such as, **a)** if cognizance is taken on the report contemplated under sub-section (1) of section 27 is *naraji* maintainable, **b)** is the Tribunal competent to reject the report as aforesaid and direct further investigation or, where expedient, judicial inquiry, **c)** so far as the power of the Tribunal is concerned, is there any difference between the proceedings started on *Awf‡hvM* (referred to hereinafter as "FIR") as contemplated under sub-section (1) and the one started on *Awf‡hvM* (shortly, "complaint") contemplated under clause (1Ka) of sub-section (1), **d)** is the Tribunal powerless in matters of sending back the complaint to the police station even, in its opinion, an investigation should be made **e)** in a case started upon complaint, is the Tribunal bound to be confined to 'inquiry-report' and the 'complaint' for taking cognizance and devoid of power to take notice of *naraji*.

11. The Ain is silent about the term '*naraji*'. So is the case with the Code. But *naraji* is there to play its role as an important tool at the hands of the courts to test the *bona fide* of the police investigation and take necessary correctional measures in order that the true offenders cannot escape trial.

12. If I am not far wrong, *naraji* is largely a sub-continental phenomenon which owes its origin to the ever declining public confidence in police investigation and found favour with the courts as a document specially focused on the flaws in investigation indicating possible ways to set things right.

13. *Naraji* petition, almost without exception, is filed by the informant of a case against the final report recommending release of any or all of the accused named in the first information report as a protest indicating flaws in the investigation and asking either for further investigation or judicial inquiry. In our socio-economic reality, lack of professionalism and susceptibility of the investigating officer to undue influence seems as much likely as to make it difficult for the courts to ignore the objection raised by the informant and rely on the credibility it ideally deserves. *Naraji*, thus, came to be recognized by courts as a safeguard against ill-attempts directed to screening offenders upon extraneous considerations or against an inefficient and perfunctory investigation leaving scope for the criminals to go scot-free and gradually assumed the status of a fresh complaint by consistent judicial expositions with all the attendant formalities of a complaint petition contemplated in the Code.

14. *Naraji* is not to be confused with a partisan document by reason merely of the fact that it owes its origin in the grievance of a party. It is a document that works in aid of the court in its efforts to ascertain the nature and magnitude of the flaws, if any, in investigation and suggests the next course of action in detection mechanism. *Naraji* thus *has* turned into an instrumentality of justice germane to criminal jurisprudence. Curtailing the power of the court to take notice of *naraji* cannot, therefore, be possible without significantly impairing the power of a court to prevent investigation being misdirected with ulterior motive or flawed by inefficiency or inexperience.

15. With the jurisprudence in mind, let us see whether section 27 of the Nari-o-Shishu Nirjaton Damon Ain, 2000, (as amended upto date) can be construed to exclude *naraji* from its scheme as is sought to be canvassed on behalf of the petitioner. But before we turn to the scheme, we need to have a look through the preamble of the Ain and two other sections having direct bearing upon the issue.

16. The preamble reads as follows:

‡h‡nZybvix I wkï wbhvZbgjK Acivamgn K‡Vvi fv‡e `g‡bi D‡Ï‡k¨ c‡qvRbxq weavb cYqb Kiv mgxPxb I c‡qvRbxq;

17. Section 18 of the Ain says:

*18| **Aciv‡ai Z`š—** (1) †dŠR`wi Kvhwea‡Z wfbZi hvnv wKQyB _vKzK bv †Kb, GB AvB‡bi Aaxb †Kvb Aciv‡ai Z`šÑ*

(K) Awfhy³ e¨w³ Aciva msNU‡bi mg‡q nv‡Zbv‡Z cyjk KZ„K aŸZ nB‡j ev Ab¨ †Kvb e¨w³ KZ„K aŸZ nBqv cyj‡ki wbKU †mvc` nB‡j, Zvnvi aŸZ nBevi ZwiL nB‡Z cieZx c‡bi Kvh w`e‡mi g‡a¨ m¤úb Kwi‡Z nB‡e; A_ev

(L)Awfhy³ e¨w³ Aciva msNU‡bi mg‡q nv‡Zbv‡Z a„Z bv nB‡j Zvnvi Aciva msNUb সংক্রান্ত *cv_wgK Z_¨ cwß ev †¶ÎgZ, mswkó KgKZv ev Zvnvi wbKU nB‡Z ¶gZvcvß KgKZv A_ev UvBe¨bv‡j wbKU nB‡Z Z`‡ši Av‡`k cwßi ZwiL nB‡Z cieZx IvU Kvh w`e‡mi g‡a¨ m¤úb Kwi‡Z nB‡e|*

(2) ‡Kvb hy³ msMZ Kvi‡Y Dc-aviv (1)-G Dwj-wLZ mg‡qi g‡a¨ Z`š–Kvh mgwß Kiv m¤e bv nB‡j, Z`š–Kvix KgKZv KviY wjwce× Kwiqv AwZwi³ wÎk Kvh w`e‡mi g‡a¨ Aciv‡ai Z`š– Kvh m¤úb Kwi‡eb Ges Zrm¤ú‡K KviY D‡jL ceK Zvnvi wbqšYKvix KgKZv ev, †¶ÎgZ, Z`‡ši Av‡`k c`vbKvix UvBe¨bv‡j‡K wjwLZfv‡e AewnZ Kwi‡eb|

(3) Dc-aviv (2)-G Dwj-wLZ mgqmxgvi g‡a¨I Z`š–Kvh m¤cb bv nB‡j, mswkó Z`š–Kvix KgKZv D³ সময়সীমা অতিক্রান্ত হইবার চব্বিশ ঘন্টার মধ্যে উ³ *i‡c Z`šKvh m¤cb bv nIqv m¤c‡K Zvnvi wbq¤ÎYKvix KgKZv wKsev Z`‡ši Av‡`k c`vbKvix UvBe¨bv‡j‡K wjwLZfv‡e AewnZ Kwi‡eb|*

(4) Dc-aviv (3) Gi Aaxb Z`šKvh m¤cb bv nIqv m¤c‡K AewnZ nBevi ci wbq¤ÎYKvix KgKZv wKsev, †¶ÎgZ, Z`‡ši Av‡`k c`vbKvix UvBe¨bv‡j D³ Aciv‡ai Z`šfvi Ab¨ †Kvb KgKZvi wbKU n¯—vši Kwi‡Z cwi‡eb Ges D³ i‡c †Kvb Aciv‡ai Z`šfvi n¯—vši Kiv nB‡j Z`‡ši fvicvß KgKZv-

(K) Awfhy³ e¨w³ Aciva msNU‡bi mgq nv‡Zbv‡Z cyjk KZ„K a„Z nB‡j ev Ab¨ †Kvb e¨w³ KZ„K a„Z nBqv cyj‡ki wbKU ‡mvc` nB‡j, Z`‡ši Av‡`k cwßi ZwiL nB‡Z cieZx mvZ Kvh w`e‡mi g‡a¨ m¤cb Kwi‡eb; A_ev

(L) Ab¨vb¨ ‡¶‡Î Z`‡ši Av‡`k cwßi ZwiL nB‡Z cieZx wÎk Kvh w`e‡mi g‡a¨ m¤cb Kwi‡Z nB‡e|

(5) Dc-aviv (4) G Dwj-wLZ mgqmxgvi g‡a¨I Z`šKvh m¤cb Kiv bv nB‡j, mswkó Z`šKvix KgKZv D³ সময়সীমা অতিক্রান্ত হইবার চব্বিশ ঘন্টার মধ্যে উ³ *i‡c Z`šKvh m¤cb bv nIqv m¤c‡K Zvnvi wbq¤ÎYKvix KgKZv wKsev, †¶ÎgZ, Z`‡ši Av‡`k c`vbKvix UvBe¨bv‡j‡K wjwLZfv‡e AewnZ Kwi‡eb|*

(6) Dc-aviv (2) ev Dc-aviv (4)-G Dwj-wLZ mgqmxgvi g‡a¨ †Kvb Z`šKvh m¤cb bv Kivi †¶‡Î, Zrm¤c‡K e¨vL¨v m¤wjZ cwZ‡e`b chv‡jvPbvi ci wbq¤ÎYKvix KgKZv wKsev, †¶ÎgZ, Z`‡ši Av‡`k c`vbKvix UvBe¨bv‡j hw` GB wmØv‡š Dcbx‡Z nb †h, wbawiZ mg‡qi g‡a¨ Z`š m¤cb bv nIqvi Rb¨ mswkó Z`šKvix KgKZvB `vqx, Zvnv nB‡j Dnv `vqx e¨w³i A`¶Zv I Am`vPiY ewjqv we‡ewPZ nB‡e Ges GB A`¶Zv I Am`vPiY Zvnvi ewnIK †Mvcbxq cwZ‡e`‡b wjwce× Kiv nB‡e Ges Dchy³ †¶‡Î PvKwi wewagvjv Abjxq Zvnvi wei‡× e¨e¯—nv MnY Kiv hvB‡e|

(7) Z`š cwZ‡e`b `wL‡ji ci hw` UvBe¨bv‡j Z`š mswkó Z_¨w` chv‡jvPbv Kwiqv GB g‡g mšó nq †h, Z`š cwZ‡e`‡b Awmvgx wnmv‡e DwjwLZ †Kvb e¨w³‡K b¨vqwePv‡ii ¯—v‡_ mv¶x Kiv ev×Ãbxq, Z‡e D³ e¨w³‡K Awmvgxi cwie‡Z mv¶x wnmv‡e MY¨ Kwievi wb‡`k w`‡Z cwi‡e|

(8) hw` gvgjvi mv¶¨ MnY mgwß‡i ci UvBe¨bv‡j wbKU cZxqgvb nq †h, GB AvB‡bi Aaxb †Kvb Aciv‡ai Z`šKvix KgKZv †Kvb e¨w³‡K Aciv‡ai `vq nB‡Z i¶v Kivi D‡Ï‡k¨ ev Z`šKv‡h Mwdjwi gva¨‡g Aciva wU cgv‡Y e¨envi‡hvM¨ †Kvb Avjvgx msMn ev we‡ePbv bv Kwiqv ev gvgjvi cgv‡Yi c‡qvRb e¨w³‡i‡K D³ e¨w³‡K Awmvgxi cwie‡Z mv¶x Kwiqv ev †Kvb My‡Zc¥ mv¶x‡K cix¶v bv Kwiqv Z`š cwZ‡e`b `wLj Kwiqv‡Qb, Zvnv nB‡j D³ Z`šKvix KgKZvi wei‡× D³ Kvh ev Ae‡njv‡K A`¶Zv ev †¶ÎgZ, Awm`vPiY wnmv‡e wPwýZ Kwiqv UvBe¨bv‡j D³ KgKZvi wbq¤ÎYKvix KZ„¶‡K Zvnvi wei‡× h_vh_ AvBbvbyM e¨e¯—nv Mn‡Yi wb‡`k w`‡Z cwi‡e|

(9) UvBe¨bv‡j †Kvb Av‡e`‡bi †cw¶‡Z ev Ab¨ †Kvb Z‡_¨i wfwË‡Z †Kvb Z`šKvix KgKZvi cwie‡Z Ab¨ †Kvb Z`šKvix KgKZv wb‡qv‡Mi Rb¨ mswkó KZ„¶‡K wb‡`k w`‡Z cwi‡e| (*underlines are mine*).

18. Section 25 of the Ain reads as follows:

25| ‡dŠR`vix Kvhwewai c‡qvM,BZ¨w`| (1) GB AvB‡b wfbi¡c wKQybv _wK‡j, †Kvb Aciv‡ai Awf‡hvM `v‡qi, Z`š, wePvi I wb®úwËi †¶‡Î †dŠR`vix Kvhwewai weavbvejx c‡hvR¨ nB‡e Ges UvBe¨bv‡j GKwU `vqiv Av`vjZ ewjqv MY¨ nB‡e Ges GB AvB‡bi Aaxb †h †Kvb Aciva ev Z`bxv‡i Ab¨ †Kvb Aciva wePv‡ii †¶‡Î `vqiv Av`vjZi mKj ¶gZv c‡qvM Kwi‡Z cwi‡e|

(2) UvBe¨bv‡j Awf‡hvMKvix c‡¶ gvgjv cwiPvjbvKvix e¨w³ cvewjK cwmwKDUi ewjqv MY¨ nB‡eb|

19. There are in all 34 sections in the Ain out of which twelve are penal and rest is procedural. The Ain is in the sense a mixed legislation sought to be made as far as possible self-contained. The preamble of the Ain suggests that the law was enacted in order to

effectively curb the crimes against women and children. Under the enabling provisions of section 18(8) the Tribunal, *albeit* after examination of witnesses, may direct the controlling authority of the investigating officer to take necessary action against him, if it is satisfied that he, with intent to shield any offender, refrained from collecting evidence required to be collected or willfully omitted to examine any important witness. Sub-section (9) of the section empowers the Tribunal to issue direction to change the investigating officer and appoint a new one in his place if it finds expedient so to do 'on the basis of an application' or 'any other information received' from any source whatsoever. Subject to anything to the contrary appearing in the Ain section 25 makes the provisions of the Code of Criminal Procedure applicable to filing, investigation, trial and disposal of cases under the Ain. Under the section Tribunal is deemed to be a Court of Session and will have all powers of a Court of Session in matters of trial of any offence under the Ain. (*Underlines are mine*).

20. The aforesaid two sections read with the preamble and limitation clauses of the Ain makes it amply clear that the legislature while making the law has taken adequate care to devise a more effective mechanism for detection of criminals responsible for commission of offences against women and children and ensure punishment of the offenders through speedier investigation and trial. Furthermore, the Ain has made the Code applicable to filing, investigation, trial and disposal of the *nari-o-shishu nirjatan* cases and as abundant caution has equipped Tribunal with all the powers of the Court of Session in matters of trial of offences under the Ain. Nothing is there indicating exclusion of *naraji* rather the Tribunal is obviously better placed than the Court of Session in matters of control and supervision of investigation so that it enjoys an additional power to take steps for changing the investigating officer on the basis of an application, irrespective of *naraji*, or on information received from any source whatsoever.

21. Down to section 27, the centerline of the controversy. For ready reference excerpts of the section may profitably be quoted.

> ***27| UvBe¨vwj‡ji GLwZqvi| (1)*** *mve-B›m‡c±i c`ghv`v‡i wb‡¤ b‡nb Ggb †Kvb cwjwk KgKZv ev GZ`ywÏ‡k¨ miKv‡ii wbKU nB‡Z mvavibY ev we‡kl Av‡`k Øviv ¶gZvcvß †Kvb e¨w³i wjwLZ wi‡cvU e¨wZ‡i‡K †Kvb UvBe¨vwj †Kvb Acivax wePvi‡_ MnY Kwi‡eb bv|*
> ***(1K)*** *†Kvb Awf‡hvMKvix Dc-avivi (1)-Gi Aaxb †Kvb cwjwk KgKZv‡K ev ¶gZvcvß e¨w³‡K †Kvb Aciv‡ai Awf‡hvM MnY Kwievi Rb¨ Abyiva Kwiqv e¨_ nBqv‡Qb g‡g njdbvgv mnKv‡i UvBe¨vwj‡ji wbKU Awf‡hvM `wLj Kwi‡j UvBe¨vwj Awf‡hvMKvix‡K cix¶v Kwiqv-*
> *(K) mšó nB‡j Awf‡hvMwU AbywÜv‡bi (inquiry) Rb¨ †Kvb g¨wR‡÷U wKsev Ab¨ †Kvb e¨w³‡K wb‡`k c`vb Kwi‡eb Ges AbywÜv‡bi Rb¨ wb‡`kcvß e¨w³ Awf‡hvMwU AbywÜvb Kwiqv mvZ Kvh w`e‡mi g‡a¨ UvBe¨vwj‡ji wbKU wi‡cvU c`vb Kwi‡eb;*
> *(L) mšó bv nB‡j Awf‡hvMwU mivmwi bvKP Kwi‡eb|*
> ***(1L)*** *Dc-avivi (1K) Gi Aaxb wi‡cvU cwßi ci †Kvb UvBe¨vwj hw` GB g‡g mšó nq †h,*
> *(K) Awf‡hvMKvix Dc-avivi (1) Gi Aaxb †Kvb cwjwk KgKZv‡K ev ¶gZvcvß e¨w³‡K †Kvb Aciv‡ai Awf‡hvM MnY Kwievi Rb¨ Abyiva Kwiqv e¨_ nBqv‡Qb Ges Awf‡hv‡Mi mg_‡b cv_wgK mv¶¨ cgvY Av‡Q †mB †¶‡Î UvBe¨vwj D³ wi‡cvU I Awf‡hv‡Mi wfwË‡Z AcivawU wePvi‡_ MnY Kwi‡eb;*
> *(L) Awf‡hvMKvix Dc-avivi (1) Gi Aaxb †Kvb cwjwk KgKZv‡K ev ¶gZvcvß e¨w³‡K †Kvb Aciv‡ai Awf‡hvM MnY Kwievi Rb¨ Abyiva Kwiqv e¨_ nBqv‡Qb g‡g cgvY cvIqv hvq bvB wKsev Awf‡hv‡Mi mg_‡b †Kvb cv_wgK mv¶¨ cgvY cvIqv hvq bvB †mB †¶‡Î UvBe¨vwj Awf‡hvMwU bvKP Kwi‡eb;*
> ***(1M)*** *Dc-avivi (1) Ges (1K) Gi Aaxb cvß wi‡cvU †Kvb e¨w³i wei‡× Acivax msNU‡bi Awf‡hvM ev তৎসম্পর্কে কার্যক্রম Mn‡Yi mycwik bv _vKv m‡Z‡I UvBe¨vwj, h_vh_ Ges b¨vqwePv‡ii ¯v‡_ c‡qvRbxq g‡b Kwi‡j, KviY D‡jLcwK D³ e¨w³i e¨vcv‡i msMÖá Acivax wePvi‡_ MnY Kwi‡Z cwi‡eb|*

(2) *** *** *** *** *** ***
(3) *** *** *** *** *** ***
(*Underlines are mine)*

22. A plain reading of the section suggests that cognizance can be taken through two procedures: one upon report submitted by 'police' or by 'an authorized person' and another upon inquiry- report submitted by the 'Magistrate' or 'any other person' assigned by the Tribunal so to do. Within the scheme of section 27 a proceedings under the Ain should ordinarily be initiated by lodging information in the police station. The second or, more appropriately, the alternative procedure sets in by default with a complaint-petition directly filed in the Tribunal subject to refusal by a police officer to accept the same. Sub-section (1), providing the first procedure, read with section 25 suggests that the Tribunal has been clothed with power wide enough to cover all the power of a Magistrate and of the Sessions judge rolled together in ignoring investigation-report with concomitant power to entertain *naraji* and sending back the case for further investigation or, (where practicable) judicial inquiry. Sub-section (1) and (1Ga) of section 27 read with section 18 goes to show that the Tribunal is further equipped with power more robust than that of an ordinary criminal court in taking cognizance absolutely on its own satisfaction, *albeit* by assigning reason, gathered from any materials, irrespective of *naraji*, or information received in disregard of the final report submitted by police or the person authorized by the Government in this behalf. The enormously unqualified power of the Tribunal to take cognizance of offences on its own satisfaction in total disregard of everything means by necessary implication that the Tribunal enjoys power to take into consideration anything including the naraji-petition for its satisfaction without any formality attached to it in general law.

23. While draftsmanship went halfway through well enough in dressing-up the Tribunal with powers in keeping with legislative policy to effectively suppress the ever increasing offences against women and children the drafters suddenly lapsed into contextual oblivion and embarked upon a drastic cut-back on power depriving the Tribunal of its important armory required for detection of crime and the criminals : a new segment of provisions including clauses (1Ka) to (1Kha) were engrafted in section 27 introducing procedure of cognizance to be taken on report submitted by a Magistrate or any other person assigned by the Tribunal so to do, on materials collected through 'inquiry' apparently leaving no scope for the Tribunal to make a direction for 'investigation' by police or other specialized investigating agencies, even in the peculiar facts of the case, the Tribunal is of the opinion that nothing less than an investigation is enough to discover the truth behind the offence. This paradigm shift taken through semantically incoherent provisions has practically given rise to two types of prosecutions in similar cases: one equipped with adequate materials collected through investigation conducted by professional investigators leaving the other only with a report submitted by a Magistrate or any other person assigned by the Tribunal, almost without any exception, prepared on statements made by a handful of witnesses and the complaint, that too, if the report does support the allegations made in the complaint. In any case, if inquiry-report does not support the allegations made in the complaint the Tribunal is left with only complaint, nothing else as prosecution materials upon which trial may be held - an occasion in which success of prosecution may hardly, if ever, be expected. The textual shift or error fairly attributable to inept draftsmanship in effect divided the victims into clear two classes: fortunate and unfortunate. The victim whose case is accepted by police is fortunate as the trial, if any, would be held on enough materials collected through investigation whereas the one whose complaint was not accepted by police would have to depend on prosecution-materials at best comprising of statements of few witnesses recorded

by Magistrate/ any other person and the complaint-petition, *a fortiorari*, if the report so submitted lends support to the complaint-version**.**

24. Save as the exception made in clauses (1Ka) and (1Kha) of sub-section (1) of section 27 the phraseologies regained its contextual upbeat just from the next section, namely, section 28, which says, *inter alia*: 'any party aggrieved by an order, judgment or sentence passed by the Tribunal may prefer an appeal in the High Court Division against the order, judgment or sentence adversely affecting him or her which by its plain meaning suggests that the Ain, unlike the Code, did not limit the right to appeal only to the formal parties of the case instead has widened the same to the extent of persons directly affected by the order passed or any decision taken by the Tribunal exactly in keeping with the overriding power otherwise vested in the Tribunal.

25. The reason for sudden exclusion of investigation and drastic curtailment of power of the Tribunal made by clauses (1Ka) and (1Kha) is nothing but refusal of 'a police officer' or an authorized person to receive the complaint alleging cognizable offences (all offences under the Ain are cognizable) where such refusal by police, without lawful excuse, is itself a misconduct. The apparent ineptitude of the drafters in harmonizing the provisions with the context even with sub-section (1) of section 27 has not only stood in contrast with the legislative intent but also begged the question mooted here and many more crowding the courts with avoidable litigations. We think it apt to carve out the exclusionary clauses from section 27 (already quoted) and reproduce here once again for a ready glance.

(1K) †Kvb Awf‡hvMKvix Dc-avivi (1)-Gi Aaxb †Kvb cwjwk KgKZv‡K ev ¶gZvcvß e¨w³‡K †Kvb Aciv‡ai Awf‡hvM MnY Kwievi Rb¨ Abyiva Kwiqv e¨_ nBqv‡Qb g‡g njdbvgv mnKv‡i UvBeÿbv‡j wbKU Awf‡hvM `wLj Kwi‡j UvBeÿbvj Awf‡hvMKvix‡K cix¶v Kwiqv-

(K) mšó nB‡j Awf‡hvMwU Abyÿgvw`Üv‡bi (inquiry) Rb¨ †Kvb g¨vwR‡÷U wKsev Ab¨ †Kvb e¨w³‡K wb‡`k c`vb Kwi‡eb Ges Abyÿgvw`Üv‡bi Rb¨ wb‡`kcvß e¨w³ Awf‡hvMwU Abyÿgvw`Üvb Kwiqv mvZ Kvh©`e‡mi g‡a¨ UvBeÿbv‡j wbKU wi‡cvU c`vb Kwi‡eb;

(L) mšó bv nB‡j Awf‡hvMwU mivmwi bvKP Kwi‡eb|

(1L) Dc-avivi (1K) Gi Aaxb wi‡cvU cwßi ci †Kvb UvBeÿbvj hv` GB g‡g mšó nq †h,

(K) Awf‡hvMKvix Dc-avivi (1) Gi Aaxb †Kvb cwjwk KgKZv‡K ev ¶gZvcvß e¨w³‡K †Kvb Aciv‡ai Awf‡hvM MnY Kwievi Rb¨ Abyiva Kwiqv e¨_ nBqv‡Qb Ges Awf‡hv‡Mi mg_‡b cv_wgK mv¶¨ cgvY Av‡Q †mB †¶‡Î UvBeÿbvj D³ wi‡cvU I Awf‡hv‡Mi wfË‡Z Aciva wUwePviY MnY Kwi‡eb;

(L) Awf‡hvMKvix Dc-avivi (1) Gi Aaxb †Kvb cwjwk KgKZv‡K ev ¶gZvcvß e¨w³‡K †Kvb Aciv‡ai Awf‡hvM MnY Kwievi Rb¨ Abyiva Kwiqv e¨_ nBqv‡Qb g‡g cgvY cvIqv hvq bvB wKsev Awf‡hv‡Mi mg_‡b †Kvb cv_wgK mv¶¨ cgvY cvIqv hvq bvB †mB †¶‡Î UvBeÿbvj Awf‡hvMwU bvKP Kwi‡eb;

(*Underlines are mine)*

26. If we take a bit of pains in reading through the provisions particularly of sub-clauses (Ka) of both the clauses (1Ka) and (1Kha) of sub-section (1) we notice a legal obligation created for the Tribunal to take recourse to 'inquiry' for collection of evidence without leaving option for investigation to put in place, in case it is needed. This means the Tribunal, which was supposed to be fortified by power more robust than usual, is relegated to a position weaker than that of a Magistrate who, in the circumstances, can direct the police to treat the complaint as first information report and investigate. The proposition upon which the Tribunal's discretion exercised *ex debito justiciae* is curtailed stands sharply opposed to criminal jurisprudence. Secondly, sub-clause (Ka) of clause (1Ka) and sub-clause (Ka) of clause (1Kha) read together may fairly be taken to mean that the Tribunal is confined to the report submitted by a Magistrate or any other person in taking cognizance and holding trial on the basis of aforesaid two documents. It is totally unclear how on earth a clueless, secret or

mysterious crime which needs in-depth investigation by professional investigator or an specialized agency for detection can be detected by a Magistrate, more so, through 'inquiry' within the meaning of the Code and for that matter how the Tribunal, meant to be instrumental to curbing dreadful, organized and sometimes high-tech crimes against women and children, will proceed with trial depending on the meager materials, if any, that can be collected within the limit of 'inquiry' by a Magistrate or any other lay person as indicated in the law.

27. The apparent power imbalance between the two segments of section 27 created by textual shift has made room, amongst others, for argument that in the scheme of section 27, at least so far as it relates to the alternative procedure, there is no scope for *naraji.*

28. The Ain being a social defense legislation (as the similar statutes are often so called) the Tribunal created under it is designed to effectively curb the growing crimes against women and children by ensuring flawless investigation or (where practicable) inquiry and speedy trial. No contextually defiant and discordant phrases, expressions and terminologies found place in the law, however clear in meaning, cannot be put to strict literal construction divorced from context, without betraying the cause of the legislation. It is precisely for the reason, sub-clauses (Ka) of both clauses (1Ka) and (1Kha) need be put to strained construction so as to be synchronized with the rest of the statute for that matter the purpose of the Ain. Any otherwise a number of absurd and illogical consequences is bound to follow. **First,** if the report is in the negative the Tribunal would be left with no materials except the complaint to decide the fate of the case. Thus a hardened criminal committing the offence alleged may find an easy exit to walk away from punishment or even trial. **Second**, making the Tribunal confined to two documents only would invariably enhance the importance of the report and thereby render the inquiry more susceptible to undue influence often difficult to ward off resulting in miscarriage of justice. **Third**, Tribunal's power as a court to circumvent the vices of inquiry with the help of other materials, like *naraji*, or any information received would be significantly impaired for no good reasons. **Finally**, and most importantly, the opinion of the Tribunal would be subjected to the opinion of the inquiry- officer if the Tribunal is bound down to the inquiry-report-a proposition unknown to criminal jurisprudence.

29. Furthermore, in the alternative procedure the proceedings is basically dependant on 'inquiry' as against 'investigation' where there is no arrest, interrogation, police dossier, case diary, *alamats*, expert opinion, inquest, post-mortem reports etc. *Naraji,* in the circumstances, remains to be the most crucial document for the Tribunal to test the credibility of the inquiry-report. Strict literal interpretation of a contextually inconsistent provision and/or expression seeking to exclude *naraji* is, therefore, too ingenious to be accepted.

30. One of the basic principles of common law is, law should serve the public interest. By the same strain, Parliament, as a body representing the people, is presumed not to intend absurd or illogical result from the applications of its enactments. Consequently, interpretation of statute finally turns on discovery of the intention of legislature. In this juncture I might well borrow the words of Fancis Bennion in ***Understanding Common Law Legislation: Drafting & Interpretation*** *(First Indian Reprint, 2004, Page 39-41):* 'The historic purpose of statutory interpretation is to arrive at the presumed intention of the legislators in promulgating the enactment… The so-called literal rule of interpretation nowadays dissolves into a rule that the text is the primary indication of legislative intention...There are occasions when, as Baron Parke said, the language of the legislature must be modified to avoid

inconsistency with its intention…There are four reasons which justify stretching the literal meaning 1) where consequences of applying a literal construction are so obviously undesirable that Parliament cannot really have intended them 2) an error in the text which falsifies Parliament's intention 3) a repugnance between the words of the enactment and those of some other relevant enactments and 4) changes in external circumstances since the enactment was originally drafted.'

31. Decisions of the superior courts of the common law world including our sub-continent reflecting the aforesaid principles abound the pages of law reports. The following are but few:

32. In ***Attorney General for Canada v Hallet &Carey Ltd***. [1952] AC 427, it is held that- 'Of all the rules of interpretation, the paramount rule remains, laws should be construed to carry out the intention of legislature,' and where in the ordinary grammatical meaning of the words legislative intent is missing it must be construed by reference to the context of the whole Act. In the words of Francis Bennion occurring in '*Understanding Common Law Legislation*' (*supra*, page 50):

> *'Where the literal meaning of the enactment goes narrower than the object of the legislator, the court may need to apply rectifying construction widening that meaning. Nowadays it is regarded as not in accordance with legal policy to allow a drafter's ineptitude to prevent justice (sic) being done and the legislator's intention implemented'*

33. In ***SA Haroon v Collector of Customs,*** 11 DLR (SC) 200, Pakistan Supreme Court held:

> *"All rules of interpretation have been devised as aids to the discovery of the legislative intents behind an enactment. Where the words are plain and unambiguous, that intent can best be judged by giving full effect to the ordinary grammatical meaning of those words. But when this is not the case an attempt should be made to discover the true intent by considering the relevant provisions in the context of the whole Act in which it appears and by having regard to the circumstances in which the enactment came to be passed. The previous state of law, the mischief sought to be suppressed and the new remedy provided are relevant factors to be given due consideration*"

34. In a relatively recent case, ***K Anbazhagan v Superintendent of Police****, AIR 2004 SC 524*, Indian Supreme Court observed:

> *"Every law is designed to further the ends of justice and not to frustrate it in technicalities. The court should construe a statute to advance the cause of the statute not to defeat it."*

35. Apart from what is said above, strict literalism, one of the principles of statutory interpretation deeply rooted into the parliamentary supremacy in England, is difficult to be fitted into our constitutional dispensation, even though the language of law is clear beyond doubt but produces absurd and illogical result. Here in our jurisdiction Constitution is supreme and every piece of legislation made by Parliament must follow the parameters of the American due process principles enshrined in Art.31, in order to qualify as law as well as being enforceable by the Supreme Court. Law, therefore, cannot travel far beyond its context and afford to be arbitrary, discriminatory or unreasonable yielding absurd and illogical consequences. When purpose of the enactment is clear strained construction may

legitimately be put to any expression or phrase used inadvertently. It is held in ***Sutherland Publishing Co. v Caxton Publishing Co****. [1938] ch 174*, that'- ' Where the purpose of an enactment is clear, it is often legitimate, to put a strained interpretation upon some words which have been inadvertently used'. Reverting to Bennion: " The truth is that, sometimes the argument against a literal construction are so compelling that even though the words are not, within the rules of language, capable of another meaning they must be given one". [***Understanding Common Law Legislation,*** *supra p 43*]. Since the enactments in question apparently go narrower than the purpose of the law we have no hesitation to reject the contentions built upon strict literalism in interpretation totally isolated from the context. The language of clauses (1Ka) and (1Kha) must, therefore, be harmonized with the rest of the statute and be construed to include power not only co-equal with powers provided by section 27(1) but also the Tribunal must be taken to include powers to take notice of *naraji* as well as all other powers incidental to carrying out the purpose of the Ain.

36. Be that as it may, the controversy is set at naught by clause (1Ga) of section 27 which spelt out in no uncertain terms that notwithstanding any recommendation made in the report submitted either by police/authorized person or by Magistrate/any other person as contemplated in sub-section (1) and clause (1Ka) respectively, not sending the accused for trial, the Tribunal, if considers proper for ends of justice, may take cognizance of the offence against the accused assigning its reasons thereof. The language of the law leaves no doubt that the Tribunal, as distinguished from the Court of Session or the Magistrate, enjoys an added statutory power to reject the investigation/ inquiry report and take cognizance on its own satisfaction. It follows, by parity of reasoning, that the Tribunal which is free to take cognizance regardless of the nature of the report is free to take into notice any information supplied under any name, *naraji* or otherwise, if the same proves to be of use in testing the veracity of the report and by necessary implication enjoined with power to direct a further investigation or inquiry (where practicable) regardless of how the proceedings was started, upon FIR or complaint.

37. Viewed in the light of expositions made hereinabove, it logically follows that Tribunal is well within its competence to entertain *naraji* leaving no room for argument that there is no scope of *naraji* petition in the scheme of section 27 of the Ain.

38. Now two different but closely interrelated questions that fall to be addressed, that is, whether *naraji* is to be treated as a fresh complaint and if so whether the complainant is required to be examined u/s 200 of the Code when it is filed in a case under Nari-o-Shishu Nirjaton Damon Ain.

39. The answer is not very far to seek. It is implicit in the language of sub-section (1Ga) of section 27 of the Ain. As we have already stated, the Nari-o-Shishu Nirjaton Damon Ain, 2000, is a special and stringent legislation made with intent to detect the persons alleged to have committed crimes against women and/or children and to suitably punish them through speedier investigation, inquiry and trial. With the end in view the Ain, unlike the Code, has taken care to equip the Tribunal, as far as possible, with unqualified power to take cognizance of offences on its own satisfaction gathered from any materials (*naraji* or otherwise) regardless of what is said in the report. In the realm of almost unqualified power directed to achieving the object of law, *naraji* stands to lose its ordinary legal signification and is relegated merely to the status of a document supplying important information indicating flaws in the investigation or inquiry making the formalities in taking notice of it totally redundant. There is, therefore, no scope in the Ain, to ascribe the status of fresh complaint to

naraji-petition. In the same vein, examination or non-examination of the informant/complainant under section 200 for taking *naraji*-petition into consideration is of no consequence. Examination of complainant, thus, being unnecessary, non-examination under section 200 does not furnish any ground for quashing.

40. The contention finally raised is whether section 27(1Ka) of the Ain takes away power of the Tribunal to send back the petition of complaint to the police station, for recording a regular case and proceed with investigation. The issue incidentally came up and already decided down the line, however, without any special reference to the question pointedly raised. Mr. Raquibul Haque, learned Advocate, tried to argue by reference to the special wordings of section 27(1Ka), that the section puts a clear bar on the Tribunal's power to send back the petition to the police, as according to him, fair investigation cannot be expected from an agency that refused to accept the complaint as a case. He sought to lend support from the case of ***Sirajul Islam v State*** reported in 17 BLC 740.

41. No doubt the point raised demands independent treatment in view of its importance. Nevertheless, before we go for addressing the contention we need to dwell in the concept of 'inquiry' and 'investigation' at a certain length.

42. The Nari-o-Shishu Nirjatan Damon Ain, 2000, does not define any of the terms. Naturally, the pre-existing law ie., the Code of Criminal Procedure, will come into play in filling up the gap as per settled principles of interpretation. So far as the word' investigation' occurring in the Ain is concerned, the Code will apply specially by virtue of section 25 of the Ain. Section 4(k) of the Code describes 'inquiry' as one- '*that includes every inquiry other than a trial conducted under the Code by a Magistrate or Court.'* Section 4(l) describes 'investigation' as one-**'***that includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by Magistrate in this behalf*. Since the meaning of the words 'inquiry' and 'investigation' appearing in the Ain borrow their meaning from the Code there is no difference of meaning of those words occurring in the Code and in the Ain. Nevertheless, the word 'inquiry' appearing in section 27(1Ka) (Ka), in view of its special wordings, seems to differ, if at all, in degree from 'inquiry' within the scheme of the Code. An inquiry within the meaning of the Code, especially when follows a *naraji* petition, is generally an *indoor* activity of *quasi* judicial nature conducted by a Magistrate or court that includes recording of oral evidence adduced by a handful of witnesses, in most cases selected by the informant, in order to examine whether there is *prima facie* materials to justify cognizance which has nothing to do with visiting place of occurrence, search, seizure, detection and tracking down accused, arrest, interrogation, collection of evidence on ground-level including expert opinion etc. as is done during investigation.

43. On the other hand, "inquiry" as contemplated under section 27(1Ka)(Ka) may fairly be construed to include spot- visit and recording statements of witnesses at the field level before preparing a report to be submitted in the Tribunal. Here the inquiry- officer is either a Magistrate or 'any other person' assigned so to do by the Tribunal. It is knowledge *a priori* that a Magistrate is not a professional investigator. So is the case with the persons generally assigned by the Tribunal to make the inquiry, such as, the local Upa-Zila Chairman, Vice-Chairman (as is the case here) or a Government officer**.** Furthermore, it is difficult to ascribe an extended meaning to the phrase, "any other person" so as to include an officer belonging to police or any other investigating agencies for the simple reason that had the legislature, by the phrase, meant to include any officer belonging to any of those agencies it had no reason

not to specify the name of the agency. More importantly, if it is an 'inquiry' with its legal import as aforesaid, persons assigned matters a little because of the fact that inquiry made even by a member of an investigating agency is an 'inquiry' not 'investigation' and being circumscribed by its inherent limitations is incapable of making any significant difference.

44. It is, thus, clear that the words 'inquiry' and 'investigation' are not words meant to bear the same connotations in the Code as well as in the Ain. They finally remain to be distinctly different in connotations to be taken recourse to by the Magistrate or the Tribunal according as the nature of a particular case, they respectively sit on, permits.

45. As is suggested by its definition read with chapter XIV of the Code investigation is an independent discipline to be mastered by long training and experience, adequate knowledge of criminal law, law of evidence, forensic science, art of tracking down the suspects and of interrogation and priorities in collection of evidence (material, documentary and oral) including expert-opinion enough to establish interlinkage between the offence and the offender. Investigation may be hidden or open unbounded by territorial limits involving various scientific methods, instruments and devices to be used in order to unearth the secret behind the crime. Investigation knows no time limit except sheer professionalism of performance and untiring efforts of the investigating officer directed to discovering the truth behind a crime, often clueless and shrouded with mystery. With the progress of science and technology crimes are also gaining newer and newer dimensions. Dreadful offences against women and children, including killing and grievous hurt throwing acid or other corrosive substance are being regularly recorded. Cases of rape and gang-rape have risen to an epidemic scale. Routine rape over months under constant threat of posting nude images of young girls in the website often resulting in suicide committed by the victims has become a regular phenomenon. Women and children trafficking is now a subject of gang operation having international network. Extra-marital conception of unmarried girls, question of paternity of the baby and identification of the real criminal have posed a threat to social harmony. The offences are often so complicated, clueless and deep- rooted into influential quarters that nothing less than a full-scale investigation by a professional investigator is enough to unearth the truth behind them.

46. Investigation is a goal- oriented mission, like a tiger chasing a deer, not to stop short of the target and must be allowed exactly as much time as it needs in its bid to reach the target. Statutory limitation giving deadline for the report is, therefore, bound to produce abortive and distorted result to the advantage of the true offenders. Investigation being a process that follows its own rules must be allowed to go unhindered unless its goal is reached. What is important is not to squeeze a report within a deadline but constant vigilance by the supervisory authority to see whether the investigation is going in right order and in right pace and take drastic measures against the investigating officer should any laches, negligence or foul-play on his part is noticed.

47. The factual perspective illustrates the difference between the two terms and makes it amply clear that they are not mechanisms to be used interchangeably irrespective of the nature of the cases. Investigation must be directed to be carried out either by police or by any other specialized agency where facts of a particular case requires the Tribunal so to do. A police officer is not police. Refusal by him to accept the complaint need not be construed as refusal by police. If in the peculiar facts of a case Tribunal is satisfied that nothing less than a threadbare investigation is needed for detection of the crime and the criminals it has no

choice but to exercise its inherent power and send back the complaint- petition to the police station with direction to treat the same as an FIR and cause investigation to be made by any competent police officer (other than the one who refused to accept the complaint) or by an officer belonging to any other specialized investigating agency. The power to make such direction must not be limited to any stage or difference of title of the information upon which the proceedings was started, FIR or complaint precisely for the reason that justice is the *raison d'ętre* of a court or tribunal and no law, however clear in meaning, seeking to deter the court/tribunal in passing any order for securing ends of justice can stand without being indicted. Direction may be made on receipt of the complaint-petition or even after receiving inquiry- report if the report, in the opinion of the Tribunal, suggests that the facts are not as obvious and plain as is narrated in the complaint petition and the inquiry-report is not enough to support a fruitful prosecution.

48. Over and above, police is duty bound to receive complaint alleging commission of cognizable offence and cannot refuse it without lawful excuse. Since all the offences under the Ain are cognizable arbitrary refusal by police to accept the complaint alleging commission of any of them amounts to misconduct. It is an absurd proposition to suppose that mere refusal by a police officer or in other words, dereliction of duty of a police officer or for that matter an authorized person may be taken to create a legal binding upon the Tribunal to take recourse to inquiry-procedure although, in its opinion, investigation should be directed in the peculiar facts of the case. This is a proposition which militates against the ultimate authority of the Tribunal to take its own decision and runs contrary to the 'last say' doctrine.

49. It may not be out of place to mention here that a Magistrate or 'any other person' for that matter a Judge, how high soever, is not an expert in investigation. They are not persons, merely because of their higher credibility in the society, to act as a substitute for a competent police officer or a member of other investigating agencies nor a direction for inquiry by one or more of them may be given interchangeably with investigation regardless of the nature of the case.

50. The case of ***Sirajul Islam*** (*supra*), sought to be relied upon by the learned Advocate is clearly distinguishable because the issue in that case was whether the phrase "any other person" occurring in section *27(1Ka) (Ka) includes* a police officer or not and their Lordships answered the question in the negative. We see no difference between the view taken by their Lordships and the one taken by us on the point in the sense, in our view, if it is 'inquiry' a person merely by virtue of being a police officer is of no consequence. Learned Advocate seemingly missed the position that here we are not on interpretation of the phrase "any other person" occurring in section 27(1Ka) (Ka) but on acceptability of the proposition that mere refusal by a police officer leaves the Tribunal with no choice but to go for inquiry. The citation, therefore, is misplaced in the context and is of no avail for the petitioner.

51. The last and the final contention raised as a faint attempt to show that the allegation does not constitute any offence fades away as a cry in wilderness. We have meticulously gone through the complaint petition. Unfortunately for the petitioner, we notice her name consistently appearing throughout the complaint-petition indicating her direct involvement (true or false) in the commission of the offence. There is obviously a strong *prima facie* case against the petitioner to be tried. The report submitted by the Vice-Chairman of the local Upa-Zila Parishad is clearly biased and the Tribunal has rightly taken cognizance of the offence against the petitioner by rejecting the report.

52. **To sum up:**

1. *Naraji* petition filed by the informant/complainant or any other person aggrieved against any report within the meaning of section 27 of the Ain, submitted by police, Magistrate or any person authorized by the Government or appointed by the Tribunal is maintainable and the Tribunal is competent to take notice of the *naraji*-petition for its own satisfaction about the acceptability of the investigation or inquiry-report and as an aid to the process taking cognizance.
2. The informant/complainant or person aggrieved filing *naraji* petition against investigation/inquiry report within the meaning of section 27 of the Ain is not required to be examined u/s 200 of the Code for any purpose.
3. On receipt of the complaint the Tribunal may, if thinks fit, withhold direction for inquiry as contemplated under sub-clause (Ka) of section 27(1Ka) and send the complaint-petition back to the police station for recording a regular case, with direction to cause the investigation to be made by any competent police officer, other than the one who refused to accept the complaint, or direct any other investigating agency to investigate.
4. Without prejudice to the findings made in the preceding paragraph, the Tribunal may, if it appears after receiving the inquiry-report that the facts are not as plain and obvious as narrated in the petition of complaint and an inquiry is not enough for discovery of truth behind the offence, send the complaint-petition to the local police station with direction to cause an investigation to be made by a competent police officer, other than the one who refused to accept the same, or otherwise direct any other investigating agency to investigate, and report.

53. For what we have stated above, we see no merit in the Rule. In the result, the Rule is discharged. The order of stay granted earlier is hereby vacated. The Tribunal is directed to proceed with the trial of the case in accordance with law.

54. Communicate at once.

7 SCOB [2016] HCD 84

High Court Division

Death Reference No.18 of 2010.

The State
Versus
Julhash and others.
……Condemned-Prisoners.
With
Criminal Appeal No.5458 of 2011
Julhash and another
.....Appellants.
Versus
The State
……..Respondent
With
Jail Appeal No.367 of 2010
Md. Julhash
.....Appellant.
Versus
The State
……..Respondent
With
Jail Appeal No.368 of 2010
Hashmat @ Hasu
.....Appellant.
Versus
The State
……..Respondent

Mr. M.A. Mannan Mohon, D.A.G with
Mr. Md. Aminur Rahman Chowdhury and
Mr. Kazi Bazlur Rashid, A.A.Gs
… For the State

Mrs. Hasna Begum, Advocate
… For the State Defence.

Mr. Khandaker Aminul Haque, Advocate
…For the appellants (in Crl. A. No.5458/11)
Mrs. Hasna Begum, Advocate
… For the appellants (in Jail A. No.367/10 & Jail A. No.368/10)

Heard On: 28.07.15, 29.07.15 & 30.07.2015.
And
Judgment on: 30.07.2015 & 02.08.2015

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

Code of Criminal Procedure, 1898
Section 164
Confessional Statement:
The spirit of law on confession under section 164 of the Code of Criminal Procedure with regard to the confessional statement of a accused is such that a confession is a direct piece of evidence which is substantial and such statement of any accused can be relied upon for the purpose of conviction and no further corroboration is necessary if it relates to the confessing accused himself; provided it is voluntary and also free. A free and voluntary confession under the purview of this section deserves highest credit,

because it is presumed to flow from highest sense of guilt. If the court believes that the confession is voluntary and free, there is no legal embargo on the court for ordering conviction. If it is found that the Magistrate appears to have recorded his satisfaction as to the voluntariness and spontaneous nature of the confession of the accused, in that case; such confession cannot be vitiated from illegality and this type of confession alone is enough to convict the confessing accused. ... (Para 37)

Judgment

Soumendra Sarker, J:

1. This Death Reference No.18 of 2010 has been referred under section 374 of the Code of Criminal Procedure by the learned Additional Sessions Judge, 1st Court, Gazipur for confirmation of the death sentence passed by the learned trial court in Sessions Case No.240 of 2003 dated 22.03.2010 wherein the condemned-prisoners Julhash, son of Abdul Barek and Hashmot alias Hasu, son of Hazrat Ali along with the condemned-convict Babul, son of Jalil were convicted and sentenced under sections 302/201/34 of the Penal Code sentencing them to death.

2. The prosecution case as made out in the ejahar in a nutshell can be stated thus, one Ajufa Begum wife of late Joinuddin of village Mariali, Police Station-Joydebpur under Gazipur District lodged an ejahar with the Officer-in-Charge of Joydebpur Police Station on 12.06.2003 contending *inter alia* that her son Billal Hossain (19) was a lineman of Gazipur Bus terminal. During his service the condemned-prisoner namely Julhash threatened him on different occasions and that matter was informed to the local elite persons. On the date of occurrence i.e. on 22.05.2003 in the evening at about 7.30 p.m. the condemned-prisoner Hasmat Ali alias Hasu of the informant's same village requested Billal to accompany him for the residence of his father-in-law. The condemned-prisoner Hasu since was previously known to the informant and her son, she did not resist the deceased Billal to go with Hasu. At night the informant's son Billal Hossain did not return back to his residence and as a result of that the informant informed the matter of taking away her son Billal by the condemned-prisoner Hasmat alias Hasu in the evening of 22.05.2003 A.D. The informant along with her villagers thereafter started to search the deceased Billal and at a stage of that one of the neighbor of the informant Hazi Alkas Ali Mia lodged a missing information to the local police station on which a G.D. entry being No.1468 dated 23.05.2003 was made. On the following day at about 1.00 a.m. the informant came to learn that a dead body is floating in the water of nearby west Bhurulia Chellai canal. After getting that information the informant went there and found the dead body. She could recognize the dead body as of her son 'Billal Hossain'. Subsequently; police sent that dead body to nearby hospital for autopsy. Thereafter, the informant came to know that; out of previous enmity the condemned-prisoners Julhas and Hasmat alias Hasu along with the condemned-convict Babul jointly with some unknown 3/4 persons killed her son brutally beside "Chillai Khal" of their locality, which is situated to the northern side of her residence and they concealed the dead body under the water of that canal. On the said ejahar Joydebpur Police Station Case No.31 dated 12.06.2003 was started under section 302/201/34 of the Penal Code.

3. The case was investigated by Joydebpur police station and Sub-inspector Md. Alauddin was entrusted the charge of investigation who during his investigation visited the place of occurrence and prepared sketch map along with index. During his investigation the investigating officer seized some alamats and examined the witnesses under section 161 of

the Code of Criminal Procedure. The condemned-prisoners Julhash and Hasmot along with their companion of the occurrence of killing the other condemned-convict Babul after their apprehension by police, confessed their guilt of killing the victim Billal Hossain. The investigating officer thereafter produced them before Magistrate, 1st Class, for recording their statements under section 164 of the Code of Criminal Procedure and the learned Magistrate recorded the confessional statements of the condemned-convicts under the aforesaid section of law. After the close of investigation while the charge of killing the victim Billal Hossain was proved, the investigating officer submitted charge sheet No.393 dated 05.07.2003 against all the 03 (three) condemned-persons namely Julhash, Hashmat @ Hasu and Babul Sarder under sections 302/201/34 of the Penal Code.

4. Subsequent to that, for trial the case was sent to the Court of learned Sessions Judge, Gazipur, who subsequently transmitted the same to the learned Additional Sessions Judge, 1st Court, Gazipur. The learned trial court during trial of the case framed charge against all the three condemned-convicts under the aforesaid sections of law which was read over and explained to them in Bengali, at which they pleaded not guilty and claimed to be tried. The learned trial court *viz.* the Additional Sessions Judge, 1st Court thereafter examined 13 witnesses and defence cross-examined them.

5. During trial taking advantage of bail the condemned-convicts absconded and due to their absconsion they could not be examined under section 342 of the Code of Criminal Procedure and treating them fugitive the learned trial court after evaluation of the evidence on record both oral and documentary, passed the impugned judgment and order of conviction and sentence on 22.03.2010.

6. During hearing of this death reference along with Criminal Appeal and Jail Appeals Mr. M.A. Mannan Mohon, learned Deputy Attorney General with Mr. Md. Aminur Rahman Chowdhury and Mr. Kazi Bazlur Rashid, the learned Assistant Attorney Generals appeared on behalf of the State while Mr. Khandaker Aminul Haque, the learned Advocate appeared on behalf of the condemned-prisoners Julhas and Hasmat @ Hasu and Ms. Hasna Begum the learned State Defence lawyer appeared on behalf of the fugitive condemned-convict Babul Sardar.

7. Mr. Khandaker Aminul Haque, the learned Advocate appearing on behalf of the condemned-prisoners Julhash and Hasmat @ Hasu submits that the prosecution in the case could not able to discharge their onus in proving the prosecution case beyond shadow of doubt but inspite of that the learned trial judge convicted and sentenced the condemned-convicts being guided by surmise and conjecture. The learned Advocate Mr. Khandaker Aminul Haque further submits that the date of occurrence of this case while was 22.05.2003 the FIR has been lodged on 12.06.2003. The learned Advocate also submits that the postmortem done doctor during autopsy of the dead body could not find any injury in the testis of the deceased Billal Hossain which is a defect on the face of the record to hold such a view that the prosecution case as it appears is proved. Furthermore; in the inquest report there is no injury in the testis and the P.C. & P.R. of the condemned-prisoners Julhash and Hasu is nil. The learned Advocate argued that the confessional statements of the condemned-convicts are not true and voluntary and these are not consistent with the prosecution case. The G.D. entry was not given by the informant immediate after the occurrence but a third person going to the police station lodged the G.D. entry being No.1468 dated 23.05.2003 and in the G.D. entry there is no mention that any of the accused prior to the occurrence took away or called away the victim Billal Hossain from his residence. The learned Advocate lastly submits that

the confessional statements of the condemned-convicts which are the basis of the conviction are not true and voluntary and the entire judgment and order of conviction and sentence is without any legal evidence which is liable to be set aside and as such the condemned-convicts are entitled to get an order of acquittal. In the conclusion; the learned Advocate on behalf of the defence argued that all the condemned-convicts are tender boys and they are not habitual offender and both the two condemned-prisoners are suffering a lot within the condemned-cell and as a result of that they deserve compassionate consideration of this Court.

8. Mrs. Hasna Begum the learned State defence lawyer appearing on behalf of the absconding accused Babul Hossain adopted the argument advanced from the side of the learned counsel who was engaged on behalf of condemned-prisoners Julhash and Hasmat @ Hasu. The learned State defence lawyer in her concluding submission submits that the condemned-convict Babul Hossain is not habitual offender and he is a young boy and considering all these facts and circumstances of the case the death sentence should be commuted.

9. As against the aforesaid submissions of the learned Advocates for the convict-appellants and State defence lawyer the learned Deputy Attorney General on behalf of the State in support of the prosecution case submits that there are as many as 03(three) confessional statement of all the three condemned-convicts namely, Julhash, Hashmat @ Hasu and Babul which were recorded by the learned Magistrates, 1st Class, under section 164 of the Code of Criminal Procedure and during recording the confessional statement of the condemned-convicts all the requirements under sections 164 and 364 of the Code of Criminal Procedure were duly complied with. The learned Deputy Attorney General further submits that the confessional statements of the condemned-convicts are true and voluntary which are very much consistent with the prosecution case and by these confessional statements the condemned-convicts directly involved themselves within the occurrence of killing the victim Billal Hossain. Besides this; the money bag which was taken away from the pocket of the victim Billal Hossain by the condemned-convicts during the occurrence, was recovered and seized by the investigating officer and accordingly the seizure list was prepared and that money bag was recovered at the instance of the condemned-convict Hashmat @ Hasu which is a convincing incriminating evidence to connect the condemned-convicts with the offence of killing the victim Billal Hossain apart from their confessions. The learned Deputy Attorney General also submits that the investigating officer, Sub-Inspector Alauddin as witness No.10 of the prosecution proved the seizure list who prepared the same. It is the positive case of the prosecution that on the date of occurrence the informant Ajufa Begum who happens to be the mother of the victim handed over Taka 27,000/- to her son Billal Hossain and asked him to deposit the same in the local bank but Billal being failed to deposit the same within time; kept the money in his pocket which was known to the condemned-convict Hashmat @ Hasu and for getting the said money amounting to Taka 27,000/- Hashmat @ Hasu along with his co-condemned-convicts Julhash and Babul in a pre-planed way killing the victim Billal snatched away that money. The learned Deputy Attorney General submits that, this is a cool-headed murder and the victim Billal Hossain being innocent was brutally killed by the condemned-convicts and the victim could not resist the assailants to commit the offence on the date of occurrence. The witness No. 03 and 07 of the prosecution during their testimony testified that before the occurrence they have seen the condemned-prisoner Hashmat @ Hasu with Billal Hossain in a '*Rikshaw*' and at their interrogation the condemned-convict Hasu told them that for making 'shirt-pant' from a local Tailoring Shop they are going to that tailoring house. The learned Deputy Attorney General lastly submits that in fact there is no delay in lodging the FIR despite; it is within the face of the ejahar (Exhibit-1) that after 21 days of the occurrence

the ejahar was lodged on 12.06.2003. To substantiate this sort of submission the learned Deputy Attorney General argued, prior to FIR there was a G.D. entry with regard to missing of the victim Billal Hossain by one Hajee Alkas Ali Mia because of the ailing condition of the informant (deceased's mother) Azufa Begum who could not lodge the FIR after the occurrence, which is within the body of the ejahar and that fact; not at all denied from the side of the defence. Apart from this; the aforesaid G.D. entry bearing the missing information of Billal Hossain was at the instance of the informant Azufa Begum. As to the reason of delay in lodging the FIR, the learned Deputy Attorney General argued that, it is within evidence and not challenged from the side of the defence that the informant who is the widow mother of the victim Billal, was very much sick after missing of her only son and as she was in a very ailing condition; she could not go to the police station to lodge the FIR. Hence; the delay which was caused or occurred; was natural and likely. The learned trial judge viz. the Additional Sessions Judge, Gazipur after holding trial rightly assessed the evidence on record in its true perspective and evaluating the evidence both oral and documentary including the most vital piece of evidence which are the confessional statements of the condemned-convicts rightly decided the fate of the case against all the three condemned-convicts namely, Julhash, Hashmat @ Hasu and Babul Sarder and there exist no illegality or infirmity in passing the impugned judgment and order of conviction and death sentence which was awarded by the learned trial judge.

10. Heard the learned Advocates of both sides. Considering the submissions of the learned Advocates of both the sides and on perusal of the FIR, charge sheet, evidence adduced from the side of the prosecution and the confessional statement of the condemned-convicts which were recorded by a Magistrate, 1st Class, under section 164 of the Code of Criminal Procedure along with the exihibited documents, materials on record etc. in view of the respective cases of the parties consulting the judgment and order of conviction and sentence let us now scan and evaluate the evidence as adduced from the side of the parties to the case.

11. Here in this case, prosecution have made out a charge against the condemned-convicts that on 22.05.2003 for want of money amounting to Taka 27,000/- all the three accused persons collusively and conjointly calling the victim Billal Hossain from his residence at about 7.30 p.m. committed the murder. Against the condemned-convicts charge under sections 302/201/34 of the Penal Code was framed. To substantiate the aforesaid charge prosecution in this case have examined as many as 13 witnesses. Out of the aforesaid number of witnesses, P.W.1 Ajufa Begum is the informant as well as mother of the victim-boy Billal Hossain, the witness No.2 of the case Hajee Alkas Ali Miah is a co-villager of the informant who gave the missing information immediately on the following day of the occurrence to the local police station upon which a G.D. entry having No.1468 dated 23.05.2003 was entered. The witness No.3 Amjad Hossain is a villager who has seen the victim Billal Hossain on the date of occurrence in a '*Rikshaw*' with the accused Hasu. The witness No.4 Md. Bahauddin is an employee of a tailoring house, in where the deceased put his order to prepare his 'shirt-pant'. P.W.5 Forhad Hossain is the Cutting Master of the aforesaid tailoring house viz. 'Dhaka Tailors'. P.W.6 Lutfor Rahman is the Manager of the above mentioned 'Dhaka Tailors'. P.W.7 Abdul Aziz is a villager of the place of occurrence village who also on the date of occurrence found the victim Billal Hossain with the accused Hasu. The prosecution witness No.8 Md. Abdul Hamid Zamadder is a Magistrate, 1st Class, who recorded the confessional statement of one accused Md. Julhash under section 164 of the Code of Criminal Procedure. The witness No.9 Doctor Md. Salman was a Resident Medical Officer of Gazipur Sadar Hospital, Gazipur, who did the autopsy of the deceased Billal Hossain's dead body on

24.05.2003 at 4.15 p.m. The witness No.10 is the first investigating officer of the case Sub-Inspector Md. Alauddin. The witness No.11 is the second investigating officer Sub-Inspector Md. Sultan Uddin who submitted charge sheet against the condemned-convicts. The witness No.12 Md. Mizanul Hoque Chowdhury is a Magistrate, 1st Class, who recorded the confessional statement of a accused Babul Sarder under section 164 of the Code of Criminal Procedure on 16.06.2003 while he was Magistrate, 1st Class, in Gazipur. The last witness of this case P.W.13 Momena Khatun is another Magistrate, 1st Class, who recorded the confessional statement of another condemned-convict Hashmat @ Hasu on 15.06.2003 under section 164 of the Code of Criminal Procedure.

12. The informant of this case P.W.1 Ajufa Begum during her testimony before the trial court testified that on the date of occurrence she handed over some money to her son Billal Hossain to deposit the same in bank account. The amount of money was Taka 27,000/-. She identified two accused of this case namely Hasu and Julhash in the accused's dock. The informant in her deposition testified that the accused Hasu at the time of giving money to Billal witnessed that handing over of the money prior to the occurrence. The informant subsequently came to learn that Billal could not deposit that money to the bank. Subsequent to that, in the evening the accused Hasu and Julhash coming to the residence of the informant took away Billal Hossain in a '*Rikshaw*' towards bazar. Thereafter, her son Billal Hossain while did not return back to the residence, the informant along with her villagers started to search Billal but could not get him. Thereafter, the informant informed about the missing of her son to Hajee Alkas and Amjad. Hajee Alkas after getting that information lodged the G.D. entry with the local police station. The informant in her testimony further submits that out of greed of the money the condemned-convicts Julhash, Hasu and Babul killed her son Billal Hossain and subsequent to the occurrence she was very much sick and after her recovery from the ailing condition she went to the police station and lodged the ejahar which was identified by her. The ejahar has been marked as Exhibit-1. The informant also identified her signature therein which has been marked as Exhibit-1/1.

13. During cross-examination from the side of the defence in a reply to a question the informant testified that she cannot recollect the date in which she lodged the ejahar. In reply to another question from the side of the defence the informant testified that she herself collected that sum of Taka 27,000/- and that very amount was given by her to Billal Hossain for depositing the same in bank account, but Billal could not deposit that amount on the date. The informant denied that she has deposed falsely before the court and the accused of the case are innocent. At a stage of cross-examination the informant most empathetically asserted that the condemned-convicts namely Julhash, Hasu and Babul for want of the aforesaid money killed her son Billal Hossain on the date of occurrence. In the last portion of cross-examination the informant testifies that there was no enmity with Hasu and Babul prior to the date of occurrence and after the occurrence she came to learn that the condemned-convicts jointly killed her son Billal and subsequent to that she lodged the ejahar.

14. P.W.2 Hajee Alkas Ali Miah in his deposition testified that he is a witness of this case and after getting information of missing he went to the local police station and lodged a G.D. entry. He was also present at the time of inquest report of the dead body. He put his signature therein. This witness identified the inquest report of the dead body and his signature therein which has been marked as Exhibits-2 and 2/1 respectively.

15. P.W.3 Amzad Hossain in his testimony testified that he knows the condemned-convicts and on 22.05.2003 he found the deceased Billal Hossain in a '*Rikshaw*' with the

accused Hasu. Billal in his (P.W.3) query replied that they are going to a tailoring shop for making his wearing apparels. This witness in his reply to a question during his cross-examination testified that Billal and Julhash are uncle and nephew (brother's son) with each other. He also testified that he did not find the occurrence but found the dead body after the occurrence.

16. P.W.4 Md. Bahauddin in his deposition states that on 22.05.2003 Billal Hossain who is the victim of this case went to their tailoring shop for making shirt, pant and after giving that order he left the tailoring house. During cross-examination this witness testifies at a stage that he could not know Billal prior to the occurrence and he did not receive the cloths or the measurement of shirt-pant.

17. P.W.5, Forhad Hossain testified that he serves as 'cutting master.' On 22.05.2003 Billal Hossain went to their tailoring shop to give an order for making his shirt-pant. In a reply to a question during cross-examination P.W.5 testifies that he does not know the deceased Billal Hossain.

18. P.W.6 Lutfor Rahman states that he is the Manager of Dhaka Tailoring House. On 22.05.2003 Billal gave an order to their tailoring shop for making his shirt-pant therefrom and he (P.W.6) took that order which is in the serial No.1068. Police seized that order-book during investigation and prepared seizure list after going to their tailoring house. This witness put his signature in the seizure list which was identified by him and his signature has been marked as Exhibit-3/2.

19. P.W.7 Abdul Aziz in his testimony testified that about three years back the occurrence took place and he knows the informant of this case. On the date of occurrence while he was returning to his residence from Joydebpur he found Billal Hossain with Hasu in front of a Primary School and in his question Billal replied that, they are going to bazar for making his wearing apparels. In reply to a question in the cross-examination this witness (P.W.7) testified at a stage that at about 6.00 p.m. he found Billal Hossain with Hasu in a '*Rikshaw'*.

20. P.W.8 of this case Md. Abdul Hamid Zamadder, who was a Magistrate, 1st Class, at the relevant time testified that on 14.06.2003 while he was posted at Gazipur Collectorate as a Magistrate, 1st Class, on that date in connection with Joydebpur Police Station Case No.31(6)03 under section 302/201/34 of the Penal Code one accused of this case namely Julhash was brought before him and he recorded the confessional statement of Julhash under section 164 of the Code of Criminal Procedure. Magistrate Abdul Hamid in his deposition identified that confession and his five signatures in the confessional statement of the condemned prisoner Julhash which has been marked as Exhibits No.-4, 4(1)-4(5). In a reply to a question during cross-examination P.W.8 Abdul Hamid Zamadder testifies that the accused was produced before him on 11.00 a.m. and he gave three hours time to the accused for his mental reflection and after three hours he recorded the confessional statement of the accused person namely Julhash in his Court's chamber. This witness further testified that after compliance of all legal formalities he recorded the confessional statement of Julhash. He denied the suggestion of the defence that at the instance of police he recorded the statement.

21. P.W.9 of the prosecution Dr. Md. Salman in his deposition testified that while he was serving as Resident Medical Officer on 24.05.2003 in the Sadar Hospital of Gazipur, at 4.15 p.m. the dead body of the deceased Billal Hossain, aged about 18 years was brought before him for postmortem examination and a Medical Board consist of three members did the

postmortem of the deceased and he (P.W.9) was the Chairman of that board. After postmortem the opinion of that medical board reads as follows :

> "m¡n¢V i¡pj¡e J N¢ma ¢Rmz *Rm. Present both limbs. Eyes open decomposed; Nose decomposed frothy clear, decomposed, NB-decomposed, Mouth partially open, tongue bite 2 cm. Anus-clear decomposed.*
> জখম হচ্ছে নিম্নরুপঃ- *One continuous ligature mark around the neck, breadth 1", partch mentigation-present. On dissection: Clotted blood seen under surface of the skin over upper chest.*
> *Cause of death:*
> *Due to asphyxia followed by strangulation which was anti mortem and homicidal in nature."*

22. This witness identified his signature along with the signatures of other members of the Board in the postmortem Report and the postmortem report with the signatures has been marked as Exhibits. That report is Exhibit-5.

23. During cross-examination the postmortem done doctor Md. Salman testified at a stage of his reply to a question from the side of the defence that during autopsy they did not find any injury in the testis of the dead body, on which the defence argued much.

24. P.W.10, Sub-Inspector Md. Alauddin testifies before the Court that on 22.05.2003 he was Sub-Inspector, Joydebpur Police Station and on that date he was entrusted investigation of this case by the Officer-in-Charge of Joydebpur Police Station. After taking investigation he went to the place of occurrence, prepared sketch map and index. He identified the sketch map and index of the place of occurrence which has been marked as Exhibits-6 and 7. The investigating officer Sub-Inspector Alauddin further testified that during his investigation he arrested all the three accused of this case namely Hashmat, Julhash and Babul those who confessed their guilt before him and as a result of that he produced them before the Magistrates for recording their confessional statement under section 164 of the Code of Criminal Procedure. The accused of this case in their confessional statement admitted frankly that they have killed the victim of this case namely Billal Hossain. During his investigation he examined 10 witnesses under section 161 of the Code of Criminal Procedure. The accused Hashmat disclosed before him (P.W.10) that taking money from the money bag of the victim Billal he has thrown the empty bag to a bush which is nearer to local "Brulia Bridge". Thereafter, with the accused Hasmat he (P.W.10) went there and recovered the money bag which was seized by him. This witness prepared the seizure list of that money bag and identified the same which has been marked as Exhibit-8. He also identified the accused Hashmat and Babul in the dock.

25. During cross-examination from the side of the defence the investigating officer Sub-Inspector Alauddin testified at a stage that there was a G.D. entry being No. 1468 dated 23.05.2003 and that G.D. entry was in connection of missing of the victim Billal Hossain and one Alkas lodged that G.D. and in that G.D. there was no mention about the accused of this case and during his (P.W.10) investigation getting materials he apprehended the accused of this case after the occurrence. On 12.06.2003 Hashmat @ Hasu was arrested and on 14.06.2003 Julhash was arrested and lastly on 17.06.2003 Babul was arrested from Madaripur District. This witness testified that during his investigation he did not find any enmity between the victim and the accused of this case.

26. P.W.11 Sub-Inspector Md. Sultan Uddin as second investigating officer of this case testified that on 21.06.2003 he obtained investigation of this case and going through the case docket he sought for permission to file charge-sheet against the accused persons and after getting permission from the concerned Police Super, he submitted charge-sheet No.393 under sections 302/201/34 of the Penal Code on 05.07.2003.

27. P.W.12 of this case Md. Mizanul Hoque Chowdhury in his deposition deposed that on 16.06.2003 he was Magistrate, 1st Class in Gazipur. On that date one of the accused of this case Babul Sarder was produced before him for recording his confessional statement and rendering all legal opportunity for reflection of Babul Sarder after compliance of the legal formalities he recorded the confessional statement of the accused Babul Sarder under section 164 of the Code of Criminal Procedure. This witness identified that confessional statement and his four signatures therein which were marked as Exihibits-10, 10/1-10/4 respectively.

28. During cross-examination in a reply the witness No.12 Magistrate Mizanul Hoque Chowdhury testified at a stage that there was no mark of injury in the person of the accused Babul and three hours time was given to the accused prior to recording of the confession. P.w.12 denied the suggestion of the defence that he did not comply with the legal formalities as provided in section 364 of the Code of Criminal Procedure prior to recording of the confession of the condemned-convict Babul Hossain.

29. The last witness of this case P.W.13 Momena Khatun testified that on 15.06.2003 she was Magistrate, 1st Class in Gazipur district and on that date one of the accused of this case Hashmat @ Hasu was produced before her for recording his confessional statement under section 164 of the Code of Criminal Procedure. This witness has given three hours time to the accused Hashmat for his reflection and thereafter, on compliance of all legal formalities at 5.30 p.m. she recorded the confessional statement of the condemned-prisoner Hashmat @ Hasu. P.W. 13 identified the confessional statement of Hashmat and her signatures therein which has been marked as Exhibits-11 and 11/1-11/6.

30. During cross-examination from the side of the defence P.W.13 Magistrate Momena Khatun categorically replied to a question of defence that the accused Hashmat was given enough time for his reflection and there was no mark of injury in the person of the accused. This witness specifically denied at a stage of cross-examination that the confessional statement of the accused Hashmat was not voluntary.

31. In the instant case as we have come across-from the deposition of the witnesses that there is no eye-witness of the occurrence and on perusal of the impugned judgment and order of conviction and sentence passed by the learned trial Judge it is evident that the learned Additional Sessions Judge on the basis of confessional statements of the condemned-convicts awarded the conviction and sentence. Hence; the incriminating evidence as it transpires are the confessional statements of the condemned-convicts Julhash, Hashmat @ Hasu and Babul Sarder.

32. Having gone through the confessional statement of the condemned-convicts it appears that the condemned-prisoner Julhash on very date of his apprehension confessing his guilt before the learned Magistrate, 1st Class made his confessional statement (Ext.4) which was recorded under section 164 of the Code of Criminal Procedure by that Magistrate which reads as follows:

"হাসু বিল্লালকে মেয়ের কথা বলে জয়দেবপুর বাসষ্ট্যান্ড থেকে নিয়ে যায়। বৃহস্পতিবার রাত ৮ টায় বাসষ্ট্যা®ä নেয়। আমি জুলহাস, বিল্লাল আমার চাচা। হাসু আমারে ও বাবুলকে বিমান বাহিনীর চালায় বসাইয়া রাইখা যায়। বিল্লাল আসার পর হাসুকে জিজ্ঞাসা করে কিরে মাইয়া কই। হাসু বিল্লালকে বলে যে বস এখনই আসবে মাইয়া। বিল্লাল তত re বসে থাকে ৫/৭ মিনিট। পরে বিল্লাল বলে যে আম্মা তারে খুজবে চল যাইগা। তারপর ৫/৭ পা আইগাতেছি যাওয়ার জন্য তখন হঠাৎ করে হাসু বিল্লালের পিছন থেকে গলায় ধরে ফেল্ল এবং শোয়াইয়া ফেলল। বাবুল উর পায়ে বসে প্যান্টের চেইন খুলে ফেলে। দুইটি বিচি গালাইয়া ফেলে বাবুল। ভাবছে যে মারা গেছে। তখন ছাইরা দেয়। আবার শুনে যে গলা দিয়ে শব্দ হচ্ছে। তখন আমাকে বাবুল ও হাসু বলে যে, তুই যদি না ধর তোরে মাইরা ফালামু। তারপর আমি ওর হাত ধরলাম। হাসু বিল্লালকে গলা চিপাইয়া মাইরা ফালাইল। আমি ডান হাত, হাসু বাম হাত এবং বাবুল পা ধরে আঙ্গিঁয়ে নিয়ে খালে ফালাইয়া দিল। খালে ব্যালেনচার ভীতরে বাবুলে ঢুকাইয়া দিছে। হাসু টাকা l জন্য বিল্লালকে মেরে ফেলে। বাবুল ২৭০০০/- টাকা পেয়েছে এবং ৩০০০/- টাকা হাসু পায়। আমি একটাকাও পাইনি। আমি হাসুর সাথে ছোট বেলা থেকে চলাফেরা করি। ও যে এত ডেনজার জানতে পারিনি। হাসু আমাকে ওখানে ডেকে নিয়ে যায়। জীবনে একবার মাইয়া লাগাইছি। তখনও হাসু, বিল্লাল ও আমি একত্রে ঐ জায়গায় লাগাই। হাসু মাইয়া নিয়া আছিল। ঘটনার দিনও আমরা মাইয়া লাগানোর জন্য যাই।"

33. The second confessional statement (Exhibit-10) is of the condemned-convict Babul Sarder who also on the date of his apprehension produced before the learned Magistrate, 1st Class, for recording his confessional statement and on that date i.e. on 18.06.2003 he confessed his guilt in the following way, (quote):

"0Ve¡l ¢ce på¡ 7-৭/৩০ জুলহাস আমাকে ঘটনাস্থলে নিয়ে যায়। ৫/৭ মিনিট পর হাসু বিল্লালকে ঘটনাস্থলে নিয়ে আসে। হাসু আমাকে এবং জুলহাসকে বলে ck বিল্লাল এর নিকট টাকা আছে, তাকে মেরে ফেলতে হবে বললে হাসু বিল্লালের গলায় হাত দিয়ে চাপ দিয়ে ধরে। আর জুলহাস বিল্লালের গলায় চাপ দিয়ে ধরে। a¡lfl B¢j বিল্লালের গলায় চাপ দিয়ে ধরি। জুলহাস বিল্লালের হাত ধরে এবং আমি বিল্লালের পায়ে ধরে পানির নিকট নিয়ে যাই। এ সময় হাসু বিল্লালের গলায় চাপ দিয়ে ধরে। জুলহাস এবং আমি বিল্লালের ২টি বিচিতে চাপ দেই। এর সাথে সাথেই বিল্লাল 0Ve¡Ùলেই মারা যায়। তারপর বিল্লালের পকেট থেকে আমি টাকা বের করে নিয়ে আসিz এ অবস্থায় মৃত বিল্লালকে পানির কাছে রেখে আমারা তিনজন মাঠে চলে আসি। আমি হাসুকে টাকা দিয়ে দেই। এর পর আমি বাসায় চলে আসি। ২ ঘন্টা পর জুলহাস বাজারে এসে আমাকে ৮৮০/- V¡L¡ ®cuz"

34. The third confessional statement of this case (Exhibit-11) is of the remaining condemned-prisoner Hashmat @ Hasu, who in his confessional statement before the Magistrate, 1st Class, Momena Khatun (P.W.13) confessed his guilt in the following way (quote):

"বিল্লাল অনুমান মাস খানেক আগে মারা গেছে। মারা যাওয়ার দিন ছিল বৃহস্পতিবার। বৃহস্পতিবারের আগের দিন ¢hL¡m ®hm¡ B¢j জুলহাস ও বাবুল প্রোগ্রাম করি। আমরা প্লান করি এই মর্মে যে, আমি বিল্লালকে জয়দেবপুর বাসস্ট্যান্ড থেকে ডেকে ওয়াপদা অফিসের পিছনে মাঠে নিয়ে যাব। বিল্লাল টাঙ্গাইলের ও সাভারের গাড়ীর সুপার ভাইজার ছিল। বিল্লালের কাছে সব সময় টাকা থাকত। আমাদের এলাকাতেই বিল্লালের বাড়ী। প্লান মত B¢j বৃহস্পতিবার সন্ধ্যা ৭টার দিকে জয়দেবপুর বাসস্ট্যান্ডে আসলাম। এসে বিল্লালকে মিথ্যা মিথ্যি জানাই ®k, Ju¡fc¡ মাঠে একটি মেয়ে আনবে জুলহাস ও বাবুল। মেয়ের কথা না বললে বিল্লাল আসবে না তাই এই মিথ্যা বলা। বিল্লালকে মেয়ের কথা বলাতে বিল্লাল যেতে রাজী হয়। বিল্লালের কাপড় বানাতে আমি বিল্লালের সাথে ঢাকা টেইলার্সে গিয়ে কাপড় বানাতে দেই। বিল্লালের একটা প্যান্ট ও একটা শার্ট বানাতে দেই। সেখানে কাজ সেরে সুরমা হোস্টেলের উত্তর পার্শ্বের বেকারী থেকে cCSe ®LL M¡C। তারপর রিক্সা নিয়ে B.R.T.C. ব্রীজের ওপারে রেল লাইনে নেমে হেটে Ju¡fc¡ j¡ঠে যাC। ঐ মাঠ টাকে কেউ কেউ পুন বাড়ীর চালা বলে। ঐ মাঠে কথা মত জুলহাস ও বাবুলকে বসা AhÙ¡u ®c¢খ। আমাদের প্ল্যান ছিল আমি ও বিল্লাল আগেই গিয়ে বসে থাকবো এবং জুলহাস ও বাবুল পিছন থেকে গিয়ে লাঠি মেরে অজ্ঞান করে বিল্লালের কাছ থেকে টাকা নিয়ে নিব। কিন্তু প্ল্যান উল্টে যায়। আমাদের আগেই জুলহাস ও বাবুল সেখানে হাজির হয়ে যায়। Bjl¡ সেখানে গিয়ে ওদের সাথে কথা বলি। জুলহাস বাবুলের সাথে বিল্লালকে বসিয়ে রেখে আমাকে দূরে নিয়ে যাu। দূরে নিয়ে আমাকে জানায় বিল্লালকে মেরে ফেলবে। আমি প্রতিবাদ জানাCz জুলহাস বলে বিল্লালকে মেরে ফেলবো। মেরে ফেলার পর তুই শশুর বাড়ী চলে যাবি। আমি কিভাবে ধরবো তা জুলহাস দেখিয়ে দেয়। আমাকে গলার দিকে এমন ভাবে ধরার জন্য জুলহাস বলে যাতে বিল্লাল কথা না বলতে পারে। জুলহাস হাত ধরবে এবং বাবুল প্যান্টের চেইন খুলে অন্ডকোষে চিপ দিয়ে মেরে ফেলবে। এই প্রোগ্রাম করে আবার বাবুল ও বিল্লালের কাছে গেলাম। বিল্লাল চলে যেতে চাচ্ছিল। আমাদেরকে পিছনে রেখে বিল্লাল সামনে পেশাব করতে বসেছিল। তখন আমাকে বাবুল ধা , ¡ দিয়ে দেখানো মতে ধরতে বলে। আমি সাহস পাইনি। বিল্লাল পেশাব করে উঠে যায়। চলে

যাওয়ার জন্য বিল্লাল হাঁটা শুরু করে। বাবুল ও জুলহাস আমাকে ধরতে বললে আমি হেটে গিয়ে বিল্লালের গলায় ধরি, জুলহাস হাত ধরলো এবং বাবুল চেইন খুলে অন্ড কোষ চেপে ধরলো। বিল্লাল পড়ে গেলে তাকে একটা পার্শ্ববর্তী খালের মধ্যে শুইয়ে ফেলি। তখন জুলহাস বিল্লালের গলায় চিপ দিয়ে ধরে পানিতে চিপ দিয়ে ধরে। আমিও গলা ছেড়ে দিয়ে বিল্লালের মাথা চেপে ধরে রাখি। বাবুল টাকা পয়সা নেয়। বাবুল পরে ৩৬০০/- টাকা আমাদেরকে দিয়েছে। পানিতে অনুমান ৭/৮ মিনিটি চিপে ধরে রাখার পর বিল্লাল নিস্তব্ধ হয়ে যায়। তারপর আমি ও জুলহাস পানি থেকে উপরে উঠে kiC। বাবুল বিল্লালকে কচুরী পানার নীচে লুকিয়ে রাখে। তিনজন চলে যাওয়ার পথে হঠাৎ বাবুল বলে তার স্যান্ডেল খালের মধ্যে রয়ে গেছে। বাবুল শার্ট খুলে জুলহাসের কাছে দিয়ে স্যান্ডেল আনতে যায়। বেশ কিছুক্ষণ হয়ে গেলেও সে আসে না। না আসাতে আবার জুলহাসকে নিয়ে আমরা সেখানে যাই। সেখানে বাবুল বা লাশ কিছু না দেখে বাবুল বাবুল বলে জুলহাস ডাক দেয়। কোন সাড়া শব্দ না পেয়ে চলে আসি। বাবুলের দেওয়া টাকা নিয়ে আমরা বিআইটি এর সামনে kiC। বিল্লালের মানিব্যাগ থেকে টাকা বের করে নিয়ে BADC ব্রীজের কাছে মানিব্যাগটা ফেলে দিয়ে আসি। আমি ভয়ে চিটাগাং চলে যাCz hdhi I f¢mn Bji কে ধরে।"

35. With regard to all these 03(three) confessional statements of the condemned-convicts which has been marked as Exhibits-4, 10 and 11 respectively it has come to our notice after it's scrutiny as well as from through close reading from beginning to the end of these confessional statements that the learned Magistrates, who recorded the confessional statements of the condemned-convicts under section 164 of the Code of Criminal Procedure observed all the mandatory legal formalities incorporated in section 364 of the Code of Criminal Procedure and it is obvious to note that the learned Magistrates who are P.Ws. 8, 12 and 13 respectively during recording of the statements of the condemned-convicts gave sufficient caution to the accused persons that they are not bound to confess their guilt before the Magistrate. The Magistrates also were satisfied that the condemned-convicts prior to their confession were not influenced, induced or tortured in any way by the Law enforcing Agencies. In a voice all the recording Magistrates testified that the confessions of the condemned-convicts are true and voluntary.

36. Going through the confessional statements of the condemned-convicts we find that the questions which were put forward by the learned Magistrates before recording of the statements to the confessing accused prior to recording the confessional statements are very much within the ambit of law on confession and they have carefully complied with the provisions laid down in sections 164 and 364 of the Code of Criminal Procedure and being satisfied that the confessional statements are true and voluntary recorded the same under section 164 of the Code of Criminal Procedure.

37. The spirit of law on confession under section 164 of the Code of Criminal Procedure with regard to the confessional statement of a accused is such that a confession is a direct piece of evidence which is substantial and such statement of any accused can be relied upon for the purpose of conviction and no further corroboration is necessary if it relates to the confessing accused himself; provided it is voluntary and also free. A free and voluntary confession under the purview of this section deserves highest credit, because it is presumed to flow from highest sense of guilt. If the court believes that the confession is voluntary and free, there is no legal embargo on the court for ordering conviction. If it is found that the Magistrate appears to have recorded his satisfaction as to the voluntariness and spontaneous nature of the confession of the accused, in that case; such confession cannot be vitiated from illegality and this type of confession alone is enough to convict the confessing accused.

38. On perusal of the confessional statements of the condemned-convicts Julhash, Hashmat @ Hasu and Babul Sarder in comparison with the material evidence on records including the ejahar, charge sheet and the seizure list, we find that; except some minor discrepancies no such material contradiction, omission or discrepancy is noticed within their

confessional statement, from which it can be held that the confessional statements of the confessing accused are not true and voluntary, rather it can be easily held from the facts and circumstances of the case along with the connected evidence on record that the confessional statements are quite consistent with the prosecution case which are identical and not tutored. From plain reading of these confessional statements it appears that the statements are sound and cogent. In this context; the chain of events leading to killing the victim have been well proved by these consistent substantial evidence which is transpired within the statements of confession of the condemned-convicts and inasmuch as during trial of the case the trial court assessed and appreciated the evidence on record rightly in the total approach within the ambit of sections 164 and 364 of the Code of Criminal Procedure we have the reason to draw such inference that due to the existence of true and voluntary confessional statements the court can well form the basis of conviction on the solitary evidence of these confessional statement of the condemned-convicts namely Julhash, Hasmat @ Hasu and Babul Sarder.

39. Let us now draw our attention on the submission advanced from the side of the defence with regard to delay in lodging the FIR as agitated from the side of the learned Advocate Mr. Khandaker Aminul Haque appearing on behalf of the condemned-prisoner Julhash and Hashmat @ Hasu it appears from the records that the date of occurrence of this case is on 22.05.2003 and the ejahar was lodged on 12.06.2003 and the delay which occurred; is 21 days and in this context; the learned Advocate argued that for the said delay it can be easily held that the prosecution case is manipulated. In this context; law enjoins that an information to the police with commission of a cognizable offence is guided under section 154 of the Code of Criminal Procedure. The word "information" in this connection means something in the nature of a complaint or acquisition, or at least information of a crime, given with the object of putting the police in order to investigate. The word "First Information" is not mentioned in the Code. It is that information which is given to the police first in point of time on the basis of which the investigation commences.

40. In the instant case; we find from the case records that a G.D. entry with regard to missing of Billal Hossain was lodged and this G.D. entry being No.1463 was given immediately on the next following day of the occurrence i.e. on 23.05.2003 by the witness No.2. The witness No. 2 Hajee Alkas Ali Miah on the basis of telephonic conversation from Azufa Begum, the informant of this case lodged this G.D. entry. It further appears from the testimony of the informant that she was very much sick after the occurrence and while she was in the know about her son's death and obtained the dead body of her son Billal Hossain, she could not move and prior to that after the missing of her son Billal investigation was started by police and over mobile phone she informed about the missing of her son immediately after the occurrence to P.W.2 Hazi Alkas Ali Miah. Therefore, it is well within record that P.W.2 Hazi Alkas Ali Miah while lodged the G.D. entry, was not in the know about the occurrence of killing. Accordingly, only a missing information was given by him to the police and on this information, pursuant to that, practically investigation was started. From the evidence of first investigating officer P.W.10 Sub-Inspector Md. Alauddin we find the aforesaid factual aspects of this case. Subsequent to that; the mother of the deceased lodged the ejahar which is not a substantive piece of evidence under the purview of section 154 of the Code of Criminal Procedure. In the case of *Md. Shamsuddin-vs.-The State* 40 DLR(AD) 69 it is decided by their lordships that, mere delay in lodging the ejahar is not a

ground to disbelieve the prosecution case. There may be circumstances in which lodging of a F.I.R. as to commission of an offence may be delayed – as the instant case be. It is to be remembered here that the positive contention of the prosecution that the informant Ajufa Begum after the occurrence was very much in an ailing condition, is not challenged from the side of the defence. There is not even a suggestion from the side of the defence as to the sickness of the informant Ajufa Begum who is a widow woman having only son Billal Hossain was not sick. Besides this; we have already spelt out earlier that the FIR is not a substantive piece of evidence and it is used as a means for corroborating or contradicting the statement of the informant [Ref: 8 BCR (AD) 141, 8 BLD (AD) 109.

41. Mr. Khandaker Aminul Haque, the learned Advocate for the convict-appellant contended that, absence of injury in the testis of the deceased Billal Hossain is fatal for the prosecution when he was examined by the doctors and this has cast a doubt. Kepping ahead the above submissions on perusal of the evidence we are constrained to hold such a view that it is very much likely in consultation with the case records specially the evidence of the P.Ws. that the P.M. done doctor P.W.9 Dr. Md. Salman during autopsy of the dead boy of victim Billal Hossain could not find any injury in the testis inasmuch as two days after the occurrence the P.M. was held by the doctor when the dead body was admittedly decomposed. It is also within record and well within the testimony of the P.W.3 Amjad Hossain that two days after the occurrence i.e. on 24.05.2003 the dead body of the victim was found in a floating condition on the water of a canl which is commonly known as "Chilai Khal". It is also apparent from the evidence of the concerned doctor Salman (P.W.9) that when he examined the dead body, at that time "m¡n¢V i¡pj¡e J N¢ma ¢Rmz" Hence; it is quite natural that the doctor could not found any injury in the testis of the victim Billal Hossain.

42. The learned Advocate, who has preferred appeal on behalf of the condemned-prisoners Julhash and Hashmat @ Hasu at a stage of his submissions also submits that the prosecution witnesses who are thirteen in number since not ocular witness of the occurrence; the prosecution has failed to prove the charge of murder which is brought against the convict-appellants and that's why the accused are liable to be acquitted and consequently the Death Reference would be rejected. In the last portion of argument the learned Advocate has drawn our attention regarding commutation of death sentence stating that the condemned-prisoners are in condemned-cell for a considerable period and they are suffering from mental agony of death within the death-cell.

43. Having regard the aforesaid submissions of the learned counsel for the appellants, scrutinizing the relevant papers on record, especially the evidence led from the side of the prosecution and the materials on record including the confessional statements of the condemned-convicts as to the facts and circumstances of the case, we have every reason to hold such a view that to ensure complete justice it would be justified in convicting the sentencing convict-appellants under section 302 of the Penal Code relying upon the

confessional statements of all the three condemned-convicts which are fully corroborated by other evidence on record and these are oral, documentary and circumstantial.

44. Before parting, however, we must observe that on careful scrutiny and assessment of oral and documentary evidence and also taking into consideration of the present status of the condemned-prisoners in the death-cell we are of the view that the prosecution inasmuch as has been able to prove the charge of murder against the condemned-convicts beyond all reasonable doubt, the learned Additional Sessions Judge, Gazipur was legal and justified in passing the impugned judgment and order of conviction and sentence.

45. In view of the facts and circumstances of the case and also having regard to the submissions put forward from the side of the learned counsels of the defence we are of the considerate decision that, ends of justice would be sufficiently met, if the sentence of death imposed upon the condemned-convicts (1) Julhash, son of Abdul Barek and (2) Hashmot alias Hasu, son of Hazrat Ali along with the condemned-accused (3) Babul, son of Jalil be commuted to the imprisonment for life instead of death sentence.

46. Consequently, the order of conviction and sentence passed by the learned Additional Sessions Judge, Gazipur against the condemned-convicts is altered from death sentence to imprisonment for life.

47. In the result, the Death Reference No.18 of 2010 is rejected with modification of sentence from death to imprisonment for life.

48. The impugned judgment and order of conviction and sentence dated 22.03.2010 passed by the learned Additional Sessions Judge, First Court, Gazipur in Sessions Case No.240 of 2003 is hereby upheld in the modified form.

49. The condemned-convicts Julhash, Hashmot alias Hasu and Babul Sarder are hereby found guilty under section 302 of the Penal Code and are convicted and sentenced thereunder to suffer imprisonment for life and to pay a fine of Taka 20,000/- in default to suffer rigorous imprisonment for 03(three) months more.

50. The condemned-prisoners Md. Julhash and Hashmat @ Hasu be immediately shifted from the condemned-cell and be kept in custody with other convicted persons in accordance with law. The period of custody of the condemned-prisoners shall be deducted from the term of imprisonment as per provision of section 35A of the Code of Criminal Procedure.

51. Issue modified conviction warrant at once.

52. Consequently, the Criminal Appeal No.5458 of 2011 and Jail Appeals No.367 of 2010 and 368 of 2010 stands dismissed.

53. Send down the lower Court’s record at once along with the copy of this judgment and order to the trial court concerned immediately for information and necessary action.

7 SCOB [2016] HCD 98

HIGH COURT DIVISION
(Statutory Original Jurisdiction)

Income Tax Reference Application No. 334 of 2006.
with
Income Tax Reference Application No. 335 of 2006.
with
Income Tax Reference Application No. 12 of 2008.
with
Income Tax Reference Application No. 422 of 2009.

Youngone Synthetic Fiber Product Industries Ltd. and another
.... Applicant

Versus

The Commissioner of Taxes
.....Respondent

Mr. M.A. Noor with
Mr. Muhammad Nawshad Zamir with
Mr. Reajul Hasan, Advocates
..... for the applicant.

Mr. Pratikar Chakma, A.A.G
..... for the respondent.

Heard on 20.01.2016, 27.01.2016, 28.01.2016 and 03.02.2016
Judgment on: 04.02.2016.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Abu Taher Md. Saifur Rahman

Income Tax Ordinance, 1984
Section 28, 29:
Therefore, it appears from the above description of the word "depreciation" that in calculating the total income in a concerned assessment year, the wears and tears of assets, which have been used for the purpose of the business and to earn revenue, have to be taken into consideration. From the context of the said concept, the relevant provisions have been incorporated in our statute book, namely Income Tax Ordinance, 1984. Thus, while Section 28 of the said Ordinance classifies the income from business and profession, Section 29 provides for the allowances to be deducted from the said income while calculating the same for the purpose of assessment. Clause(VIII) of sub-section (1) of Section 29 provides that the depreciation of building, machinery, plan or furniture etc. of the concerned assessee, which have been used for the purposes of business or profession, shall be allowed as admissible under the Third Schedule to the said Ordinance. Again, Paragraph-2 of the said Third Schedule, in particular sub-paragraph (1) of the same, provides that in computing the profits and gains from the business or profession, an allowance for depreciation shall be made in the manner provided hereinafter. This Paragraph 2 is followed by a Table under Paragraph 3

prescribing fixed rates of depreciations to be allowed on the 'written down value' of any particular assets used in the business. ... (Para 16)

As against above backdrop, we are of the view that, if the interpretation as suggested by the learned advocate for the assessees is accepted by this Court, that will give an absurd result in that though the assessees became liable to face some sort of consequences because of non-filing of the returns during the said ten years period, thereby preventing the concerned tax authorities from doing any assessment thereon, the same assessees would be given a double benefit now by allowing the original costs of the said properties ten years ago to be treated as 'written down value' in the concerned assessment year without deducting the actual depreciation which would have been allowed or could have been allowed had there been any actual assessments upon returns filed by the assessees. Under no circumstances, a Court of law can accept such proposition. This being so, we are of the view that, though no assessment has in fact been done during the said exemption period, the application of law should be made in such a way that no undue benefit is given to such assessees. In view of above, we hold that the words "depreciation allowed under this Ordinance" can under no circumstance be regarded as depreciation actually allowed through assessment orders. ... (Para 19)

Judgment

SHEIKH HASSAN ARIF, J:

1. Since the questions of law and facts involved in the aforesaid four reference applications are almost same, they have been taken up together for hearing, and are now being disposed of by this common judgment.

2. The background facts in the aforesaid reference applications are as follows:-

I.T.R. Application No. 334 of 2006

This Reference Application, at the instance of the Assessee- Youngone Synthetic Fiber Product Industries Ltd., has arisen out of order dated 31.05.2006 passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka in I.T.A. No. 3864 of 2005-2006 (Assessment year 2005-2006).

3. Background facts are that the assessee-applicant, pursuant to notices under Section 83(1) and 79 of the Income Tax Ordinance, 1984, submitted return for the assessment year 2005-2006 showing Tk. 82,19,179/- as income. In the said return, the assessee, amongst others, claimed depreciation on its assets for an amount of Tk. 1,35,47,142/-, having been worked out upon taking the original costs of the assets as the 'Written Down Value'. However, the said depreciation and Written Down value were not accepted by the concerned Deputy Commissioner of Taxes (DCT), who calculated Written Down Value of the properties as Tk. 3,03,97,499/-, as against the Written Down Value of Tk. 8,70,58,476/- as claimed by the Assessee. The said Written Down Value, as determined by the DCT, was done by reducing the original costs of the properties by notionally allowing depreciation on the said properties for each of the preceeding 10(ten) years, namely from the assessment year 1995-1996, during which period the assessee-company was enjoying tax exemption. Being aggrieved by such assessment order, the assessee preferred appeal before the Commissioner of Taxes (Appeal), Taxes Appeal Zone-2, Dhaka, whereupon, the Commissioner (Appeal) affirmed the said decision of the DCT holding that the DCT lawfully allowed such depreciation at the prescribed rate as provided by the Third Schedule to the Income Tax

Ordinance, 1984 ("the said Ordinance"). Being dissatisfied again, the assessee filed Second Appeal before the Taxes Appellate Tribunal, Division Bench-1, Dhaka, being ITA No. 3864 of 2005-2006, whereupon, the Tribunal, vide order dated 31.05.2006, affirmed the said decisions of the lower authorities by referring to the concerned law and a circular of the National Board of Revenue, being Circular No. 3/2005 dated 06.04.2005.

4. **I.T.R. Application No. 335 of 2006**

This Reference Application, at the instance of the assessee, has arisen out of order dated 31.05.2006 passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka in I.T.A. No. 3865 of 2005-2006 (Assessment year 2005-2006).

5. Background facts are that the assessee submitted return pursuant to notices issued on it under Sections 83(1) and 79 of the said Ordinance for the assessment year 2005-2006. In the said return, the assessee had shown income of Tk. 3,01,48,288/- and claimed depreciation for Tk. 5,70,38,381/-, having been worked out upon taking the original cost of the Written Down Value of the property after tax exemption enjoyed by the assessee for 10(ten) years. However, the said depreciation was not accepted by the DCT who, accordingly, calculated depreciation by working out written down value for the said assessment year at Tk. 24,65,07,938/-, as against the written down Value of Tk. 74,49,30,277/- as claimed by the assessee. The DCT did the said calculation of written down value by reducing the original cost of the concerned properties by notionally allowing depreciation at the prescribed rate for each of the preceding 10(ten) years, starting from the assessment year 1994-1995, during which period the assessee was enjoying tax exemption. Being aggrieved by such calculation of written down value and depreciation, the assessee preferred appeal before the Commissioner of Taxes (Appeal), Taxes Appeal Zone-2, Dhaka, whereupon, the Commissioner (Appeal), vide order dated 07.12.2015, though partly allowed the appeal, upheld the calculation done by the DCT in so far as the same is concerned with regard to the calculation of depreciation and written down value. Being aggrieved again, the assessee filed Second Appeal before the Taxes Appellate Tribunal, Division Bench-1, Dhaka, being ITA No. 3865 of 2005-2006 (Assessment year 2005-2006), whereupon, the Tribunal, vide order dated 31.05.2006, affirmed the said decision of the lower appellate authorities by referring to the concerned law and also to a circular of the National Board of Revenue, being Circular No. 3/2005 dated 06.04.2005.

6. The above two reference applications are directed against the aforesaid orders of the Tribunal by referring the following questions of law for the answer of this Court:-

> *Whether on the facts and in the circumstances of the case, depreciation ought to have been allowed taking the original cost of the fixed assets to the applicant as the written down value within the meaning of paragraph 11(5) of the Third Schedule to the Income Tax Ordinance, 1984?*

7. **In I.T.R.A No. 12 of 2008**

This Reference Application has arisen out of order dated 29.08.2007 passed by the Taxes Appellate Tribunal, Division Bench-2, Dhaka in I.T.A. No. 479 of 2007-2008 (Assessment year 2004-2005) at the instance of the Assessee-Youngone Hi-Tech Sportswear Industries Ltd.

8. Background facts are that the assessee filed return under Section 82 of the said Ordinance for the assessment year 2004-2005 showing Tk. 1,61,84,112/- as net loss. Thereupon, the assessment was completed. Subsequently, the assessment of the assessee was

re-opened under Section 93 of the said Ordinance, wherein the assessee claimed depreciation for an amount of Tk. 3,18,50,287/- as per books of accounts and claimed depreciation for the entire year, though the assessee was enjoying tax exemption for the initial nine months out of twelve months in the concerned income year. The DCT then calculated written down value for an amount of Tk. 4,41,93,450/- as per the rate prescribed by the 3rd Schedule to the said Ordinance, but allowed the said depreciation for the entire year as claimed by the assessee. Being aggrieved by some other allowances and disallowances, the assessee preferred appeal before the Commissioner of Taxes (Appeal), Taxes Appeal Zone-2, Dhaka, whereupon, the Commissioner (Appeal), vide order dated 23.05.2007, amongst others, reduced the said allowance of depreciation to a period of 03(three) months holding that since the assessee was enjoying tax exemption for the preceeding nine months in the income year, depreciation could not be allowed for the entire year. Being aggrieved by such reduction of depreciation and other issues, the assessee preferred Appeal before the Taxes Appellate Tribunal, Division Bench-2, Dhaka, being ITA No. 497 of 2007-2008 (Assessment year 2004-2005), whereupon, the Tribunal affirmed the said decision of the Commissioner of Tax (Appeal) in so far as the issue of depreciation was concerned. This reference application is directed against the said order of the Tribunal with the following question of law for the answer of this Court:-

> *Whether in the facts and in the circumstances of the case, depreciation could be allowed proportionately for three months when the assets were in use for the entire period during the income year?*

9. **In I.T.R.A No. 422 of 2009**

This Reference Application, at the instance of the Assessee-applicant Youngone Hi-Tech Sportswear Industries Ltd., has arisen out of order dated 29.08.2009 passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka in I.T.A. No. 2292 of 2008-2009 (Assessment year 2006-2007).

10. Background facts are that the assessee, after enjoying ten years of tax exemption, filed return for the assessment year 2006-2007 showing a net loss of Tk. 11,93,06,787/-. Accordingly, assessment was completed pursuant to notices under Section 83(1) and 79 of the said Ordinance. In the said return, the assessee showed income of Tk. 2,35,34,324/- and claimed depreciation for an amount of Tk. 5,24,75,782/- in respect of its assets and properties. As against the same, the DCT allowed depreciation for an amount of Tk. 3,55,10,760/- on the basis of Written Down Value and fresh acquisition during the year as per a separate sheet as attached to the order, but allowed such depreciation only for 06(six) months being Tk. 1,77,55,380/- and thus refused to allow the depreciation for the entire year, namely 100% as claimed by the assessee. Being aggrieved by such calculation of depreciation and other orders, the assessee preferred appeal before the Commissioner of Taxes (Appeal), Taxes Appeal Zone-2, Dhaka, whereupon, the Commissioner (Appeal), vide order dated 30.09.2008, partly modified the said order of the DCT as regard depreciation and, accordingly, directed the DCT to allow depreciation at the rate of 47.44%. Being aggrieved again, the assessee-applicant preferred Second Appeal before the Taxes Appellate Tribunal, Division Bench-2, Dhaka being ITA No. 2272 of 2008-2009 (Assessment year 2006-2007), whereupon, the Tribunal affirmed the said order of the Commissioner (Appeal) in so far as the calculation of depreciation was concerned. This reference application is directed against the said order of the Tribunal with the following question of law:

> *Whether on the facts and circumstances of the case, depreciation worked out by the DCT on the basis of written down value of the assets ought to have been allowed for the entire year?*

11. The aforesaid reference applications are contested by the concerned Commissioner of Tax who filed affidavits-in-reply (affidavit-in-opposition) in I.T.R. Application Nos. 334-335 of 2006 and 422 of 2009.

12. Mr. M.A. Noor, learned advocate appearing for all the applicants, at the very outset, has taken this Court to the relevant provisions of law, in particular Sections 28, 29(1)(viii) and Paragraphs-2 and 11(5) of the Third Schedule to the said Ordinance and other relevant provisions of law. Particularly referring to the provisions under sub-paragraph (5) of Paragraph 11 in the said Third Schedule, learned advocate submits that though admittedly no depreciation was previously allowed to the petitioner, the concerned tax officials, in ITR No. 334-335 of 2006, calculated the depreciation upon notionally reducing the value of the original price of the properties, purchased or installed by the petitioner about ten years ago, at a rate prescribed in the Third Schedule to the said Ordinance and, accordingly, upon calculating depreciation at such rate for each and every year, the written down value of the said properties in the concerned assessment year has been worked out for calculation of the depreciation. Mr. Noor further submits that since Clause (b) of sub-paragraph (5) of Paragraph 11 in the Third Schedule specifically provides the words "depreciation allowed under this Ordinance" and since admittedly no such depreciation was ever allowed to the assessee before the concerned assessment year, the tax authorities committed illegality in not applying the letters of the statute as they are. This being so, according to him, the answer to the question referred to in ITR Nos. 334-335 of 2006 should be in the affirmative i.e. in favour of the assessee and against the revenue.

13. By putting emphasis on the words "allowed" as occurring in the said sub-paragraph (5) of Paragraph-11, Mr. Noor argues that since the statute has specifically mentioned the words in the said provision, in view of the long standing practice of this Court in applying fiscal law literally, the concerned authorities ought to have taken the original cost of the assets and properties of the assessees as the 'written down value' in the concerned assessment year for deduction of depreciation at a rate prescribed by law. The same having not been done, according to him, this Court should answer the question in the affirmative. The above being the general and common submissions of Mr. Noor in respect of all the reference applications, he submits, the questions posed in other two reference applications, namely in ITR Application No. 12 of 2008 and 422 of 2009, should also follow same result upon taking into consideration the submissions made by him on this point. Thus, according to him, the Tribunal ought to have allowed depreciation for the entire year in ITR No. 12 of 2008 and ITR No.422 of 2009.

14. As against this, Mr. Rashed Jahangir, learned Deputy Attorney General, submits that since the admitted position is that the properties in question in Reference Application Nos. 334-335 of 2006 were acquired, purchased or installed about ten years ago, under no circumstances, the original price of the said properties can be taken as the 'written down value' in the concerned assessment year. Referring to the same words, namely, "depreciation allowed under this Ordinance" as occurring in Clause-(b) of sub-paragraph (5) of Paragraph 11 in the Third Schedule, leaned DAG argues that the word "allowed" cannot be interpreted as 'actually allowed through assessment done by the concerned DCTs in the said period of 10 years'. Rather, he submits, it should be interpreted in a way that the allowance allowable or would have been allowed during the said ten years' period should be calculated for

determination of the written down value in the concerned assessment year. According to him, "allowed under this Ordinance" does not necessarily mean that the said allowance of depreciation for each of the ten years has to be practically done through actual assessments by the DCT. He submits that, even though no assessment had been done during the said ten years period, though the assessee was required to file return for each year, the effect depreciation taken into consideration for the purpose of calculating the 'written down value' after 10 years had the returns been filed and assessment been done. In this regard, he draws this Court's attention to the concerned SRO No. 289-Ain/89 dated 17.08.1989 by which the said exemption on payment of tax for ten years was given in favour of the petitioner. According to him, the same principle should also be applied in answering the questions referred to in ITR no. 12 of 2008 and ITR No. 422 of 2009.

15. For addressing the issues raised in the aforesaid reference applications, let us, at the beginning, try to understand the meaning of the word "depreciation" as used in some relevant sections of the said Ordinance, though no such definition has been provided by the said Ordinance itself. It appears from the reputed text books in this field, namely "The Law and Practice of Income Tax, Kanga & Palkhivala, Tenth Edition (2014)" that the said author has described the word 'depreciation' in the following terms:-

> *"Depreciation, as a general principle, represents the diminution in value of a capital asset when applied to the purpose of making profit or gain. The term "depreciation" means wear and tear of the assets used for the purposes of earning revenue on user of the assets. In other words, one cannot deduce the correct income without taking into account the wear and tear which an asset undergoes while being used for the purpose of generating receipts, which on finalization of accounts, result in taxable profits. The concept of depreciation is that any asset, on account of normal wear and tear, is required to be replaced at a point of time in future. Therefore, to enable a business to meet the cost of such replacement, the wear and tear is permitted to be calculated at a notional rate of percentage of the cost/written down value of the assets.(see para-1 at page-728).*

16. Therefore, it appears from the above description of the word "depreciation" that in calculating the total income in a concerned assessment year, the wears and tears of assets, which have been used for the purpose of the business and to earn revenue, have to be taken into consideration. From the context of the said concept, the relevant provisions have been incorporated in our statute book, namely Income Tax Ordinance, 1984. Thus, while Section 28 of the said Ordinance classifies the income from business and profession, Section 29 provides for the allowances to be deducted from the said income while calculating the same for the purpose of assessment. Clause (VIII) of sub-section (1) of Section 29 provides that the depreciation of building, machinery, plan or furniture etc. of the concerned assessee, which have been used for the purposes of business or profession, shall be allowed as admissible under the Third Schedule to the said Ordinance. Again, Paragraph-2 of the said Third Schedule, in particular sub-paragraph (1) of the same, provides that in computing the profits

and gains from the business or profession, an allowance for depreciation shall be made in the manner provided hereinafter. This Paragraph 2 is followed by a Table under Paragraph 3 prescribing fixed rates of depreciations to be allowed on the 'written down value' of any particular assets used in the business. The term "written down value" has also been defined in the said Third Schedule under paragraph-11(5) in the following manner:

"written down value" means-

(a) Where the assets were acquired in the income year, the actual cost thereof to the assessee;

(b) Where the assets were acquired before the income year, the actual cost thereof to the assessee as reduced by the aggregate of the allowances for depreciation allowed under this Ordinance, or the Income-tax Act, 1922 (XI of 1922), in respect of the assessments for earlier year or years;"

(Underlines supplied)

17. For the purpose of giving answers in the instant reference applications, Clause (b) of the aforesaid definition of "written down value" is relevant. According to the said Clause (b) of sub-paragraph (5) of paragraph-11 of the Third Schedule, if a particular property is purchased before the concerned income year, the actual cost of the property has to be reduced by aggregate of allowance for depreciation allowed under this Ordinance. These words "depreciation allowed under this Ordinance" have become the crux of dispute between the parties. According to the applicants, depreciation actually allowed through assessments done in previous years can only be taken for consideration in determining the "written down value" of any assets in the concerned assessment year. On the other hand, according to the department, depreciation allowed means depreciation, in usual course, would have been allowed, either by assessment, or without assessment has to be the criterion for consideration before determination of such 'written down value'.

18. The admitted position in these reference applications is that the assessee in I.T.R. No. 334-335 of 2006 enjoyed ten years exemption from payment of tax and the assessee in ITR No. 12 of 2008 and 422 of 2009 enjoyed exemption for nine months and six months respectively in their respective concerned income years. Therefore, the question is whether the 'depreciation allowed under this Ordinance' should be meant depreciation actually allowed through assessment orders or not. It is evident from the concerned SRO, by which the petitioner admittedly enjoyed a tax exemptions, that by such exemption the petitioner was not exempted for filing returns, or the DCT concerned were not prevented from doing any assessment on such returns, during the said exemption period. However, it is also admitted that the assessee, during the said exemption period of ten years, did not file any return. Thus, the DCT also did not have any opportunity to do assessment on such returns filed by the assessee. This means some penal consequences for the assessees for such non-filing of returns, but that is not relevant for the disposal of the questions in these reference applications. The only question is given that the assessees did not file returns during the said exemption periods, whether the words "depreciation allowed under this Ordinance" should give any benefit to the assessee as no such depreciation was in fact allowed through

assessment orders or no such opportunity was there on the part of the concerned DCT to allow such depreciation in the absence of any return being filed by the assessee.

19. As against above backdrop, we are of the view that, if the interpretation as suggested by the learned advocate for the assessees is accepted by this Court, that will give an absurd result in that though the assessees became liable to face some sort of consequences because of non-filing of the returns during the said ten years period, thereby preventing the concerned tax authorities from doing any assessment thereon, the same assessees would be given a double benefit now by allowing the original costs of the said properties ten years ago to be treated as 'written down value' in the concerned assessment year without deducting the actual depreciation which would have been allowed or could have been allowed had there been any actual assessments upon returns filed by the assessees. Under no circumstances, a Court of law can accept such proposition. This being so, we are of the view that, though no assessment has in fact been done during the said exemption period, the application of law should be made in such a way that no undue benefit is given to such assessees. In view of above, we hold that the words "depreciation allowed under this Ordinance" can under no circumstance be regarded as depreciation actually allowed through assessment orders.

20. Our above view will also apply as regards the questions referred to in the remaining two other reference applications, namely ITR No. 12 of 2008 and ITR No. 422 of 2009, in that though the assesssees in those cases enjoyed tax exemption in the concerned income year for nine months and six months respectively, the depreciation has to be calculation for the entire year.

21. Therefore, our answers to the questions referred to in ITRA Nos. 334-335 2006 are negative, i.e. against the assesses and in favour of the revenue, to the question referred to in ITRA No. 12 of 2008 is in the negative, i.e. in favour of the assessee and against the revenue and to the question referred to in ITRA No. 422 of 2009 is in the affirmative, i.e. in favour of the assessee and against the revenue.

22. The Registrar, Supreme of Bangladesh is directed to take steps in view of the provisions under Section 161(2) of the Income Tax Ordinance, 1984.

7 SCOB [2016] HCD 106

High Court Division

Death Reference No.64 of 2010
with
Jail Appeal No.339 of 2010

The State
... Petitioner

Versus

Aynal Haque
... Condemned-Prisoner

Aynal Haque
... Appellant
(In Jail Appeal No.339 of 2010)

Versus

The State
... Respondent

Mr. Delowar Hossain Somadder, D.A.G
with
Mr. Nizamul Haque Nizam, A.A.G
... For the State.

Mr. Md. Fazlur Rahamn, *State Defence* Lawyer
... For the Condemned-Prisoner

Heard on:14.12.2015.
Judgment on:15.12.2015.

Present:
Mr.Justice Bhabani Prasad Singha
And
Mr.Justice S.M. Mozibur Rahman

Nari-O-Shishu Nirjatan Daman Ain, 2000
Section 11(ka):
The husband i.e. the accused in this case did not offer any satisfactory explanation as to how his wife met her death. This inaction on the part of the accused points at his guilt in the alleged occurrence. ...(Para 31)

Value of circumstantial evidence in a wife killing case:
In a wife killing case, there could be no eye-witness of the occurrence, apart from the inmates of the house who may refuse to tell the truth, the neighbors may not also come forward to depose. The prosecution is, therefore, necessarily to rely on circumstantial evidence. ...(Para 32)

Judgment

Bhabani Prasad Singha, J:

1. This Death Reference has been made by the learned Judge, Nari-O-Shishu Nirjatan Daman Tribunal, Narsingdi for confirmation of the death sentence imposed upon the condemned –prisoner Aynal Haque in Nari–O-Shishu Nirjatan Daman Tribunal Case No. 302

of 2008 arising out of Raipura, Narsingdi P.S. Case No. 41 dated 29.03.2008 vide his judgment and order of conviction and sentence dated 01.11.2008.

2. The prosecution case, to narrate in brief, is that the daughter of the informant, the victim-deceased Halima Akter (25) was given in marriage with the accused Aynal Haque 8 (eight) months before the date of occurrence. Few days after the marriage, demanding Tk.1,00,000/00 as dowry, the accused Aynal Haque used to burn the private organ and the body of the victim by hot iron rod and by burning cigarette. From 8.00 p.m. of 28.03.2008 to 4.00 a.m. of 29.03.2008 at his south-eastern bhiti house i.e. the place of occurrence, having not found the dowry as demanded by him from the victim, the accused assaulted at the different parts of the body of the victim Halima Akter and wrapping the body of the victim with a quilt, put her body on fire and burnt her to death. At 3.00 a.m. of 29.03.2008 having received the news of the death of his daughter from witness Abul Mia, the informant forthwith went to the house of the accused and saw the burnt dead body of the deceased. The informant also saw the accused in detained condition. Receiving his information, the police from Raipura P.S. came, held inquest on the dead body of the victim deceased, sent the dead body for autopsy and arrested the accused. Thereafter, on 29.03.2008 at 17.15 hours, the informant lodged the FIR of the case with Raipura P.S.

3. On receipt of the First Informant Report (FIR) of the case, police took up investigation of the case and after investigation prima-facie case having been made out against the accused, submitted Charge Sheet No. 137 dated 06.06.2008 of Raipura, Narsingi P.S. under sections 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000(Amended in 2003) against him.

4. At the commencement of trial of the case, charge under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (Amended in 2003) was framed against the accused. The charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

5. To substantiate its case the prosecution in all examined as many as 11 witnesses.

6. On the other hand, none was examined on behalf of the defence.

7. On the closure of the evidence of the prosecution, the accused Aynal Haque was examined under section 342 of the Code of Criminal Procedure to which he pleaded his innocence once again informing the tribunal that he would not adduce any evidence on his behalf.

8. The defence case, as it transpires from the cross examination of the prosecution witnesses is the denial and the plea of innocence in the alleged occurrence.

9. After trial, on perusal and on analysis of the evidence and materials on record , the learned trial judge came to the finding that the prosecution had been able beyond all shadow of doubt to bring home the charge as brought against the accused and accordingly, convicted and sentenced the accused by the impugned judgment and order as aforesaid.

10. At the very outset, Mr. Nizamul Haque Nizam, the learned Assistant Attorney General (AAG) appearing on behalf of the State submits that the trial Court was well-founded in law in convicting and sentencing the condemned-accused-prisoner Aynal Haque on the basis of the evidence on record and as such, the order of conviction and sentence

should be maintained. The learned AAG prays for acceptance of the Death Reference. The learned AAG also referred the case laws reported in 21 BLD (AD) at page 27 and 52 DLR at page 179.

11. On the other hand, Mr. Fazlur Rahman, the learned State Defence Lawyer appearing for the condemned-accused-prisoner submits that the alleged occurrence being an extremely pathetic, barbaric and ruthless act, morally and ethically he has nothing to argue in the case; that excepting the facts that there are no eye-witnesses in this case and that the witnesses of the prosecution being related to each other, there is no other defect in the prosecution case; that however, if there be any mitigating and extenuating circumstances, the death sentence as awarded to the condemned-accused-prisoner may be commuted to a lesser sentence.

12. In order to appreciate the respective arguments of the learned Advocates of the parties and to determine whether the trial court was justified in passing the impugned judgment and order of conviction and sentence, we would now turn to and discuss the evidence as adduced by the prosecution in this case.

13. The P.W.1, the informant Abdul Based stated in his deposition that the deceased Halima was his daughter and the accused Aynal Haque was her husband. The occurrence took place from about 8 p.m. of 28.03.2008 to 4.00 a.m. of the next day in the residence of the accused situated at Shaheb Khola under Raipura police station. Eight months before the date of occurrence he gave in marriage of his daughter with the accused. From after the marriage, the accused started assaulting his daughter demanding dowry. On the date of occurrence his daughter, the victim informed him over mobile phone that the accused was beating up her demanding Tk.1,00,000/- as dowry. At 3.00 a.m. at night the witness Abul Hossain informed him over mobile phone that demanding dowry, the accused assaulted her and by pouring kerosene oil on the body of the victim burnt her to death. Thereafter, he along with the witnesses Latif, Abu Taher, Sadeque, Hariz and Nasir Uddin went to the residential house of the accused to see his daughter was burnt to death. They saw that by apprehending the accused, the inmates of the house of the accused kept him in detained condition. Thereafter, police came from the police station and held inquest on the dead body of the deceased and brought him under arrest. Thereafter, he lodged the FIR of the case. This witness proved the FIR as Exhibit-1, his signature therein as Exhibit-1/1, the Inquest Report as Exhibit-2 and his signature therein as Exhibit-2/2. This witness further stated that after Post Mortem Examination on the dead body of the deceased-victim they brought her dead body to their house and buried it. This witness identified the accused in the dock. In his cross on behalf of the accused by the State Defence Lawyer, this witness stated that knowing that the accused to be a good and wealthy man he gave in marriage of his daughter with him. His daughter had a mobile phone. This witness denied the defence-suggestions that after marriage the accused did not demand dowry from his daughter or that at the time of occurrence the accused was not in his house or that as the bad caught on fire from the kerosene lamp, the deceased died by sustaining burn injury or that for financial benefit he filed the case.

14. The P.W.2 Abu Taher deposed that the deceased was his niece. At the time of the occurrence she was 20/22 years of age. The accused Aynal Haque was her husband. From 28.03.2008 to 4.00 a.m. of 29.03.2008 the occurrence took place in the house of the accused situated at Shaheb Khola. At 3.00 a.m. at night the informant Based Mia called him and told that by demanding dowry the accused assaulted his daughter and burnt her to death. Thereafter, he along with Based, Nasir, Rafiqul, Sadeque, Fazar Ali went to the house of the accused to see the burnt dead body of the deceased and that the quilt and the mattress were

burning and that fire was put on by pouring kerosene oil. They saw that the inmates of the house of he accused apprehended him and kept him in detained condition. The informant Based Mia went to the police station and brought police. The police held inquest on the dead body of the deceased and seized alamats of the case. This witness proved his signature in the Inquest Report as Exhibit-2/2. This witness also proved the Seizure List as Exhibit-3, his signature therein as Exhibit-3/1 and identified the seized burnt cotton, a part of the burnt quilt, a burnt portion of a blanket and a burnt portion of mattress as Material Exhibits-I,II,III,IV. This witness further deposed that after Post Mortem Examination on the dead body, it was brought to the house of the informant. This witness identified the accused in the dock. In his cross by the State Defence Lawyer on behalf of the condemned-accused-petitioner this witness stated that the house of the accused was at a distance of 4/5 kilometers away from his house. They went to the house of the accused by five rickshaws. After going to the house of the accused they saw that he was kept in detained condition by Joynal in the eastern bhiti house. This witness denied the defence-suggestions that at the time of the occurrence the accused was not at his house or that he was watching his sweet potato field or that which the deceased was arranging the bed, it caught on fire from the kerosene lamp and as a result sustaining burnt injury, the deceased had died or that he deposed falsely.

15. The P.W.3 Md. Rafiqul Islam stated in his deposition that the deceased Halima was the daughter of the informant Based Mia and that the accused Aynal Haque was the husband of the victim. The occurrence took place from about 8 p.m. of 28.03.2008 to 4 a.m. of the following day at the house of the accused situated at Shaheb Khola under Raipura police station. On the date of occurrence at about 3 a.m. at night the informant Based Mia woke him up from bed and told him that he had to go to the house of the accused as the accused had killed his daughter demanding dowry. Thereafter, he along with Nasir Uddin, Haris, Taher, Sadek and some other people went to the house of the accused by five rickshaws. After going there they saw many people and also saw the deceased deed and that the quilt and the mattress of the bed were burning. They saw the dead body of the deceased in the burning quilt and mattress. Thereafter, Based Mia informed the police station of the occurrence. Thereafter, at 8 a.m. a police officer came to the place of occurrence who held Inquest on the dead body of the deceased, prepared Inquest Report and took his signature therein. This witness proved his signature in the Inquest Report as Exhibit-2/3. This witness further deposed that the inmates of the house of the accused kept the accused in detained condition in a room of the house. From that room police arrested the accused. The police officer seized some articles under a seizure list. This witness proved his signature in the seizure-list as Exhibit-3/2 and identified the alamats in the Court. This witness further deposed that police took away the accused to the police station along with the dead body of the deceased and alamats of the case. The informant Based Mia lodged the FIR of the case. After autopsy, the dead body was brought to the house of the informant and was buried. This witness further deposed that the victim deceased was known to him. This witness identified the accused in the dock. The informant Based Mia disclosed that demanding dowry the accused assaulted the victim and burnt her to death. In his cross by the State Defence Lawyer on behalf of the accused this witness stated that when the informant Based gave information about the occurrence, Nasir, Haris and others were present. Thereafter, they went to the house of the accused by rickshaws and reached there at 4.00 a.m. This witness denied the defence-suggestions that at the time of occurrence the accused was not present in his house or that while the deceased was arranging the bed with a kerosene lamp, the bed was caught fire and as a result, sustaining burn injury, the deceased had died or that the accused did not demand dowry from the deceased or that he did not burn the deceased to death by demanding dowry.

16. The P.W.4 Nasir Uddin stated in his deposition that the informant Based and his daughter deceased Halim were known to him. The accused Aynal Haque was the husband of Halima. The occurrence took place before 1 year and 9 months in the house of the accused situated at Shaheb Khola. At about 3/3.30 a.m. at night, the informant called him and said that he had to go to the house of the accused. On his asking, the informant disclosed that demanding Tk.1,00,000/- as dowry, the accused killed her. Thereafter, they went to the house of the accused to see that the quilt and the mattress of the bed were burning and that Halima was lying there in deed condition. They also saw that the villagers kept the accused in detained condition in a room. Thereafter, Based went to the police station and brought police. Police held Inquest on the dead body of the deceased, prepared Inquest Report, seized alamats and took the accused to the police station. Thereafter, the dead body was brought to the house of the informant and was buried. This witness identified the accused in the dock. In his cross by the State Defence Lawyer this witness stated that by rickshaws they went to the house of the accused. This witness denied the defence-suggestions that the accused was not present in his house at the time of occurrence or that he was watching his sweet potato field or that being burnt by fire of lamp, the victim had died or that he deposed falsely.

17. The P.W.5 Fazal Mia stated in his deposition that the informant was known to him. He used to cary the dead bodies at Raipura Bazar. On 29.03.2008, as per the instruction of the Officer-in-Charge, he brought a dead body of a woman from Shaheb Khola to Narshingdi Sadar Hospital and that after Post Mortem Examination he reached the dead body to the house of the informant Based. Police seized a part of burnt Sari which the deceased was wearing at the time of occurrence, some portion of burnt cloth, petticoat, burnt hair and burnt blouse under a Seizure-List and took his signature therein. This witness proved the Seizure List dated 01.04.2008 as Exhibit-4 and his signature therein as Exhibit4/1 and identified the seized materials as Materials Exhibits-V-VIII. In his cross this witness stated that after autopsy he took the dead body to the house of the informant. The constable Jalil had the alamats with him.

18. The P.W.6 Sadeque Mia stated in his deposition that the informant was Based, his daughter was the deceased Halima and the accused Aynal Haque was her husband. The occurrence took place from 28.03.2008 to the following morning at 4.00 a.m. At about 3/3.30 a.m. at night, the informant Based woke him up from bed and told him that demanding Tk.1,00,000/- as dowry, the accused had killed her. Thereafter, they went to the house of the accused situated at Shaheb Khola. They saw that the victim deceased was lying in burning quilt. Thereafter, Based brought the police from the police station. The police officer held Inquest on the dead body of the deceased and prepared inquest report. Police took the dead body to the police station. After post mortem examination police made over the dead body to the informant and it was buried. In the mean time, the informant lodged the FIR of the case. The witness identified the accused in the dock. In his cross by the State Defence Lawyer this witness stated that they in all 7 persons went to the house of he accused by 5 rickshaws and reached the house of the accused at 4/4.30 a.m. in the morning. They saw the accused in detained condition in the east bhiti room. This witness denied the defence suggestions that at the time of occurrence, the accused was watching sweet potato field or that at the fire of the lamp, the bed being caught on fire, the victim sustained burn injury and died or that he deposed falsely.

19. The P.W.7 Md. Haris Mia stated in his deposition that the informant Based was his nephew. The deceased Halima was his daughter and that the accused Aynal Haque was her husband. The occurrence took place on 29.03.2008 in the house of the accused situated at

Shahel Khola. On the night of occurrence at about 2.00/2.30 a.m. at night, the informant Based woke him up and told him that demanding dowry the accused burnt his daughter to death. Then he along with Based and 4/5 others went to the house of he accused to see the deceased in dead condition in the house of the accused. They saw fume of fire in a quilt. They saw that the people of the village apprehended the accused and kept him in detained condition in the next room. Thereafter, the informant Based informed police of the occurrence. At 8.00 a.m. in the morning police went there, held inquest on the dead body of the deceased, prepared Inquest Report and seized some alamats. This witness proved his signature in the Inquest Report as Exhibit-2/4. This witness identified the accused in the dock. In his cross by the State Defence Lawyer this witness stated that before occurrence, the informant told him that the accused used to demand dowry from his daughter. This witness denied the defence-suggestions that he did not go to the place of occurrence or that he did not see burnt mattress beside the deceased or that he deposed falsely.

20. The P.W.8 Alauddin was tendered for cross-examination. The defence declined to cross-examine him.

21. The P.W.9 Md. Abul Hossain deposed that for killing of the deceased Halima, the informant filed this case. The accused Aynal Haque was the husband of his daughter. The occurrence took place on 29.03.2008 at about 2.30/3.00 at night. His house was situated at a distance of 1000 cubits from the house of the accused. While he was sleeping in his house, the uncle of the accused named Rashed woke him up from bed and informed him that the accused Aynal Haque had killed his wife. Thereafter, he came to the house of the accused and as per instruction of the local Member informed the father of the deceased of the occurrence over mobile phone. The inmates of the house of the accused tied him up and kept him in detained condition. Thereafter, police came to the place of occurrence, held inquest on the dead body of the deceased, prepared the Inquest Report and took his signature therein. This witness proved his signature in the Inquest Report as Exhibit-2/5 and identified the accused in the dock. This witness denied the defence-suggestions that at the time of occurrence the accused was not present in his house or that the accused did not demand dowry from his wife or that he deposed falsely.

22. The P.W.10 doctor Syed Aminul Haque deposed that on 29.03.2008 he was attached to Narsingdi Sadar Hospital. On that date he held post mortem examination on the dead body of the deceased and submitted Post Mortem Examination Report under his signature. During post mortem examination, he found the following injuries on the person of the deceased:

> "Blackish discoloration of skin from burn from mid thigh to scalp along with both superior extremities. On dissection extraverted clotted blood beneath the skin which resisted in washing and ante-mortem in nature"

23. In his opinion the death of the deceased was due to shock resulting from dry burn which was ante-mortem and homicidal in nature. This witness denied the defence suggestion that he did not held Post Mortem Examination on the dead body properly.

24. The P.W.11 Md. Saidur Rahman, the investigating officer of the case stated in his deposition that on 29.03.2008, the informant lodged the FIR of the case. The officer-in-charge Alamgir filled up the FIR Form and started the case. The hand writing and signature of the officer-in-charge (O.C.) Alamgir was known to him. This witness proved the FIR Form as Exhibit-5, the signature of O.C. Alamgir therein as Exhbiit-5/1, the signature of O.C. Alamgir in the FIR as Exhibit-1/2. This witness further deposed that the case was entusted to

him for investigation. During investigation, he visited the place of occurrence, drew the Sketch Map thereof with index, recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure, arrested the accused. This witness further deposed that immediately after the occurrence, the people apprehended the accused and made him over to him. After investigation, prima-facie case having been made out against the accused Aynal Haque, he submitted charge sheet no.137 dated 06.06.2008 under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 against him. This witness proved the Sketch Map of the place of occurrence and index thereof as Exhibits-6 and 7 and his signatures therein as Exhibits-6/1 and 7/1 and identified the accused in the dock. This witness denied the defence-suggestion that he did not take out the investigation of the case properly.

25. So, this is the evidence adduced by the prosecution to bring home the charge as brought against the condemned-accused-prisoner. We would now scrutinize the above evidence to find out whether the impugned judgment and order of conviction and sentence is sustainable in law.

26. From the evidence of the prosecution witnesses, it appears that demanding dowry worth Tk.1,00,0000-/00, in between 8.00 p.m. of 28.03.2008 and 4.00 a.m. of 29.03.2008 , the accused Aynal Haque assaulted the victim Halima Akter, wrapped her body up with a quilt and pouring kerosene oil on it put the body on fire and as a result, the victim Halima Akter(25) had died sustaining burn injury. The Inquest Report (Exhibit-2) shows that at the time of inquest, the whole hair of the victim was found to be burnt, both the eyes were found to be swelled up, the right and the left cheek found to be burnt, bubbles were coming out from the nose and that both the hands, the chest and the belly were found to be burnt. It is also mentioned in the Inquest Report that soon after their marriage, the accused often used to beat up the victim demanding dowry; that on 28.03.2008 at night, the accused created pressure upon the victim for dowry which the victim refused to pay saying that her father being a poor man how she would pay the money where on the accused along with some others wrapped the body of the victim with a quilt, put the body of the victim on fire and burnt her to death. On perusal of the Post Mortem Examination Report, it appears that during post mortem examination blackish discoloration of skin from mid thigh to scalp and both superior extremities on the person of the victim-deceased were found; that on deep dissection extravassated clotted blood beneath the skin which resisted in washing and ante mortem in nature were found and that the death of the deceased was due to shock resulting from dry burn which was ante mortem and homicidal in nature. So, it is found that both the Inquest Report and the Post Mortem Examination Report with regard to the cause of death of the victim–deceased Halima Akter by sustaining burn injury corroborate each other.

27. It is the claim of the prosecution that for dowry worth Tk.1,00,000/00, the condemned-accused-prisoner Aynal Haque wrapped the body of the victim a quilt, poured kerosene oil on it and by putting fire on the body of the victim burnt her to death.

28. On the other hand, the defence case is that while the victim Halima Akter was arranging the bed with a kerosene lamp, kerosene fell on the bed and as a result, the bed was caught on fire resulting in the death of the victim.

29. On perusal of the evidence on record, as stated above, it appears that all the prosecution witnesses in a row corroborated the prosecution case of demanding dowry by the condemned-accused-prisoner from the victim and burning her to death. But none came

forward to support the defense case as set forth by the defence. So, the defence case as stated above has no leg to stand.

30. Admittedly, the instant case is a wife-killing case and that the victim had died in the house of the condemned-accused-prisoner the place of occurrence.

31. Law has now been settled that in a wife killing case, the husband while they were living in the same house at the time occurrence has the liability to explain as to how his wife was killed. In this regard, the learned AAG referred the case of Abdul Motleb Howlader versus The State reported in 21 BLD (AD) at page 27 in which case our Apex Court held that "in a case involving the murder of a wife while she was living with her husband in the same house, the husband owes an explanation as to how his wife was murdered. Inaction of the husband together with his failure to offer a satisfactory explanation points at the guilt of the husband. It is quite natural that the relations of the accused will not come to support the prosecution case. In such a case, the circumstantial evidence leading to the irresistible conclusion as to the guilt of the accused- husband can well be relied upon to safely form the basis of conviction." The husband i.e. the accused in this case did not offer any satisfactory explanation as to how his wife met her death. This inaction on the part of the accused points at his guilt in the alleged occurrence.

32. As stated earlier, the learned State Defence Lawyer for the condemned-accused-prisoner submits that excepting the facts that there are no eye-witnesses in this case and that the witnesses of the prosecution witnesses are related to each other, there is no other defect in the prosecution case. In this regard, the learned AAG referred the case of The State versus Md. Shafiqul Islam @ Rafique and another reported in 43 DLR (AD) at page 92 in which case our Apex Court held that " in a wife killing case, there could be no eye-witness of the occurrence, apart from the inmates of the house who may refuse to tell the truth , the neighbors may not also come forward to depose. The prosecution is, therefore, necessarily to rely on circumstantial evidence." This Court is in respectful agreement with the said decisions.

33. In this case, the defence claims that at the time of the occurrence the condemned-accused-prisoner was not present at the place of occurrence at the time of occurrence. To support this claim no witness was examined on behalf of the accused, rather, from the evidence of the Pw1, the Pw2, the Pw3, the Pw4, the Pw6, the Pw7, the Pw9 and the Pw11, it is crystal clear that for committing the offence the inmates of the house of the accused and the local people apprehended him and kept him in tied up condition and handed him over to police which suggest that the condemned-accused-prisoner was very much present at the time of occurrence at the place of occurrence house.

34. In view of the discussion made here above, and on perusal of the evidence and materials on record and also on observation of the case laws cited by the learned AAG, this Court is led to find that demanding dowry worth Tk.1,00,0000-/00, in between 8.00 p.m. of 28.03.2008 and 4.00 a.m. of 29.03.2008, the condemned-accused-prisoner Aynal Haque assaulted the victim Halima Akter, wrapped her body up with a quilt and pouring kerosene oil on the body of the victim put it on fire at the place of occurrence i.e. the house of the condemned-accused-prisoner and as a result, the victim Halima Akter had died sustaining burn injury. So, the offence as committed by the condemned-accused-prisoner clearly comes under the purview of the section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (Amended in 2003).

35. As stated earlier, the learned State Defence Lawyer submitted that if there be any extenuating circumstances in this case, the death sentence as awarded to the condemned-accused-prisoner may be commuted to a lesser sentence. But as the offence as committed by the condemned-accused-prisoner falls under section 11(K) of the Nari-O-Shishu Nirjatan Daman Ain,2000 (Amended in 2003) and that in the said section no other alternative punishment other than death penalty is prescribed, there is no scope to award the condemned-accused-prisoner lesser sentence.[1] Further, considering the killing of the victim Halima Akter in a barbaric, gruesome and ruthless manner as stated above by the condemned-accused-prisoner, we find no extenuating or mitigating circumstances to commute the death sentence of the condemned-accused-prisoner.

36. In the light of discussion made here above, we find that the trial Judge was perfectly justified in passing the impugned judgment and order of conviction and sentence. We find nothing to interfere with the impugned judgment and order of conviction and sentence.

37. In the result, the Death Reference No. 64 of 2010 is accepted and the judgment and order of conviction and sentence of the trial court is hereby upheld and affirmed. The condemned-accused-prisoner be hanged by the neck till he is deed.

38. Let the lower court's record along with a copy of this judgment be transmitted down at once.

[1] **Editors' Note:** Section 11(Ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 in which no other alternative punishment other than death penalty is prescribed, has been declared *ultra vires* to the Constitution by the Appellate Division. For further reading see 1 SCOB (AD) 1.

7 SCOB [2016] HCD 115

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 9263 of 2011

Orascom Telecom Bangladesh Limited
.....Petitioner

Versus

Bangladesh Telecommunication Regulatory Commission and others
.....Respondents

Mr. Rokanuddin Mahmud, Advocate with
Mr. Md. Asaduzzaman, Advocate
Mr. Imtiaz Uddin Ahmad Asif, Advocate
Ms. Nazmun Nahar Choudhury, Advocate
.....For the petitioner

Mr. Imtiaz Mahmod, Advocate
Mr. Khandaker Reza-E-Raquib, Advocate
Mr. Imranul Kabir, Advocate
Mr. Mejbahur Rahman, Advocate
..... For the respondent No. 1.

Mr. Murad Reza, Additional Attorney General with
Mr. S.M. Moniruzzaman, D.A.G.
Mr. Pratikar Chakma, A.A.G.
.....For the Respondents

Heard on: 10.07.2012, 11.07.2012, 12.07.2012, 16,07,2012, 17.07.2012, 18.07.2012 and judgment on: 14.08.2012.

Present:
Mr. Justice Md. Ashfaqul Islam
And
Mr. Justice Md. Ashraful Kamal

Bangladesh Telecommunication Act, 2001
Section 55(3):
The imposition of MCF while calculating the spectrum assignment fee is completely a separate issue done in pursuance to the section 55(3) of the Bangladesh Telecommunication Act, 2001-having no relevance with regard to the Cellular Mobile Phone Operator license of the petitioner company.
The concept of MCF was introduced in the guidelines, 2011 by the BTRC by virtue of its power under section 55(3) of the Act, 2001. The issue of MCF is entirely related to the issue of spectrum/ frequency as dealt in section 55 of the BT Act, 2001. As such, it has no nexus in respect of the cellular mobile phone operators. ... (Para-36 & 37)

The issue of applicability of VAT and/or liability of the petitioner company to pay the VAT has no relation whatsoever with regard to the payment of license renewal fee and spectrum assignment fee. The petitioner company is bound to pay the net amount of the license renewal fee fixed by BTRC, without any kind of deduction. ... (Para-38)

VAT Act, 1991
Section 2, 3 (N), and 5:
The VAT Act requires the service recipient to pay an amount of 15% VAT on all services received in Bangladesh on the basis of the value mentioned in section 5. As per section 3 (N) of the VAT Act 1991, in case of providing service, the service providing entity was required to deposit the said applicable amount of 15% VAT to the government exchequer. Section 5(4) of the said Act provides that in case of providing service, the VAT will be charged on the total receivable amount ('ph©j¡V f¢çl Efl'). As such, a conclusion may be drawn if section 3 (N) is read along with section 5 (4) together with the definition of fZ' (consideration) as given in section 2 (Z Z) of the VAT Act that VAT is always assessed or calculated on the basis of the total value receivable or received. ... (Para-40)

VAT Act, 1991
Section 3 and 5:
In view of sections 3 & 5 of the VAT Act 1991, the basic scheme of the VAT Act is that the VAT is calculated at the rate of 15% on the total value receivable and is always added to the total consideration value instead of deduction. Under no circumstances; it can be deducted or subtracted from the total value. In order to comply with the basic scheme of VAT Act and VAT Rules made thereunder, the BTRC lawfully mentioned the words 'without any deduction' in its memo dated 17 October 2011 – which means that the demanded money has to be paid by the petitioner to BTRC as it is, and, while calculating the VAT to be paid at source, the petitioner will have to add an amount calculating at the rate of 15% of the total demanded amount as VAT, withhold the same and deposit it in the exchequer directly within the stipulated time period. ...(Para-41)

Judgment

Md. Ashraful Kamal, J:

1. This Rule Nisi was issued on an application under section 102 (2) (a) (ii) of the Constitution of the People's Republic of Bangladesh registered by the petitioner Orascom Telecom Bangladesh Limited calling upon the respondents to show cause as to why the decision of the Bangladesh Telecommunication Regulatory Commission issued under the signature of Deputy Director, Legal and Licensing Division (Respondent No. 4) vide Memo No. BTRC/LL/ Mobile/License Renewal (382)/2011- 688 dated 17.10.2011 (Annexure 'A') claiming Spectrum Assignment Fee based on Market Competition Factor (MCF) so far it relates to already assigned spectrum in 2008 (2.6 MHz-1800 band) and payment of license fee and spectrum fee for new assignments without any deduction, shall not be declared to have been made without lawful authority and is of no legal effect;

2. Brief facts, necessary for the disposal of this Rule, are as follows:

The petitioner Orascom Telecom Bangladesh Limited is a private company limited by shares and incorporated under the laws of Bangladesh. The petitioner company is a digital cellular mobile telecommunication service provider in Bangladesh under a valid license granted by the Bangladesh Telecommunication Regulatory Commission (BTRC).

3. Pursuant to an advertisement dated 16.08.1995, the petitioner being the successful bidder entered into an agreement with the Ministry of Post and Telecommunications of

Bangladesh (hereinafter referred to as 'MOPT') on 11.11.1996 under the provision of Section 4 of the Telegraph Act 1885 to provide cellular mobile telephone services. Subsequently, MOPT issued a Radio System Operating License to the petitioner on 28.11.1996 under the provision of Telegraph Act, 1885 and the Wireless Telegraphy Act, 1933 for installation and operation all over Bangladesh for the multi-station radio system of Digital Mobile Cellular Telephone Service in the frequency band from 900 to 905 MHz and 945 to 950 MHz with at least12.5 KHz channel spacing at both ends of the Bands. Then, on 28.11.1996 the petitioner got a Radio Stations and Equipment License pursuant to the Telegraph Act, 1885 and the Wireless Telegraphy Act, 1933 for the specific frequency assignment of the radio base station and the equipment /mobile sets.

4. Thereafter, Government for the establishment of an independent commission for the purpose of development and efficient regulations of telecommunication system and telecommunications service in Bangladesh and for the transfer of the powers and functions of the Ministry of Post and telecommunication to the Commission and matters ancillary thereto enacted 'The Bangladesh Telecommunication Act, 2001 (Act No. 18 of 2001) and it came into force on 16 April, 2001. Accordingly, The BTRC assumed all regulatory and licensing functions of the MOPT, pursuant to Sections 89 and 90 of the BTA, the BTRC got the power to revalidate the License Agreement. Then, the BTRC vide letter no. BTRC/Mobile/Sheba/2002-5 dated 27.12.2004 issued a revalidation order an amended License Agreement including additional conditions, an addenda to the amended License Agreement dated 27.12.2004 under Section 89 and 90 of the BTA. Subsequently, BTRC vide letter nos. BTRC/SM/4-23/94 part -7/80-834 and BTRC/ SM/4-23/94 part -7/80-833 both dated 02.07.2005 issued to the Petitioner, allocated microwave frequency of 10915/ 11445 and 11035/11565 MHz and further allocation of frequency in the band of GSM 1800 MHz on certain terms and conditions. The terms and conditions of the Renewed Frequency Allocation inter alia provided that all charges, levies, royalties and other fees shall be payable by the petitioner for its use of such frequency and radio equipment.

5. Therefore, BTRC on 18.06.2006 amended the Revalidated License Agreement vide Memo No. BTRC/Mobile/ Sheba/ 2002-2143 by attaching an addenda to the Amendment Order thereby replacing the clauses relating to Levy and Charges and Allocation of Frequencies. Further, BTRC vide letter no. BTRC/SM:4-23/94 Part-1/97-2415 dated 17.07.2006 revised the spectrum charges of the petitioner, which was effective from 01.07.2006. After that, on 28.07.2008 vide memo No. BTRC/ Mobile/ Sheba (3) Part-1/2007-981, BTRC further amended the Revalidated License Agreement by attaching the Addenda 2 to the Amendment Order dated 28.07.2008, thereby inserting clauses in relation to charges for international incoming and outgoing calls. Further, by a letter dated 17.07.2006 BTRC revised the spectrum charges of the petitioner which was effective from 01.07.2006.

6. In pursuance of the meeting dated 29.09.2008 held between the Respondent No. 1 and the Petitioner along with Grameenphone Bangladesh Limited and Telecom Malaysia International Bangladesh- regarding GSM Spectrum Assignment of GSM 1800 MHz Band, one Anamika Bhakta, Senior Assistant Director, vide letter No. BTRC/SM/3- 1/97 part-32/327-2278 dated 30.09.2008 had informed the Chief Executive Officer of the petitioner that decisions were taken regarding the terms and conditions of the additional Spectrum Assignment and the conditions which runs as follows:

i. *Maximum of 7.4 Mhz, 5. 1 Mhz and 5 Mhz will be assigned respectively to the petitioner, Grameen phone and Telecom Malaysia International Bangladesh.*

ii. Price of spectrum has been fixed to Tk.80.00 (Eighty) crore for per MHZ uplink and downlink.

iii. Down payment is 25% of the total price of the spectrum to be assigned to take the assignment and rest amount shall be paid by June 2009 with equal installment per month.

iv. The operators have to pay the Annual Spectrum Charge for this assignment as per spectrum pricing formula.

v. Current Spectrum Pricing Formula will be reviewed at the end of 2008.

vi. The assignment will be for 18 years from the date of assignment subject to the renewal of the license. Within 18 years of the license is renewed there will not be any additional charge for this particular assignment for current technology (GSM, GPRS and EDGE).

vii. The licensees will be to provide services with the spectrum according to the conditions of the cellular mobile license. However to utilize the frequency for 3G, LTE or equivalent technology based services the licensee will be required to take permission from the Commission. In such cases conditions and terms may be varied as deemed necessary by the Commission.

viii. The operators shall inform the Commission in writing about their consent for additional GSM spectrum assignment under the above terms and conditions by 16th October 2008 and have to make down payment by 30th October 2008.

7. In compliance with the aforesaid terms and conditions of the letter dated 30.09.2008, the petitioner had paid an amount of Tk. 5,20,000,000.00 (Taka Five Corers Twenty laces) on 30.11.2008 as 25% down payment for 2.6 MHz Spectrum in GSM-1800 MHz band to the Respondent No. 1. Subsequently, on 30.11.2008, the Respondent No. 5 vide Letter N. BTRC/SM/3-1/97 Part-32/327-2278 dated 30.09.2008 had informed the Chief Executive Officer of the Petitioner's company that the Respondent No. 1 was pleased to assign 2.6 MHz Spectrum in GSM-1800MHz band for a period of 18 years to the petitioner. According to the terms and conditions No 1 of the said Letter No. BTRC/SM/4-23/94 Part-16/16-3120 dated 30.11.2008 (issued by the Respondent No.5) it was specifically mentioned that the assignment had been made for a period of 18 years, subject to the renewal of the license.

8. It was also mentioned that within 18 years if the license renewed then there will not add any additional charge for this particular assignment for current technology (GSM, GPRS and EDGE). Thereafter, on 11.09.2011, the Respondent No.1vide Memo No. BTRC/LL/Mobile/License Renewal (342)/ 2009-563 dated 11.09.2011 had issued the Regulatory and Licensing Guidelines for Renewal of Cellular Mobile Phone Operator License for establishing, operating and maintaining cellular mobile phone systems and services in Bangladesh, which is prospective in nature. The said guideline was thereafter amended on 22.09.2011 vide the Respondent No.1's Amendment Order No. BTRC/LL/Mobile/License Renewal 93420/2009-609 dated 22.09.2011, which is also prospective in nature. In the said guidelines it has been clearly mentioned that the spectrum assignment fees shall be applicable for all of the access frequencies assigned to the licensees except for the 7.4 MHz, 2MHz and 2.6 MHz spectrum assigned in the year 2008 in favour of the Petitioner, Grameen Phone, AXIATA respectively with a value of Tk. 80 (eighty) crore per MHz uplink and downlink for 18 (eighteen) years from the date of assignment subject to the renewal of the license.

9. However, other provisions of these guidelines shall be applicable for respective licensee (s). On 09.10.2011, the Petitioner vide Letter Nos. OTBL/License

Renewal/Application/BTRC/01 and OTBL/License Renewal/ Application /BTRC/02 both dated 09.10.2011 had applied to the Respondent No. 1 for renewal of the Cellular Mobile Phone Operator License and Radio Communications Equipment License. Thereafter, on 17.10.2011, the Respondent No. 1 vide impugned letter No. BTRC/LL/ Mobile/License Renewal (382)/2011-688 dated 17.10.2011 has claimed an amount of Tk. 2018.75 crore only from the Petitioner as the Spectrum Assignment Fee. An amount of Tk. 10,00,00,000/- has been claimed by the Respondent No. 1 as License Renewal Fee vide the said letter of the Respondent No. 1. In the said letter the Respondent No. 1 has also requested the petitioner to submit certain documents. In these regard the Respondent No.1 has provided 10 days time to the petitioner for making the payment claimed, without deduction, and to submit the required documents. Immediately, on 19.10.2011, the petitioner vide letter No. OTBL/License Renewal/Notification Response/BTRC/19102011 sent a response to the impugned letter No. BTRC/LL/Mobile/License Renewal (382) /2011-688 dated 17.10.2011. In the said letter, the petitioner has pointed out the mistakes conducted by the Respondent No. 1 in calculating the Spectrum Assignment Fees and requested the Respondent No. 1 to re-calculate the applicable fees and charges. Subsequently, on 25.10.2011, the Respondent No. 6 vide letter No. BTRC/Finance-1373/License Renewal info/2011-145 dated 25.10.2011 sent a reply to the letter of the petitioner dated 19.10.2011 denying to re-consider the impugned decision communicated to the petitioner vide impugned letter dated 17.10.2011.

10. Being aggrieved by the aforesaid decision issued by the respondent No. 3 on behalf of the respondent No. 1 vide letter dated 17.10.2011 claiming spectrum assignment fee based on Market Competition Factor (MCF) so far as it relates to already assigned spectrum in 2008 (2.6 MHZ -1800 band) and having no other alternative and efficacious remedy , the petitioner was compelled to file this instant application under Article 102 of the Constitution of the People's Republic of Bangladesh and obtained the present Rule.

11. Mr. Rokanuddin Mahmud, the learned Senior Advocate appearing with Mr. Md. Asaduzzaman the learned advocate for the petitioner submits that as per letter No. BTRC/SM/4-23/94 Part-16/16-3120 dated 30.11.2008 and Guideline No. 9.01 of "the Regulatory and Licensing Guidelines for Renewal of Cellular Mobile Phone Operator License for Establishing, Operating and Maintaining Cellular Mobile Phone Systems and Services in Bangladesh" dated 11.09.2011, the assignment fees will not be applicable for the 2.6 MHz spectrum already assigned to the petitioner in the year 2008. The guideline requires for spectrum fees to be paid for future applicants and hence, it does not create any retrospective effect. Next, Mr. Rokanuddin submits that the Respondent No. 1 arbitrarily introduced Market Competition Factor (MCF) in the Guideline dated 11.09.2011 which is in violation of the Constitution as it is discriminatory and arbitrary and it is not made retrospective effect.

12. He also submits that the impugned letter has violated the vested right of the petitioner accrued under allocation of spectrum assignment vide letter dated 30.11.2008 issued by the Respondents inasmuch as that allocation had been made for a period of 18 years which the petitioner had been enjoying since 30.11.2008. He further submits that the issuance of the impugned letter claiming additional spectrum assignment fees is nothing but the cancellation of earlier assignment given to the petitioner vide letter dated 30.11.2008 without issuing notice upon the petitioner for such cancellation of assignment is nothing but complete denial of natural justice of the petitioner.

13. Moreover, he submits that the claim made by the Respondent No 1 without deduction is contradictory and is clear violation of the VAT Act, VAT Rules and the NBR clarifications. He also submits that the petitioner is entitled to carry out their business of mobile operator as per Article 40 of the Constitution of the People's Republic of Bangladesh without interruption since there is an implied covenant that the petitioner's right to provide mobile operating service cannot be interrupted by way of imposing unreasonable and discriminatory fee in violation of the Telecommunication Regulation Guideline and without giving the petitioner scope defend themselves.

14. Mr. Mahmud also submits that the petitioner has fulfilled all the conditions of the spectrum assignment letter dated 30.11.2008 by paying all requisite fees to the Respondent No. 1 and hence, the said impugned order dated 17.10.2011, so far it relates to already assigned spectrum fee based on MCF (2.6 MHz-1800 band) to the petitioner in 2008 and payment of license fee and spectrum fee for new assignments without any deduction is liable to be declared to have been made without any lawful authority and is of no legal effect.

15. Mr. Rokanuddin Mahmud also argues that the license itself is not a service, but it unable and entitle its holder like the petitioner to render a service. He also submits that the license in question is not a service within the meaning of the Value Added Tax Act, 1991, therefore, not vatable. Referring to Section 2 (R) of the VAT Act and 2nd schedule to the same, Mr. Mahmud submits that the license as provided by the BTRC comes under Article -7 (0) of the 2nd schedule of the VAT Act and as such it is excluded from the scope of imposing VAT by the clear terms of Section 2 (R) of the VAT Act. Accordingly, the license or any other facility as provided by the BTRC in favour of the petitioner is not vatable. He also argues that, even if it is found that the licencee provided by the BTRC is vatable, then, the Vat payable should be deducted from the amount claimed by the BTRC. Moreover, referring to Sections 3(3)(Ga), 5, 6 and Rules 18 (L-P), argues that according to those provisions 'deduction at source' (Evp Lae) means deduction from the total receivable but not deduction from the receivable after adding Vat. Furthermore, Mr. Mahmud submits that the granting of a license is not a service render the BTRC within the meaning of the Act. Mr. Mahmud in the course of his submission cited a case Hutchison-3G-UK Ltd. and others –V- Customs and Excise Commissioner (HC-369/04) Simons Tax cases (2008) before the court Justice of the UROPEAN communities. In the instance case the activity of issuing or renewal of license to operate Cellular Mobile system and to use Radio frequencies is not to be service within the meaning of Section 3(1) of the Act and consequently license fees and fees for allocation of spectrum are not to be deemed taxable services within the Act.

16. Mr. Mahmud submits that there ought to be a prior finding by this court that the activity under consideration is of an economic nature. Section 3(1) comprises the activities of a service provider. A taxable person under Act is a person who provides services in Bangladesh except the services mentioned in the 2nd schedule to the Act. Therefore, to qualify as a taxable person under the Act, it has to be a person who independently carries out any economic activity for rendering services other than those mentioned in the 2nd schedule. In the instance case the petitioner does not see any addition of value occurring when the license is granted or the spectrum is allocated. Therefore the grant of license or allocation of spectrum not being activity which adds value, cannot be regarded as being subject to VAT. He further submits that Section 3(3)(N) provides that VAT shall be payable in case of service by the service provider. So, even if provision of license were to be considered a service, then BTRC/GOB is service provider and the petitioner the service recipient. Thereafter, it is BTRC who has to pay VAT on the amount received by it;

17. Mr. Mahmud also submits that Section 6(3) specifies the time when VAT for the services becomes payable. Since no service has been provided by renewal of license, no VAT is payable. Alternatively, even if granting license were to be considered service, then the grantor of the license is service provider, who has to pay the VAT when any of the following events occur first, i.e. (i) when service is rendered, (ii) when chalan is issued relating to providing of service, (iii) when part or full payment is received. In this case, payment is received by BTRC which should, therefore, pay VAT;

18. He submits that Section 5(4) provides that in case of service, VAT is payable on total amount received. Total amount received has been defined in Section 2 (i) of the Act as the amount received as VAT by a taxable service provider. First, BTRC is not a taxable service provider. Therefore, no VAT is payable by the petitioner on the license fee, etc. Alternatively, even if BTRC were to be assumed to be a chargeable or taxable service provider, then it has to pay the VAT on the account of the amount received for the license, etc.

19. Finally, Mr. Mahmud submits that the Rule 18P (1) (L) and (M) provides for deduction at source (Lae) (i) from the amount received from "p¢hd¡ NËZL¡l£" at the time of granting or renewal of license, registration and permit and (ii) from the amount reeived as revenue sharing, royalty, commission, charge, fee or otherwise from "p¢hd¡ NËZL¡l£" in terms of the license registration and permit so granted. Rule 18 P does not provide for levy/ impose (B-l¡fZ) VAT of itself, but it provides for deduction or "Laez" of VAT. VAT is imposed (B-l¡¢fa) by Section 3 (1) of the Act. Where VAT has not been imposed/levied on a service, there is no question of deduction at source. In order for Rule 18 P to be applicable for deduction there has to be an imposition of VAT. Unless there is an imposition of VAT, there cannot be any deduction.

20. Mr. Khandaker Reza-E-Raquib, the learned advocate appearing for the respondent No. 1 BTRC by filing affidavit in opposition at first raises the issue of maintainability of the Writ petition itself on the ground that since there is an Arbitration Clause in the revalidated license agreement of 2004 and even in the original agreement of 1996, the Writ petition is not maintainable as the petitioner has come before this court without availing of the alternative remedy as agreed by the parties and provided by the law, namely the Arbitration Act, 2001. He submits that even the 'Arbitration Tribunal or Arbitrators may give interpretation of law if they are required to do so in disposing of the disputes between the parties. Mr. Raquib further argues that the contract between the BTRC and Orascom Telecom is an ordinary commercial contract, and as such, Writ should be held to be not maintainable.

21. He also submits that the BTRC cannot claim MCF for the period from 2008 to 2011 as it will be amounting to giving retrospective effect to the Guideline which is not permitted by law. However, BTRC can claim MCF for the remaining 15 years period in respect of assignment of 2008 as the same was given for 18 years. Mr. Raquib argues that the Guideline have been issued in exercise of the statutory powers conferred on the BTRC and the Government under Sections 38 and 39 read with Section 55(3) of the Telecom Act, and as such, to change the terms and conditions of the assignment of spectrum relating to its fees and charges, no notice is required to served on the licensees under section 39 of the said Act. Referring to Clause-1 of the Assignment Letter dated 30.08.2008, learned advocate points out that the additional charges mentioned therein relate to the spectrum fee of Tk. 80 crore and it does not have any nexus with the MCF. He argues that since the spectrum fee of Tk. 80 crore

for the said 2008 spectrum has not been increased, BTRC has not even violated any terms of the said Assignment Letter.

22. Mr. Raquib also submits that the License renewal fee as demanded by the Respondent No. 1/BTRC vide its Memo dated 17 October 2011 (annexure-A of W.P. at pg-31) are non-refundable and payable by the Petitioner-Company *without any kind of deduction.* It is further submitted that the amount as specified in the aforesaid Memo was demanded on the basis of the Guidelines, 2011 as issued in pursuance to section 38 of the BT Act, 2001 with prior approval from the MoPT. It is also submitted the said Guidelines, 2011 the subsequent amendment of the said Guidelines, 2011 was also done in accordance with law i.e. under sections 55 (3) and 24 and also by virtue of the inherent power of the Commission of BTRC which was duly communicated to the MoPT who accordingly approved the said amendments (Annexure-2 at pg -7 of Supplementary Affidavit dated 11 July 2012 by BTRC). He also submits that the amount as requested to furnish vide the impugned Memo dated 17 October 2011 with regard to the Spectrum Assignment Fee on the basis of MCF corresponding to the Spectrums 2.6 MHz- 1800 Band as assigned in favour of the Petitioner-Company in 2008 was done in pursuance of the Guidelines, 2011 (attached to the W.P. as Annexure –E at page 39) as well as the assignment letter dated 30 October 2008 (W.P. as Annexure-D at page 37).

23. It is further submitted that the Spectrum Fees of Tk. 80 Crore per MHz for 2.6 MHz-GSM 1800 Frequency Band for 18 years from the date of assignment, remains unchanged. However, clause 9.01 of the Guidelines, 2011 states inter aila that other provisions of the said Guidelines shall be applicable to the respective licensee(s). Accordingly, all the other provisions of the Guidelines, 2011 including MCF as fixed by the Government in the Guidelines, 2011 at clause 8.01 (ii) thereof becomes applicable to all operators including the Petitioner-Company for renewal of the license. Further or alternatively, as per clause 5 (under the head of terms & conditions) of the assignment letter dated 30 October 2011 (Writ Petition as Annexure –D at page 37), the Respondent No. 1/BTRC reserves the right to make any change in the charges or levies from time to time and that the Licensee i.e. the Petitioner-Company shall abide by such decision of the Respondent No. 1/BTRC. Moreover, prior to the enactment of the Bangladesh Telecommunication Regulatory Act 2001 (hereinafter referred to as BT Act, 2001), the Government i.e. MoPT was empowered and solely responsible under the Telegraph Act, 1885 to deal with all sorts of issues relating to Telecommunication system, its control, management, operations and service in Bangladesh. Later on, in the year of 2001, upon enactment of the BT Act 2001, the Writ Respondent No. 1/Petitioner/ BTRC was formed under the said Act and all the aforesaid power of the MoPT was vested with BTRC.

24. As a result, the Respondent No. 1/ BTRC became the exclusive authority to control and regulate the entire telecommunication system and service of Bangladesh including all ancillary matters related to the same i.e. issues relating to issuance of required license to operate telecommunication system and/or provide telecommunication service, tariff, charge rage, radio communications, spectrum managements, issuance of spectrum assignment license etc. However, in the year of 2010, the aforesaid BT Act, 2001 has undergone major changes through the amendments vide Act 41 of 2010 as published in Bangladesh Gazette dated 01 August 2010 and in consequence to which, the power of the Commissioner relating to certain matters have been vested with the Government i.e. MoPT. As a result, the MoPT becomes the concerned authority to deal with certain issues under the BT Act 2001 i.e. to give approval in relation to the issuance of Operators' license and ll the matters related to the

same to establish maintain and operate telecommunication system and also to provide telecommunication service in Bangladesh, Licensing procedure, issuance of Guidelines where requires and to take necessary decisions etc. in these regard. On the other hand, the power of the Commission/BTRC relating to other matters, i.e. issues relating to spectrum allocation, determination of allocation fees, its management, issuance of required license i.e. Spectrum Assignment License, determination of fees and charges and inclusive other affairs etc. remains unchanged by virtue of section 55 and section 24 of the BT Act, 2001. As a result, even after the said amendment in the year 2010, the Respondent No. 1/BTRC still reserves the exclusive authority to deal with all sorts of issues in relation to radio communications, spectrum allocation, spectrum Assignment fees, issuance of Spectrum Assignment License and its management etc. as mentioned above.

25. Mr. Raquib submits that by exercising the aforesaid power of the Commission as conferred by sections 55(3) and 24 of the BT Act 2001, the Respondent No.1/BTRC has lawfully introduced the aforesaid concept of the MCF and multiplied the same while calculating the Spectrum Assignment fee for the respective spectrum allocation assigned in favour of the respective spectrum allocations assigned in favour of the Writ Petitioner-Company on different occasions. Moreover, disputed spectrum allocation of 2.6 MHz in 1800 Frequency Band in favour of the Writ Petitioner-Company in 2008 itself is a separate permit/license i.e. Spectrum Assignment License [attached to the W.P. as Annexure-D at page 37] having no impact upon the terms and conditions of the Writ Petitioner's Operator License of 1996.

26. He also submits that the amount as requested to furnish vide the impugned Memo dated 17 October 2011 (attached to the Writ petition as Annexure-A at page 31) in respect of the Spectrum assignment Fee on the basis of MCF corresponding to the Spectrums 2.6 MHz-1800 Band as assigned in favour of the Writ Petitioner/ Respondent in 2008 was done in pursuance of the Guidelines, 2011 as well as the Spectrum Assignment License dated 30 October 2008 (attached to the Writ petition as Annexure-D at page 37) and the Spectrum Fees of Tk. 80 Crore per MHz for the assignment of 2.6 MHz –GSM 1800 Frequency Band spectrum in 2008 for 18 years from the date of assignment, remains unchanged.

27. Mr. Raquib submits that Clause 9.01 of the Guidelines, 2011 states inter alia that other provisions of the said Guidelines shall be applicable to the respective licensee (s). Accordingly, all the other provisions of the Guidelines, 2011 including MCF as fixed by the Government and BTRC in the Guidelines at Clause 8.01 (ii) thereof becomes applicable to all operators including the Writ Petitioner/Respondent for renewal of the license. Further or alternatively, as per Clause 5 (under the head of terms & conditions) of the Spectrum Assignment License dated 30 October 2011 (attached to the Writ Petition as Annexure –D at page 37), the Respondent No. 1 reserves the right to make any change in the charges or levies from time to time and that the Licensee i.e. the Writ Petitioner-Company shall abide by such decision of the Respondent No. 1. Accordingly, it is submitted that by virtue of section 55(3) and 24 of the BT Act 2001, the Respondent No. 1 is legally entitled to take into consideration of the MCF in calculating the Spectrum Assignment Fee with regard to the Spectrums in question assigned in 2008 in favour of the Petitioner /Orascom for the remaining 15 years. And the Respondent No. No.1/BTRC has lawful authority and also legally entitled to impose MCF while calculating the Spectrum Assignment Fee corresponding to the 2008 Spectrum Allocation but failed to recognize that introducing MCF in such case does not call for compliance with the provisions of notice as mandated by Section 39 (2) of the BT Act, 2001.

28. He submits that claiming MCF, as incorporated in the Guidelines 2011, on the assignment of 2.6 MHz Spectrum in 2008 does not amount to change the terms and conditions of the Operator License of the Writ Petitioner-Company. It is submitted that the imposition of MCF while calculating the Spectrum Assignment fee is completely a separate issue done in pursuance to the section 55 (3) of the Act 2001-having no relevance with regard to the Cellular Mobile Phone Operator License of the Writ Petitioner-company and as such has no impact in changing the terms and conditions of the Operator License. And the aforesaid Operator License as issued in favour of the Writ Petitioner Company was issued under section 35 of the BT Act, 2001 whereas the Spectrum Assignment License in question of the Writ Petitioner-Company was issued under section 55 of the BT Act, 2001. The concept of MCF was also introduced in the aforesaid Guidelines, 2011 by the Respondent No. 1/ BTRC by virtue of its power under section 55(3) of the Act, 2011. The issue of MCF is entirely related to the issue of spectrum/ frequency as dealt in section 55 of the BT Act, 2001. As such, it has no impact in changing the terms and conditions of the Cellular Mobile Phone Operators License issued under section 35 of the Writ Petitioner-Company.

29. Mr. Murad Reza, the learned Additional Attorney General and Mr. S.M. Moniruzzaman, the learned Deputy Attorney General by filing affidavit –in-opposition on behalf of the respondent No. 8 opposes the Rule and submits that the Vat scheme under the VAT Act made different persons liable for collection and deposit of VAT at different stages of transactions. Therefore, liability to pay VAT and responsibility to collect and deposit the same may be required to be done by different reasons. Referring to the definition of 'করযোগ্য সেবা' (taxable service) and Ll (tax) as defined by Sections 2 (Chhaa) and 2 (Gha Gha Gha) respectively, he submits that there is no scope to hold otherwise than that the service (সেবা) or facility (p¢hd¡) as provided by the BTRC though license in exchange for license fees and other charges is not included in the 2nd Schedule to the VAT Act. Therefore, the service or p¢hd¡ as provided by the BTRC through license or permit are vatable. Drawing our attention to the provisions of Section 3(5) and definition of 'fZ' (consideration) as given by Section 2 (Z Z), Mr. Reza submits that the basic scheme of the VAT Act is that the VAT is calculated at the rate of 15% on the total value receivable. Therefore, according to him, Vat is always added to the total value receivable, and under no circumstances, it can be deducted or subtracted from the total value as suggested by the learned advocates for the petitioner. Therefore, he argues, to comply with the basic scheme of the VAT Act and VAT Rules made thereunder, BTRC lawfully motioned the words 'without any deduction' in the impugned memo, which means the demanded money has to be paid as it is, and while calculating VAT to pay the same at source, the petitioner will have to add to it 15% of the total demanded amount as VAT, withhold the same and deposit in the exchequer directly, otherwise it will go against the basic concept of Vat.

30. Mr. Reza submits that the petitioner company has not challenged any illegality of the VAT authority or any action of the VAT authority in the instant writ petition in respect of imposition of VAT on the renewal fees and other fees. But, the petitioner deducted VAT from the license renewal fees and kept illegally the same in their custody and as such the petitioner is liable to deposit the amount of VAT at source pursuant to section 6 (4) (kaka) of the VAT Act 1991. Section 3 of the said Act has provided the details of the persons who would be liable to pay the VAT. The provision laid down in section 6 (3) (ga) of the VAT Act 1991 provides that VAT would be payable when the 'pon' either partially or fully is paid up even if the service remain undelivered. So under the situation although the license has not been renewed, the fees in connection with the renewal have already been paid and the due VAT has been deducted by the petitioner, there is no lawful reason to retain the sum in the

account of the petitioner. As per provision of section 5 (4) of VAT Act 1991, Value Added Tax (VAT) will be calculated and realized on total payment of service. Moreover, the demand has been quite lawful since no VAT has been charged upon the BTRC which is a Government body and that the renewal of license of Cellular Mobile Phone Operators is a 'service. Moreover, this is clearly a VAT payable service under the VAT Act and as such the petitioner is not only liable to pay 15% VAT but also to pay the amount as demanded by BTRC as license renewal fee as well as spectrum assignment fee and there is no relation whatsoever to the applicability of VAT with regard to the payment of license renewal fee and spectrum assignment fee in favour of BTRC.

31. Mr. Reza finally submits that Section 5(4) of the VAT Act clearly provides that VAT will be calculated and realized on total payment of service that means if total receipt against service is Tk 100/- then value added tax will be (15% of 100/-) that means 15/- Tk and the petitioner company being the service availing entity is under an obligation to pay the demanded amount along with 15% applicable VAT.

32. In support of his aforesaid submissions Mr. Reza has cited two unreported cases on the self same issue, which are Grameen Phone Ltd. –V- BTRC & others in Writ Petition No. 8904 of 2011 and Robi Axiata Ltd. –V-BTRC & others in Writ Petition No. 157 of 2012. He also cited Hefzur Rahman –V-Shamsun Nahar Begum reported in 51 DLR(AD)-172 (para-6), Govt. of Bangladesh –V- Sheikh Hasina reported in 60 DLR (AD) 90 (para 46-48), 49 DLR(AD)164(para-36), PTR Exports (Madras) (P.) Ltd. –Vs- Union of India AIR 1996 SC 3461(para 5 and Head note), Asif Hameed –Vs- State of J & K AIR 1989 SC (para 19 & Head note, 2 SCC 3431(para 39,36 &31), Bangladesh and others –Vs- Mohammad Azizur Rahman and others reported in 46 DLR(AD)1994 (para-22), Sheikh Abdus Sabur –Vs-Returning Officer and others reported in 41 DLR(1989)30 (para-29), New Ideal Engineering and Works –Vs- Bangladesh Shilpo Bank and others reported in 42 DLR(AD) page-221 (para-8A), Sheikh Abdus Sabur –Vs- Returning Officer & Others reported in 41 DLR (1989)30 (para-76), Sheikh Abdus Sabur –Vs- Returning Officer & Others reported in 41 DLR(AD)1989 30 (para-38), Sheikh Abdus Sabur –Vs- Returning Officer & Others 41 DLR(AD)1989, 30 (para-43), Solicitor –Vs- Syed Sanwar Ali reported in 27 DLR(AD)16 (para-14), Tabarak Ali Sikder-Vs-The Administration of Waqfs reported in 45 DLR(1993)70 (para-10), Ali Ekabbar –Vs- Govt. of Bangladesh reported in 47 DLR(AD) 1995,394, PLD,1958, page73(FB), PLD1975(A,J &K)69,

33. The present writ petition has been hotly contested and the learned Advocates on both the sides have debated the points raised therein at sufficient length.

34. It appears from the rule issuing order as well as the prayer of the writ petition that the petitioner company did not challenge any action of the respondent No. 8 (NBR). Despite the fact, petitioner made party the NBR as respondent No. 8 for reason best known to them.

35. There is provision to issue Cellular Mobile Phone Operator license under section 35 of the Bangladesh Telecommunication Act, 2001. On the other hand Spectrum Assignment License issue under section 55 of the BT Act, 2001.

36. The imposition of MCF while calculating the spectrum assignment fee is completely a separate issue done in pursuance to the section 55(3) of the Bangladesh Telecommunication Act, 2001-having no relevance with regard to the Cellular Mobile Phone Operator license of the petitioner company.

37. The concept of MCF was introduced in the guidelines, 2011 by the BTRC by virtue of its power under section 55(3) of the Act, 2001. The issue of MCF is entirely related to the issue of spectrum/ frequency as dealt in section 55 of the BT Act, 2001. As such, it has no nexus in respect of the cellular mobile phone operators.

38. The issue of applicability of VAT and/or liability of the petitioner company to pay the VAT has no relation whatsoever with regard to the payment of license renewal fee and spectrum assignment fee. The petitioner company is bound to pay the net amount of the license renewal fee fixed by BTRC, without any kind of deduction.

39. From the record it appears that after issuance of SRO dated 30 June 2010, the petitioner company has made all sorts of payment whatsoever including the payment of annual license fee, revenue sharing and annual spectrum fee after deduction of 15% . The petitioner has deducted the said 15% amount from the total license fee, revenue sharing and annual spectrum fee on the basis of their self interpretation of the Rule 18 (Uma) of the SRO dated 30 June 2010.

40. That the VAT Act requires the service recipient to pay an amount of 15% VAT on all services received in Bangladesh on the basis of the value mentioned in section 5. As per section 3 (N) of the VAT Act 1991, in case of providing service, the service providing entity was required to deposit the said applicable amount of 15% VAT to the government exchequer. Section 5(4) of the said Act provides that in case of providing service, the VAT will be charged on the total receivable amount ('ph©j¡V f¢çl Efl'). As such, a conclusion may be drawn if section 3 (N) is read along with section 5 (4) together with the definition of fZ' (consideration) as given in section 2 (Z Z) of the VAT Act that VAT is always assessed or calculated on the basis of the total value receivable or received.

41. In view of sections 3 & 5 of the VAT Act 1991, the basic scheme of the VAT Act is that the VAT is calculated at the rate of 15% on the total value receivable and is always added to the total consideration value instead of deduction. Under no circumstances; it cannot be deducted or subtracted from the total value. In order to comply with the basic scheme of VAT Act and VAT Rules made thereunder, the BTRC lawfully mentioned the words 'without any deduction' in its memo dated 17 October 2011 – which means that the demanded money has to be paid by the petitioner to BTRC as it is, and, while calculating the VAT to be paid at source, the petitioner will have to add an amount calculating at the rate of 15% of the total demanded amount as VAT, withhold the same and deposit it in the exchequer directly within the stipulated time period.

42. In the present case, petitioner's core contention is that as per memo dated 30.11.2008 respondent No.1 has been assigned 2.6 MHz Spectrum in favour of the petitioner with a value of Tk. 80(eighty) crore per MHz uplink and downlink for 18 years from the date of assignment subject to the renewal of the license; but respondent No. 1 by Memo dated 17.10.2011 again demanded Spectrum fees in respect of aforesaid 2.6 MHz.

43. In this regard it is worthwhile to quote clause 9.01 of the 'Cellular Mobile Phone Operator Regulatory and Licensing Guidelines, 2011' which runs as follows;

> *"9. SPECTRUM, 9.01 The spectrum assignment Fees shall be applicable for all of the access frequencies assigned to the licensees <u>except for the 7.4 MHz, 2 MHz and 2.6 MHz spectrum</u>*

assigned in the year 2008 in favour of Grameenphone, AXIATA and Orascom respectively with a value of Tk. 80 (eighty) crore per MHz uplink and downlink for 18 (eighteen) years from the date of assignment subject to the renewal of the license. However, other provisions of these guidelines shall be applicable for respective licensee (s)."(underlined by us).

44. On a plain reading of the aforesaid clause 9.01 of the 'Cellular Mobile Phone Operator Regulatory And Licensing Guidelines , 2011' it is crystal clear that the Spectrum assignment Fees shall be applicable for all of the access frequencies assigned to the licensees, except Spectrum assigned in the year 2008 (30.11.2008) for the 2.6 MHz in favour Orascom Telecom Bangladesh Ltd.

45. Therefore, by Guideline 2011, NBR did not charge or impose any additional fees on the petitioner company for the aforesaid 2 MHz spectrum.

46. It is also remunerative to quote the letter dated 17.10.2011 (by which this petitioner aggrieves) which runs as follows:-

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

No. BTRC/LL/Mobile/ License Renewal (382)/2011-688
Date: 17.10.2011

Subject: Notification of awarding Renewed Cellular Mobile Phone Operator License of Orascom Telecom Bangladesh Limited (Banglalink).

Ref: (i) Banglalink's application bearing No. OTBL/License Renewal /Application/BTRC/ 01, dated: 09-10-2011 for renewal of Cellular Mobile Phone Operator License

.

(ii)Banglalink's application bearing No. OTBL/ License Renewal/ Application/BTRC/02, dated: 09-10-2011 for renewal of Radio Communications Equipment License

.

(iii) Regulatory and Licensing guidelines for Renewal of Cellular Mobile Phone Operator License bearing No. BTRC/LL/Mobile/ License Renewal (342)/2009 - 563, dated: 11-09-2011 (guidelines).

With reference to the applications mentioned in ref. (i) and (ii), the undersigned is directed to inform you that renewal of the Cellular Mobile Phone Operator License of Banglalink would be considered upon fulfillment of the followings:

(a) Under clause 7.1.3. of the guidelines, Banglalink shall pay BDT 10,00,000,00 (Taka Ten Crore) only as the License Renewal Fee.

(b) Under clause 8.01 (ii) and clause 9, of the guidelines, Banglalink shall pay BDT 2018.75 Crore (Taka Two Thousand Eighteen point Seven Five Crore) only as the Spectrum Assignment Fee against the spectrum allocated to Banglalink.

Spectrum Fee Calculation:

New Assignment in 900 MHz band	Fee for New Assignment per MHz (BDT in Crore)	New Assignment in 1800 MHz and	Fee for new Assignment per MHz (BDT in Crore)	Previous Assignment in 1800 MHz band	Fee for previous Assignment per MHz band	Market Competition Factor (MCF)	Sub Total (BDT in Crore)	Previous Payment Deducted (BDT in Crore)	Payable to BTRC (BDT in Crore)
A	B	C	D	E	F	G	H=[(AXB)+	I- (EXF)X (15/18)	J= H-I
							(CXD)+ (EXF)]X G		
5	150.00	7.4	150.00	2.6	80.00	1.06	2192.08	173.33	2018.75

(C) Payment Schedule, as per provisions of guidelines [clause 8.01 (iii)]

Period	October 31, 2011	April 13, 2012	October 10, 2012	April 8, 2013
Percentage of payment	49%	17%	17%	17%
Amount of payment (BDT in Crore)	989.19	343.19	343.19	343.19

(d)Documents to be submitted are listed below:

i. *Latest shareholding structure in MoA and AoA (as per provisions of serial 4, appendix 1 of guidelines).*
ii. *Annual Reports for the years from 1996 to 2007 (as per provisions of serial 8, appendix 1 of guidelines).*
iii. *Percentage of geographical coverage and population coverage (as per provisions of serial 13, appendix 1 guidelines).*
iv. *Information regarding compensation paid for illegal VoIP in the history of non-compliance (as per provisions of serial 14, appendix 1 of guidelines).*
v. *Detailed RF plan (as per provisions of serial 18, appendix 1 of guidelines)*
vi. *Information relating to year –wise inward and outward fund flow/transaction and year-wise income, expenditure and profit (as provisions of serial 5, appendix 1 of guidelines).*

You are requested to pay the above mentioned amount without any deduction as per provisions of guidelines and submit the documents as stated above in clause (d) to the Commission within 10 (ten) days from the date of issuance of this notification.

Thanking You.

(Tareq Hasan Siddiqui)
Deputy Director
Legal and Licensing Division
Phone: 9511127

Chief Executive Officer
Orascom Telecom Bangladesh Limited
Tiger's Den
House#4, Gulshan Avenue SW
Gulshan-1. Dhaka-1212.

47. From the aforesaid letter dated 17.10.2011 it is also clear that NBR did not claim any additional fees for the 2.6 MHz spectrum.

48. By the said letter they only notified the petitioner, the mandatory requirement for consideration of their Cellular Mobile Phone Operator License as per guidelines dated 11.09.2011.

49. Further or alternatively, as per clause 5 (under the head of terms & conditions) of the assignment letter dated 30.11.2008 (attached to the Writ Petition as Annexure-'D' at page 37), the respondent No.1/BTRC reserve the right to make any change in the charges or levies from time to time and that the licensee shall abide by such decision of the respondent No.1/BTRC.

50. Despite the fact, BTRC by its letter dated 17.10.2001 did not demand any additional charge for the 2.6 MHz spectrum which was assigned in favour of the petitioner in 2008 with a value of Tk. 80 crore per MHz.

51. So, BTRC neither did impose any Spectrum Assignment Fee according to the Guide Line 2011 for 2.6 MHz-GSM 1800 frequency Band, which was assigned in favour of the petitioner on 30.11.2008 nor by memo dated 17.10.2011 did not claim any additional Spectrum Assignment Fee for the same.

52. In the light of the above facts and circumstances, we find no substances in this writ petition. All the allegations made by the petitioner in its petition are amorphous, fallacious and absolutely based on erroneous notion. Respondent No. 1 BTRC upon issuing the memo dated 17.10.2011 did not violate any right of the petitioner as enshrined in the constitution or in the law or in any clause of the guidelines 2011 whatsoever.

53. In the result, the Rule is discharged without any order as to costs.

7 SCOB [2016] HCD 130

HIGH COURT DIVISION

(Special Original Jurisdiction)

WRIT PETITION NO. 7978 OF 2015

Md. Jahangir Alam and others
..... Petitioners.

Versus

Deputy Commissioner, Munshiganj and others
.....Respondents.

Mr. Khondaker Md. Khurshid Alam, Advocate
....For the petitioners.

No one appears
….For the respondents.

Heard on 08.11.2015.

Judgment on 17.11.2015.

Present:
Mr. Justice Shamim Hasnain
And
Mr. Justice Mohammad Ullah

Protection and Conservation of Fish Act, 1950
Section 5(2)(b) read with section 5A:
And
Mobile Court Ain, 2009
Protection and Conservation of Fish Rules, 1985
It appears that the powers conferred under section 5(2)(b) read with section 5A on an Executive Magistrate extend to conviction and sentence and also to confiscation of the article(s) or thing(s) used in the commission of the offence. Besides, the Act or the Rules does not speak of putting the factories under sealed lock and key. Therefore in putting the factories under sealed lock and key the Executive Magistrate has clearly exceeded the authority conferred upon him which has not empowered him to do so under the Act, the Ain and the Rules. The orders of sealing the factories of the petitioners, by the Executive Magistrate is also violative of the fundamental rights of the petitioners guaranteed under Article 40 and 42 of the constitution with regard to their lawful business. ... (Para 6)

Judgment

Mohammad Ullah, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh, at the instance of the 5(five) petitioners the following *Rule Nisi* was issued upon the respondent no. 1. the Deputy Commissioner, Munshiganj, 2. Bijon Kumar Singha, Executive Magistrate, Munshiganj, 3. District Fisheries Officer, Munshiganj, 4. Senior Upazila Fisheries Officer, Munshiganj Sadar, Munshiganj, 5. Secretary, Ministry of Public Administration, Government of the People's Republic of Bangladesh, Bangladesh Secretariat, Dhaka, 6. Secretary, Ministry of Fisheries and Livestock, Government of the People's Republic of Bangladesh, Bangladesh Secretariat, Dhaka, 7. Cabinet Secretary, Cabinet

Division, Government of the People's Republic of Bangladesh, Bangladesh Secretariat, Dhaka and 8. Director General, Directorate Fisheries, Matsha Bhaban, Segunbagicha, Dhaka, to show cause as to why-

> "(1) the following order passed by the Executive Magistrate, Munshiganj (respondent no. 2) by way of putting the following factories under sealed lock and key in the cases mentioned below:
>
> (A) G.A. Net Industries (Jewel Enterprise) Bagbari, Panchasar, District- Munshiganj by order dated 15.06.2015 passed in Mobile Court Case No. 119(6)2015 (Annexure-'E' series).
>
> (B) Jewel Enterprise Bagbari, Mukterpur, Panchasar, Police Station and District Munshiganj by the order dated 15.06.2015 passed in Mobile Court Case No. 117(6)2015 (Annexure-'F' series).
>
> (C) Mehedi Fishing Net Industries, Mirswari, Panchasar, Police Station and District Munshiganj by order dated 18.06.2015 passed in Mobile Court Case No. 111(6)2015 (Annexure-'G' series).
>
> (D) Sifat Fishing Net Industry, Noyagaon, Police Station and District Munshiganj by order dated 18.06.2015 passed in Mobile Court Case No. 224(6)2015 (Annexure-'I' series).
>
> (E) Sataota Monofilament Industries, Noyagaon, Pachimpara, Panchasar, Police Station and District Munshiganj by order dated 15.06.2015 passed in Mobile Court Case No. 123(6)2015 (Annexure-'I' series) should not be declared as being without lawful authority,
>
> (2) And further as to why the respondent nos. 1-4 should not be directed to open the above noted factories for the lawful use thereof by the owners thereof.
>
> Respondent no. 2, Bijon Kumar Singha, Executive Magistrate, Munshigonj is further directed to send a report within 30 (thirty) days through the office of the Attorney General with regard to the situation that led him to close the above mentioned factories under sealed lock and key and/or such other or further order or orders passed as to this Court may seem fit and proper."

2. At the very outset, Mr. Khondaker Md. Khurshid Alam, learned Advocate appearing for the petitioners submits that he intends not to proceed with the Rule on behalf of the petitioner no. 5, Arafat Rahman, Proprietor of Shapla Fishing Net Industries, inasmuch as disputed question of facts are involved in the petition. In view of the submissions of the learned Advocate, the Rule is discharged for non-prosecution so far it relates to the petitioner no. 5 only.

3. The case of the petitioners no. 1-4, as stated in the petition, are that as the proprietor of the respective factories, they have been running the business of manufacturing fishing nets including monofilament fishing net used in the fishing trade. The respondent no. 4 being the Senior Upazila Fishery Officer, Munshiganj Sadar, District- Munshiganj filed 4(four) complaints before the respondent no. 2 being the Executive Magistrate, Munshiganj to the effect that the petitioners have violated the provisions of section 4A(1) of the Protection and

Conservation of Fish Act, 1950 (hereinafter referred to as "the Act"). The Executive Magistrate initiated 4(four) Mobile Court Cases as mentioned in the Rule issuing order, took cognizance of the alleged offences, and framed charge against the Manager of the petitioner no. 4 under section 4A(1) of the Act for storing and possessing certain quantities of fishing nets popularly known as 'current jaal'. The accused factory Manager of the petitioner no. 4 pleaded guilty of the charge and the Executive Magistrate in exercise of powers under the Mobile Court Ain, 2009 (shortly "the Ain") convicted him under section 4A(1) of the Act and imposed a penalty of Tk. 10,000/- under the provisions of section 5(2) of the Ain and confiscated the seized fishing nets under section 5A of the Act. By order of the Executive Magistrate the confiscated nets were destroyed by burning except for the nets of the petitioner no. 4. By the same order, the Executive Magistrate put the factory under sealed lock and key. Challenging the orders of sealing the factory of the petitioners, they moved this Court and obtained the Rule as stated above. In the Rule issuing order dated 09.08.2015, a direction was given upon the respondent no. 2 Bijon Kumar Singha, Executive Magistrate, Munshiganj to send a report within 30(thirty) days with regard to the situation that led him to close the factories under sealed lock and key through the Attorney General's Office. But apparently the direction has not been complied with. None of the respondents has entered appearance in the proceeding to contest the Rule. We feel it prudent to dispose of the Rule with the assistance of the learned Advocate for the petitioners since a question of violation of the fundamental rights of the petitioners guaranteed under Article 40 and 42 of the Constitution has been raised before us.

4. Mr. Khondaker Md. Khurshid Alam, learned Advocate appearing for the petitioners upon placing the relevant provisions of the Act, the Protection and Conservation of Fish Rules, 1985 ("the Rules") and the Ain, 2009 submits that nowhere in those enactments the Executive Magistrate has been empowered to put the factories under sealed lock and key. However, he did not raise any grievance with regard to the fine and the sentence as passed by the Executive Magistrate. The learned Advocate submits further that the impugned order of the Executive Magistrate was not only without jurisdiction but it was also violative of the fundamental rights of the petitioners to conduct their lawful business. He lastly submits that the orders of sealing the factories have caused serious financial loss and hardship to the petitioners and rendered their livelihood at risk and accordingly a direction to unseal and to open the factories is required from this Court upon declaring the act of sealing the factories is wholly illegal and without jurisdiction.

5. We have perused the writ petition, the supplementary affidavit, and the annexures thereto and heard the learned Advocate for the petitioner.

6. A dispute has been raised questioning the extent of powers of the Executive Magistrate in sealing the factories of the petitioners. In considering the legality of the impugned action taken by the Executive Magistrate we have perused and considered the scheme of the Ain and the Act. The relevant provisions of these laws are discussed briefly herein below:
According to section 6(1) of the Ain an Executive Magistrate or District Magistrate empowers to take cognizance of an offence under 85 laws mentioned in the schedule to the Ain including the Act. The Ain also empowers a Mobile Court constituted by the Executive Magistrate or the District Magistrate to initiate a summary proceeding and section 12 thereof empowers them to take action with regard to search, seizure and disposal of the seized goods. The Act deals with offence relating to "current jaal". Section 2(1) and 2(5) of the Act define "current jaal" and fishing net respectively. Section 4A(1) of the Act deals with the prohibition of "current jaal". Section 5 describes the penalty and section 5A prescribes the procedure of

confiscation of "current jaal". From a plain reading of the contents of the Act and the Rules it is evident that section 4A of the Act prohibits the manufacture, importation, possession and carrying of "current jaal" and these activities are punishable offences under section 5(2)(b). Section 5A gives power to a Magistrate to confiscate any articles or things used in the commission of the offence including the offence relating to the "current jaal". It appears that the powers conferred under section 5(2)(b) read with section 5A on an Executive Magistrate extend to conviction and sentence and also to confiscation of the article(s) or thing(s) used in the commission of the offence. Besides, the Act or the Rules does not speak of putting the factories under sealed lock and key. Therefore in putting the factories under sealed lock and key the Executive Magistrate has clearly exceeded the authority conferred upon him which has not empowered him to do so under the Act, the Ain and the Rules. The orders of sealing the factories of the petitioners, by the Executive Magistrate is also violative of the fundamental rights of the petitioners guaranteed under Article 40 and 42 of the constitution with regard to their lawful business.

7. In view of what have been discussed above, we find merit in the *Rule* and the *Rule*, therefore, succeeds.

8. Accordingly, the *Rule* is made absolute however there will be no order as to costs.

9. The orders dated 15.06.2015 and 18.06.2015 passed by the respondent no. 2, Executive Magistrate, Munshiganj Sadar in Mobile Court Case No. (1) 119(6) 2015, (2) 117(6) 2015, (3) 111(6) 2015 and (4) 224(6) 2015 so far it relates to the petitioners factories, namely, (a) G. A. Net Industries Bagbari, Panchasar, Police Station and District Munshiganj, (b)Jewel Enterprise Bagbari, Muktarpur, Panchasar, Police Station and District Munshiganj, (c) Mehedi Fishing Net Industries, Mirswari, Panchasar Police Station and District Munshiganj, (d) Sifath Fishing Net Industry, Noyagaon, Police Station and District Munshiganj putting under sealed lock and key are declared to have been made without lawful authority and of no legal effect.

10. The respondents are directed to unseal the factories of the petitioners within 7(seven) days of receipt of the copy of this judgment positively.

11. It is necessary to mention here that we cannot but observe that the failure of the Executive Magistrate to comply with the order dated 09.08.2015 as mentioned above is tantamount to disobedience of the court's order. However, we hope that in future the Executive Magistrate shall not venture to do the same thing.

12. Office is directed to send a copy of this judgment and order to the respondents no. 1-4 at once for compliance.

7 SCOB [2016] HCD 134

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 520 of 2010

Mainuddin Ahammed
..... Petitioner

Versus

The Government of the People's Republic of Bangladesh and others
..... Respondents

Mr. Mohammad Anwar Hossain with
Mr. Md. Nazir Ahmed Hossaini, Advocates
.....For the petitioner

Mr. Md. Aminul Haque with
Mr. S.M. Anamul Haque, Advocates
....For respondent nos. 3 & 8

Heard on 23.02.2015, 11.03.2015, 02.04.2015, 16.06.2015, 23.06.2015 and Judgment on 30.06.2015

Present:
Mr. Justice Md. Emdadul Huq
And
Mr. Justice Muhammad Khurshid Alam Sarkar.

State Acquisition and Tenancy Act, 1950
Section 144B:
During conducting the revisional survey under Section 144 of the SAT Act, till final record-of-rights are published, no suit lies in any civil Court challenging any action or Order of the Settlement Officer as provided in Section 144B of the SAT Act and, thus, the only option available for respondent no. 12 was to take recourse to the provision of Rule 42A of the Tenancy Rules. ... (Para-25)

Rule 42A of the Tenancy Rules
What to be fulfilled to direct excision of a fraudulent entry:
The following criteria are to be fulfilled to direct excision of a fraudulent entry. Firstly, there shall be an application or an official report alleging fraudulent entry in the record-of-rights; secondly, the application should be made or official report should be brought to the Revenue Officer who holds the status of a Settlement Officer; thirdly, the allegation should be brought or the official report should be made before publication of the final report; fourthly, Revenue Officer shall consult relevant records and also make necessary inquiry and, finally, upon hearing both the contending sides, shall pass the order of excision, if he is satisfied that the entry has been procured by fraud. Thus, in order to ascertain as to whether there has been a fraudulent entry, once the first four conditions are fulfilled, Revenue Officer shall be eligible to issue a notice for hearing. ... (Para-29)

Tenancy Rules
Rule 42A:
Under the provisions of Rule 42A of the Tenancy Rules, a Settlement Officer becomes legally obliged to issue a notice to the applicant, whenever the former receives an allegation of fraudulent entry in the record-of-rights before its final publication and, in discharging the said legal duty, it is incumbent upon the Settlement Officer to make a

proper assessment through hearing both the sides in an endeavour to find out as to whether the allegation is vague or the same is genuine having been substantiated by some specific evidence. Thereafter, following hearing the parties, if the Revenue Officer makes any correction in the record-of-rights, which goes against any party, in our view, only then the said aggrieved party may approach this Court, for, this action of the Settlement Officer is not appealable. ... (Para-31)

Tenancy Rules
Rule 42A:
When to invoke writ jurisdiction:
There is nothing to be aggrieved by the writ petitioner with the impugned notice at this stage inasmuch as he has the opportunity to explain his position by submitting papers and documents before the notice-issuing authority who is competent to deal with the petitioner's grievance and upon examining the papers regarding title and possession as well as record-of-rights, when the Settlement Officer would pass an order, or give a decision, exercising the power under Rule 42A of the Tenancy Rules, at that juncture, if the writ petitioner is unhappy with the said order or decision, he would be competent to invoke writ jurisdiction. ... (Para-46)

Judgment

MUHAMMAD KHURSHID ALAM SARKAR, J:

1. By filing an application under Article 102 of the Constitution, the petitioner sought to question the legality and propriety of the notice dated 28.10.2009 (annexure-H) issued by respondent no. 8 (Deputy Assistant Settlement Officer, Sadar, Comilla) who has asked the petitioner to appear before him with all the papers relating to the Settlement Appeal nos. 8970 of 2003 & 11915 of 2008 of the Settlement Office of Comilla Sadar, Comilla.

2. Succinctly, the facts of the case, as stated in the writ petition, are that Maharaja of Tripura, Raja Birendra Kishore Manikya Bahadur, was owning and possessing 28.63 acres of land pertaining to CS Plot nos. 4384, 6396, 4397, 4099, 4101, 4102 and 4103. He settled the said entire lands perpetually in favour of Aftabuddin, Ahamuddin and Ali Mohammad, who are sons of late Juma Gazi of village Salmanpur within Police Station Kotwali of the then Tripura, by registered *kabuliyat* dated 13.08.1906. Thereafter, during the CS survey operation in the said area in the year 1915-1918, CS Khatian no. 88 of Mouza Lalmai Hill was recorded in the names of the aforesaid three persons in equal shares. Subsequently, the aforesaid three settlement holders voluntarily surrendered 15.65 acres of land to the Maharaja of Tripura in the year 1923 and, thus, the said three brothers kept 12.96 acres of land under their exclusive title and possession. Thereafter, the SA Khatian no. 64, which was prepared in the years from 1956 to 1962, was also recorded in the names of these three brothers. It is alleged that in the said SA Khatian no. 64 the names of some other persons, who did not have any title to the land, were inserted inadvertently. Among the said three brothers, Aftabuddin died leaving behind other two brothers Ahamuddin and Ali Mohammad and through an amicable arrangement Ahamuddin got 8.00 acres of land and Ali Mohammad 4.96 acres of land. Thereafter, Ali Mohammad died leaving behind his only son Md. Kala Miah who exchanged 4.96 acres of land with the writ petitioner vide exchange deed no. 2072 dated 25.04.1995 and Ahamuddin died leaving behind his two sons namely, Sujat Ali and Joynal Abedin and, later on, Sujat Ali died leaving behind his son Abul Hashem who exchanged 7.20 acres of land of Plot no. 4384 with the writ petitioner vide exchange deed no. 2024 dated 22.04.1995 and,

thereafter, Joynal Abedin also died leaving behind his only son Shaheb Ali who sold out 80 decimals of land under Plot no. 4384 to the writ petitioner vide Safkabala no. 3070 dated 06.07.1995 and, that is how, the writ petitioner claims to have been the owner of 12.80 acres of land. It is claimed that during field survey (Bujarat) of the BS operation, the property in question of the petitioner was enhanced upto 13.22 acres of land which was duly recorded in DP Khatian no. 2623.

3. It is stated that after being transferred the aforesaid quantum of lands in favour of the petitioner, the same were mutated in the name of the petitioner vide the order passed in the Separation Case no. 611 of 1995-1996 and the Separation Case no. 85 of 1999-2000 by the office of the Assistant Commissioner (Land) Sadar, Comilla and since then the petitioner has been paying Land Development Tax to the Government by receiving rent receipts. It is stated that during Bangladesh Survey Operation the property in question along with other property of the petitioner situated at Mouza Lalmai Pahar was recorded in the field survey (Bujarat) Khatian nos. 2636, 2637 and 2822 upon observing the relevant legal formalities as laid down in Rules 26-28 of the Tenancy Rules, 1955 (hereinafter referred to as the Tenancy Rules) and the DP Khatian no. 2623 was published by amalgamating and merging Bujarat Khatian nos. 2636, 2637 and 2822 and, then, by dealing with the objections raised by respondent nos. 7-12 under Rule 30 of the Tenancy Rules, DP Khatian no. 2623 was framed towards final publication of the record-of-rights with respect to the property of the writ petitioner.

4. It is stated that at this juncture respondent nos. 7-12 in collaboration with each other have filed the Settlement Appeal no. 8970 of 2003 under Rule 31 of the Tenancy Rules against the writ petitioner in an attempt to scrap the DP Khatian no. 2623 and, upon contested hearing, the said Settlement Appeal no. 8970 of 2003 was dismissed on 25.08.2003 by the Appeal Officer, Sadar, Comilla. After five years of the disposal of the said Settlement Appeal no. 8970 of 2003, respondent nos. 6-11 filed another Settlement Appeal no.11915 of 2008 challenging the DP Khatian no. 2623 of the petitioner, which was also dismissed on 22.02.2009 by the Appeal Officer. Thereafter, on 30.03.2009 respondent nos. 7-12 filed an application before respondent no. 3 with a prayer for reopening and rehearing of the aforesaid Settlement Appeal case nos. 8970 of 2003 and 11915 of 2008 and, pursuant to the said application, respondent no. 3 asked the Assistant Settlement Officer, Chowddagram, Comilla to hear and dispose of the said Settlement Appeals and, then, on 28.10.2009 respondent no. 8 issued notice fixing 04.11.2009 asking the petitioner to appear and hear the said appeals. On 06.12.2009 the petitioner's attorney submitted an application before respondent no. 3 with a request to cancel the order of rehearing and reopening of the said Settlement Appeal case taking the ground that previously the matter had been dealt with and disposed of twice on 25.08.25003 and 20.03.2009, but respondent nos. 3, 5 and 6 proceeded with the hearing of the case. Under the circumstances, the writ petitioner served a notice demanding justice on 03.01.2010 upon the respondents asking them to cancel the proceedings in question and finding non-compliance of the same, the petitioner approached this Court. Hence, this Rule.

5. On behalf of respondent nos. 9-14 although the Vokalatnama dated 05.04.2010 was filed, but no affidavit was submitted before this Court on their behalf to contest the Rule.

6. However, respondent nos. 3 and 8, namely, the Zonal Settlement Officer of Comilla Zone and the Deputy Assistant Settlement Officer, Comilla Sadar respectively, contested the Rule by filing an affidavit-in-compliance to the order passed by this Court on 15.04.2015. It is stated that during Bangladesh Survey Operation the property was recorded in the name of the petitioner situated at Mouza Lalmai Pahar along with other properties in the Bujarat

Khatian nos. 2636, 2637, 2822 and also in the DP Khatian no. 2623 by amalgamating the said Bujarat Khatians. The Settlement Appeal no. 8970 of 2003 was filed by respondent nos. 9 and 10, whereas the Settlement Appeal no. 11915 of 2008 was preferred by respondent nos. 11 to 13. The subsequent Settlement Appeal no. 11915 of 2008 was dismissed in absence of the appellants and on 20.08.2009 respondent no. 12 submitted an application to respondent no. 3 with a complaint of fraudulent entry in the case property upon stating the fact of his absence at the time of disposal of the said Settlement Appeal no. 11915 of 2008. Pursuant thereto, respondent no. 3 directed respondent no. 5 to submit a report upon carrying out a preliminary investigation under Rule 42A of the Tenancy Rules. Having been, thus, asked by a superior authority respondent no. 5 conducted an inquiry into the allegation of committing fraud and submitted an elaborate report to respondent no. 3. Through the said investigation, it was revealed that the opponent of the Settlement Appeal no. 8970 of 2003 and the Settlement Appeal no. 11915 of 2009 (Mainuddin Ahmed) do not have any physical possession in the property and, thus, the said investigation hinted at the existence of *prima-facie* elements of fraud.

7. Mr. Md. Anwar Hossain, the learned Advocate appearing for the petitioner, takes us through the various documents annexed to the petition in a bid to make us familiar with the claim of title of the petitioner and submits that from the annexed papers and documents it is clear that the land in question has been owned and possessed by the petitioner and, accordingly, during the Bangladesh Survey Operation, the petitioner's name was recorded in the DP Khatian no. 2623. He submits that in view of the fact that previously two appeals were preferred challenging the said DP Khatians and on both the occasions the appeal officers dismissed the appeal, respondent nos. 3 and 5, thus, have committed illegality by issuing the impugned notice for reopening and rehearing the said disposed of case. He next submits that there is no provision of appeal after an order is passed under Rule 31 of the Tenancy Rules and, hence, no appeal lies against the decision of Revenue Officer passed under Rule 31 of the Tenancy Rules and further once the appeal has been disposed of on contest under Rule 31 of the Tenancy Rules, no review application under any of the provisions of the Tenancy Rules lies and the Settlement Authority does not have any authority of reopening and rehearing the said disposed of case. By placing the provisions of Rule 32 of the Tenancy Rules, he submits that after exhausting the stage of Rule 31 of the Tenancy Rules, the Settlement Officer's only duty is to send the DP (Draft Publication) Khatian to the settlement press for its final publication. He, in an endeavour to make persuasive submission on this point, argues that when all the objections under Rule 30 of the Tenancy Rules have been dealt with and thereafter all the appeals under Rule 31 of the Tenancy Rules have been disposed of and, thereafter, the draft record-of-rights has been created in accordance with the original & appellate orders, the Revenue Officers have no other option but to proceed towards framing the final record-of-rights under Rule 32 of the Tenancy Rules and, thus, it is his submission that issuance of a notice for hearing appeals for 2nd time or 3rd time is beyond the scheme of the Tenancy Rules. He next submits that if the petitioner has any grievance against the decision or order passed in the proceedings under Rule 31 of the Tenancy Rules, the petitioner has only option to institute a civil suit in any civil Court. He places the application dated 30.03.2009 filed by respondent no. 12 before respondent no. 3 for rehearing of the appeals and submits that the allegations of fraud, as alleged by the said respondent in the application, is unspecific, vague and, thus, he argues that, as per the *ratio* laid down in the case of Jabed Ali Sarker Vs Dr. Sultan Ahmed & another 27 DLR (AD) 78, there is no reason for the Settlement Authority to entertain the said application containing unspecific and vague allegations and thereby reopen a matter which has previously been disposed of. In support of his submissions on the provisions of Rules 30,

31, 32, 33 & 42A of the Tenancy Rules, the learned Advocate for the petitioner refers to the following cases; Bhawal Raj Court of Wards Estate Vs Rasheda Begum & others 15 BLC(AD) 115, Zahirul Islam & others Vs Government of Bangladesh & others 65 DLR 168, Romisa Khanam Vs Secretary, Ministry of Land & others 61 DLR 18, Aftab Ali Sheikh (Md.) Vs Director, Land Records & others 58 DLR 397 and an unreported judgment of the High Court Division passed in writ petition no. 2175 of 2002.

8. By making the above submissions the learned Advocate for the petitioner prays for making the Rule absolute.

9. Per contra, Mr. Md. Aminul Haque, the learned Advocate appearing on behalf of respondent nos. 3 and 8, places Rule 42A of the Tenancy Rules and submits that it is the statutory obligation of a Revenue Officer/Settlement Officer to issue a notice whenever he receives an application from an aggrieved party or he is informed by a Tahashilder as to commission of fraud with regard to an entry in any record-of-rights. In an endeavour to elaborate his submission on this point, he reads out the contents of all the three applications filed by the different applicants on 3 (three) occasions in 2003, 2008 & in 2009 and submits that it is evident that the first application in the form of Appeal was filed by respondent nos. 9 & 10 in 2003 with regard to the dispute pertaining to a quantum of land of .33 acres arising out of Objection Case no. 3051 and, thereafter, the 2nd application/appeal was filed in the year 2008 by respondent nos. 11, 12 & 13 against the order passed in Objection Case no. 3523 but the same was dismissed without hearing these respondents and, thus, it is his submission that the parties of the Settlement Appeal no. 8970 of 2003 and the parties of the Settlement Appeal no. 11915 of 2008 are not the same. By placing the order sheets of the Settlement Appeal no. 11915 of 2008, he submits that since it is evident from the report of surveyors and respondent no. 5 that there are elements of fraud, the Settlement Authority has rightly issued the notice as they are statutorily bound to do so upon receipt of an application under Rule 42A of the Tenancy Rules. He submits that if the writ petitioner has any grievance against issuance of notice, he has every opportunity to explain his position by submitting papers and documents and also by making oral submissions before the said authority. By referring to the cases of Md. Saiful Alam Vs Bangladesh Bank & others 19 BLD (AD) 249, Abdullah Ahsan Vs. Bangladesh Bank & others 20 BLD (AD) 260 and ACC Vs Sheikh Hasina 60 DLR (AD) 172 (relevant Para-41), he submits that mere issuance of a notice does not create any right for anyone to challenge the same without first appearing before the authority who issues the notice and only when a disfavourable order is made pursuant to hearing the parties, then, there may be an occasion to be aggrieved by the order of the authority.

10. By making the aforesaid submissions, the learned Advocate for respondent nos. 3 and 8 prays for discharging the Rule.

11. For an effective adjudication upon the case, when no affidavit was filed by the concerned State-functionaries after issuance of the Rule, we directed the said Settlement Authorities to assist this Court by furnishing their explanations as to why they have issued the impugned notice for re-opening and re-hearing a disposed-of case, which they complied with and, then, we have accommodated the learned Advocates for the petitioner and the respondents to make their respective submissions as lengthy as they wished. Side-by-side, we have perused the writ petition, affidavit-in-compliance filed by the Settlement Authorities and the annexures appended thereto. We have also read through very carefully the relevant laws and decisions placed before us.

12. Since the question of maintainability of this writ petition has been raised by the learned Advocate for respondent nos. 3 & 8 on the ground that the writ petitioner is not competent to invoke jurisdiction under Article 102 of the Constitution without first appearing before the notice issuing authority, as per the practice and convention of handing down of a judgment, this Court is required to deal with the said preliminary point at first, before embarking upon examination of the legality and propriety of the issuance of the impugned notice. However, for the reasons to be known hereinafter, first we would take up the substantial issue, namely the action of the Settlement Authority in asking the petitioner to attend a hearing on a matter, which is claimed by the petitioner to have already been disposed of by the said authority. Thus, it appears that for a proper adjudication upon the substantial issue, we should see whether the matter is a disposed of matter or not.

13. It is an admitted position that previously the Settlement Appeal no. 8970 of 2003 was filed by respondent nos. 9 and 10 namely, Md. Nurul Islam and Md. Taleb Khan with a prayer for correction of the record-of-rights with regard to a quantum of land of only .33 acres and the same was dismissed by the appeal officer on 25.08.2003 and it is also admitted that the Settlement Appeal no. 11915 of 2008 was filed by respondent nos. 11 to 13 namely, Abul Kashem, Nazmul Islam and Abdul Majid and, thus, it is evident that these appellants are completely different groups of people who have challenged the record-of-rights for a different quantum of land under the different Khatians. It is further evident that while the Settlement Appeal no. 8970 of 2003 was preferred before the Appellate Authority against the order passed in Objection Case no. 3051, the Settlement Appeal no. 11915 of 2008 originated from the Objection Case no. 3523. Though the Settlement Appeal no. 8970 of 2003 was dismissed on a contested hearing on 25.08.2003, the Settlement Appeal no.11915 of 2008 was dismissed in absence of the appellants on 22.02.2009 and this *exparte* disposal of the Settlement Appeal no. 11915 of 2008 prompted respondent no. 12 (Nazmul Islam) to approach the concerned Settlement Authority, namely Zonal Settlement Officer, Comilla (respondent no. 3), to raise the allegations of practicing fraud in obtaining a favourable order and, thereby, prayed for re-hearing of the previous appeals.

14. The above factual examination produces two results. One outcome is that the Settlement Appeal no.11915 of 2008 is not the repetition of the appeal filed in the year 2003 and the other one is that the subject matter in question has already been dealt with by the Appeal Officer in the Settlement Appeal no. 11915 of 2008.

15. The preceding upshot triggers the following two pertinent questions for our consideration; (*K*) Did the appeal officer commit an error by pronouncing an *exparte* order? (*L*) Was any other option available or open for the applicants (defendant no. 12 &other 2) other than filing the application before the respondent no. 3? The foregoing scenario leads us to look at the relevant provisions of the Tenancy Rules and to get engaged in the scrutiny as to whether duties of the concerned Settlement Officers were carried out as per the provisions of the Tenancy Rules in dealing with the petitioner's matter.

16. As per the provisions of Section 144 of the SAT Act, the Government, when finds it appropriate, may undertake the task of preparation or revision of the record-of-rights in respect of any district, part of a district or local area by a Revenue-Officer in accordance with the relevant Government Rules and Chapter VII of the Tenancy Rules, 1955 incorporates the provisions as to the procedure to be adopted by the Revenue Officer for revision of record-of-rights under Section 144 of the SAT Act.

17. While Rule 26 of the Tenancy Rules contains the provision about the particulars to be recorded, Rule 27 states that ten phases are to be completed in preparation of the revision of record-of-rights with the discretion of the concerned Revenue Officer that all the first six stages or any of it may be omitted with the approval of the Director of the Land Records and Survey as per the circumstance of an area. Out of the above ten steps, the sixth to tenth stages deal with attestation, publication of draft record, disposal of objections, filing of appeals and disposal thereof and preparation and publication of final record-of-rights.

18. Rule 28 outlines the modus operandi of the work up to attestation by observing The Technical Rules and Instructions of the Settlement Department, which was published for the last time in 1957. Rule 29 enumerates that after completion of attestation, the Revenue Officer shall publish the draft record-of-rights by placing it for public inspection for a period of not less than one month at such convenient place as he may determine informing the local inhabitants about the last date of filing objections under Rule 30. Rule 30 spells out the procedure for filing objection against draft publication of record-of-rights and Rule 31 provides the forum for preferring appeal against the order passed under Rule 30. Before passing the final order on such an appeal the contending parties shall be afforded the opportunity to present their part of the case.

19. In other words, on completion of attestation the Revenue Officer's first-phase duty is to provide an opportunity for raising objection, if any, regarding the ownership or possession of land or of any interest in the land and, in disposing of the objection, the Revenue Officer shall record his brief decision. Then, comes the stage of appeal where the Revenue Officer shall pass an order in writing stating the grounds for allowing or rejecting the appeal upon affording the opportunity for hearing.

20. Following disposal of objections under Rule 30 and appeals under Rule 31, the Revenue Officer must proceed towards final publication of the record-of-rights, as provided in Rule 32, keeping conformity with previously published draft record and, then, according to the direction given by the Government, by general or special order, the final record shall be published. Under Rule 33 the Revenue Officer shall publish the final record-of-rights within 30 (thirty) days from the date of receipt of the general or special order of the Government. When a record-of-rights is finally published under Rule 33, the publication shall be conclusive evidence that the record has been duly revised under Section 144 of the SAT Act. Rule 34 prescribes the procedure for issuance of certificate containing the fact of such final publication. The Government is empowered by Rule 34(2) to declare by notification in the official Gazette that the record-of-rights has been finally published with regard to a specific area for every village and such notification shall be conclusive proof of such publication. Rule 35 heralds that the presumption of the published records-of-right in the above manner is to be taken as correct until it is rebutted on taking evidence before the appropriate civil Court.

21. Then, Chapter VIII of the Rules, 1955 seeks to outline the power of the Settlement Officers in revising record-of-rights under Section 144 of the SAT Act. Rule 36 speaks about a Revenue Officer's power, who is appointed with or without additional designation of the Settlement Officer or Assistant Settlement Officer for Revision of a record-of-rights under Chapter XVII of the Act within any district, part of a district or local area, of taking evidence upon following the procedure as laid down in the Code of Civil Procedure, 1908 for the trial of suit and also of his power to enter upon any land included within the area in respect of which an order under Section 144 of the Act has been made to survey, demarcate and prepare a map of the same. Rule 40 empowers the Settlement Officer to make over certain

matters, including proceedings relating to objections under Rule 30 and appeals under Rule 31, for disposal by any Assistant Settlement Officer subordinate to him. Rule 41 empowers the Settlement Officer to withdraw cases from the file of any Assistant Settlement Officer or Revenue Officer subordinate to him relating to any of the proceedings under Chapter VII and to dispose of the same by himself or by transfer them to any other Assistant Settlement Officer or Revenue Officer Subordinate to him for disposal. Rule 42 provides special power to the Revenue Officer appointed with the additional designation of the Settlement Officer who may at any time before publication of the final record-of-rights direct that any portion of proceedings referred to in Rules 28 to 32 in respect of any district, part of a district or local area shall be cancelled and to take up the proceeding afresh from such stage as he may direct. Rule 42 provides that pursuant to a complaint or on receipt of an official report the Revenue Officer with the additional designation of Settlement Officer has jurisdiction to correct a fraudulent entry in the record-of-rights upon consulting the relevant records and making other inquiries as he may deem necessary and direct excision of the fraudulent entry upon giving opportunities of personal hearing to the contending parties. Rule 42B authorises the Revenue Officer to make correction of obvious errors i.e. arithmetical or clerical before final publication of the record-of-rights. Rule 44 empowers the Director of Land Records and Surveys to discharge all the aforesaid functions of a Revenue Officer.

22. It appears that among the powers vested in the Revenue Officers in Chapter VIII (Rules 36 to 44), while Rules 36 to 41 and 43 to 44 are administrative power, the powers vested in them vide Rules 42, 42A & 42B are extraordinary power, albeit with the limitation that those may be exercised only before final publication of the record-of-rights, for, Rule 42 vests special power in the Revenue Officer to cancel any portion of the proceeding referred to in Rules 28 to 32 in respect of any district, any part of a district or local area and thereby direct the proceedings to be taken up afresh from such stage as he may direct, Rule 42A vests power in the Revenue Officer with the additional designation of the Settlement Officer to hear and dispose of any application filed alleging fraud and Rule 42B empowers the Revenue Officer to correct any clerical errors.

23. It transpires from the facts of this case that following making order under Section 144(1) of the SAT Act, revision of record-of-rights for Comilla District was commenced and, thereafter, upon completing the required works namely (i) Traverse Survey, (ii) Cadastral Survey, (iii) Erection of boundary marks, (iv) Preliminary record-writing (Khanapuri), (v) Local Inspection (Bujharat) and (vi) Attestation, when draft record-of-rights was published by the concerned Settlement Officer under Rule 29 of the Tenancy Rules, respondent no. 12 together with other two persons made objection to the concerned Settlement Officer under Rule 30 of the Tenancy Rules and the same was registered as Objection Case no. 3523. However, from the papers submitted before this Court, it is not clear as to when the Government had kicked off the work of the revision in question in the District of Comilla and also when the first six stages were carried out or those were not required to be carried out. Also, the date of publication of the draft record-of-rights, the date of filing the Objection Form/Application and the date of disposal of the Objection Case no. 3523 were not made available for our consideration. Although the petitioner in his supplementary affidavit has sought to allege that appeal no. 11915 of 2008 was preferred after five years, but no clue of delay in preferring the appeal within 30 (thirty) days, as stipulated in rule 31 of the Tenancy Rules, is traceable from the order dated 22.02.2009 passed by the Appeal Officer in Settlement Appeal no. 11915 of 2008, for, there is no date of disposal of the Objection Case no. 3523 in the order sheet. However, the Appeal Officer in the above order goes on to say

that appeal has been filed within time without bothering to mention about the date of the disposal of the said Objection case no. 3523.

24. Be that as it may, we find that the Settlement Appeal no. 11915 of 2008 has been dealt with by the concerned officer in a cavalier fashion. It is evident from the order sheets of the said appeal that while the applicants were present before the Appellate Officer on every occasion from the date of filing the appeal up to the next consecutive 6 (six) dates and the petitioner was seeking time on each occasion, on the 7th date of hearing when the appellants were found absent, the Appeal Officer in their absence dismissed the appeal on a ground that since the appeal was dealt with previously, appellants should not be allowed to re-open it. Had the matter been heard in the presence of the appellants, this matter would not have been dragged up to this Court, for, they could have placed the fact before the Appeal Officer that the present appeal had arisen out of a different Objection Case relating to a different land. It was incumbent upon the Appeal Officer to properly vet the order passed by the Objection Officer to find out as to whether any evidence regarding ownership or title was taken by the Objection Officer and whether the ground taken by the said Objection Officer for turning down the Objection Case was rational, but these vital aspects were not recorded by the Appeal Officer in dismissing the Settlement Appeal no. 11915 of 2008.

25. It follows that the Appeal Officer committed a serious error in disposing of the Settlement Appeal no. 11915 of 2008 and the question posed hereinbefore as question no (*K*) is, thus, answered in affirmative. The next question formulated in question no. (*L*) is liable to be answered in the negative, given that during conducting the revisional survey under Section 144 of the SAT Act, till final record-of-rights are published, no suit lies in any civil Court challenging any action or Order of the Settlement Officer as provided in Section 144B of the SAT Act and, thus, the only option available for respondent no. 12 was to take recourse to the provision of Rule 42A of the Tenancy Rules.

26. Now, we are to see whether respondent no. 8, under the instructions of respondent no. 3, was competent to treat the said application to be a proper application under Rule 42A of the Tenancy Rules and, thereby, to issue the impugned notice dated 28.10.2019.

27. It is evident from the text of the application filed by respondent no. 12 that he has brought the allegation of forging the papers and documents against the petitioner in the following words: *"gvgjvØ‡qi weev`xMb A‰ea I ZÂKZvc¥Rvj KvMRcÎ mÿRb K‡i A‰ea fv‡e Avgv‡`i ˆcwÎK `Ljxq fwg Zvnv‡`i bv‡g †iKW mÿRb Kwiqv †KŠk‡j †iKW mwó K‡i, A_P bwjkx fwgi GK BwÂI weev`xi `L‡j bvB, †Kvb w`bB wQj bv Ges fweI¨‡ZI weev`x `Lj Kwi‡Z cwi‡e bv"*. Respondent no. 3 considered the said allegations to be within the purview of Rule 42A of the Tenancy Rules and directed the Tahashilder and Surveyors to conduct an enquiry as to the said allegations.

28. Does the above style of representation authorise respondent no. 3 to treat the same as an allegation under the provisions of Section 42A of the Tenancy Rules? For having a better understanding of the provisions of Rule 42A of the Tenancy Rules, it is reproduced hereunder-

> **42A. Correction of fraudulent entry before final publication of record-of-rights-**The Revenue-officer, with the additional designation of 'Settlement Officer' shall, on receipt of an application or on receipt of an official report for the correction of an entry that has been procured by fraud in record-of-rights before final publication thereof, after consulting relevant records and making such other enquiries as he deems necessary, direct excision of the fraudulent

> entry and his act in doing so shall not be open to appeal. At the same time, the Revenue-officer shall make the correct entry after giving the parties concerned a hearing and recording his finding in a formal proceeding for the purpose of future reference.

29. From a plain reading of the above provisions, it appears that the following criteria are to be fulfilled to direct excision of a fraudulent entry. Firstly, there shall be an application or an official report alleging fraudulent entry in the record-of-rights; secondly, the application should be made or official report should be brought to the Revenue Officer who holds the status of a Settlement Officer; thirdly, the allegation should be brought or the official report should be made before publication of the final report; fourthly, Revenue Officer shall consult relevant records and also make necessary inquiry and, finally, upon hearing both the contending sides, shall pass the order of excision, if he is satisfied that the entry has been procured by fraud. Thus, in order to ascertain as to whether there has been a fraudulent entry, once the first four conditions are fulfilled, Revenue Officer shall be eligible to issue a notice for hearing.

30. Here, in the case at hand, it is apparent that the final record-of-rights for the case lands are yet to be published and, at this stage, an application with an allegation of fraud was lodged with a Revenue Officer who holds the status of Settlement Officer and he, upon consulting the records, directed respondent no. 5 (the Assistant Settlement Officer, Chowddagram, Comilla) to do the needful. Then, respondent no. 5 sent two surveyors to the case lands to find out the names of the persons who are holding physical possession over the case lands. The surveyors' report reveals that the petitioner is not in possession of the case land and, that is how, upon fulfilling the four pre-conditions of issuance a notice under Rule 42A of the Tenancy Rules, the Settlement Authority became legally obliged to issue the impugned notice asking the petitioner to explain his position as to whether there are irregularities in recording the names in the record-of-rights. The purpose of asking the parties to attend the hearing is to assess the authenticity of the allegation brought against the petitioner by respondent no. 12 as well as to see the veracity of the surveyors report, for, the Settlement Authority cannot remove the petitioner's name from the record-of-rights on a vague and unspecific allegation, as propounded in the case of Jabed Ali Sarker Vs Dr Sultan Ahmed & another, 27 DLR (AD) 78 and, thus, only when the allegation would be substantiated by some evidence or, at least, it would appear to be a plausible allegation to the concerned Settlement Officer, then, he would be competent to direct excision of the present entry.

31. In other words, under the provisions of Rule 42A of the Tenancy Rules, a Settlement Officer becomes legally obliged to issue a notice to the applicant, whenever the former receives an allegation of fraudulent entry in the record-of-rights before its final publication and, in discharging the said legal duty, it is incumbent upon the Settlement Officer to make a proper assessment through hearing both the sides in an endeavour to find out as to whether the allegation is vague or the same is genuine having been substantiated by some specific evidence. Thereafter, following hearing the parties, if the Revenue Officer makes any correction in the record-of-rights, which goes against any party, in our view, only then the said aggrieved party may approach this Court, for, this action of the Settlement Officer is not appealable.

32. Upon carrying out the above analysis on the contents of the application under Rule 42A of the Tenancy Rules in tandem with the circumstances which led respondent no. 12 to

make such an approach to respondent no. 3, we are satisfied that respondent no. 8 issued the impugned notice within his lawful authority and, thus, we hold that no illegality was committed by respondent nos. 3 & 8 to issue the notice dated 28.10.2009 (annexure-H).

33. With the above resolutions on the substantial issue of this case, we may comfortably discharge the instant Rule without delving into the question of maintainability of this writ petition. However, since the said issue has been raised by the learned Advocate for respondent nos. 3 & 8 that without first appearing before them by responding to the impugned notice, invocation of writ jurisdiction was improper, we feel it appropriate to briefly dwell on the maintainability issue by dealing with the cases referred to by the learned Advocates, for the sake of completeness of this judgment, particularly, in the backdrop of presentation of its counter-arguments before us by the learned Advocate for the petitioner.

34. The case of Bhawal Raj Court of Wards Estate Vs. Rasheda Begum & others 15 BLC (AD) 115, was referred to by the petitioner in a bid to buttress up his argument that after disposal of appeal under Rule 31, the Settlement Authority was incompetent to issue the impugned notice. Since the plea of lacking competency was taken by the petitioner with reference to the aforesaid case laws, it would be a prudent exercise if we discuss the fact of the cited case law in an endeavour to apply the *ratio* of the same.

35. In the said case, an order passed by the Settlement Authority directing the excision of an entry in the record-of-rights was challenged, but in the case at hand a mere notice has been challenged. More so, in the said case, after preparation of the SA Record and BS Record in the names of the writ petitioners of the said case, they were in exclusive possession continually for decades together in the property by constructing multistoried buildings thereon. The High Court Division and Appellate Division found that while the writ petitioners of the said case were owning and possessing their land for decades and, particularly, when their names were published finally in the Gazette Notification after preparation of the SA Record and the BS Record, the Settlement Authority was not competent to correct the records inasmuch as after final publication, an aggrieved party can take recourse to the jurisdiction of the civil Court. Therefore, the facts of the afore-cited case being completely different, the *ratio* laid down therein is not applicable in the said case.

36. The learned Advocate Mr. Md. Anwar Hossain has also sought to rely on the cases of Zahirul Islam Vs Bangladesh 65 DLR 168, Romisa Khanam Vs Secretary, Ministry of Land, Government of People's Republic of Bangladesh & others 61 DLR 18, Aftab Ali Sheikh (Md.) Vs. Director, Land Records & others 58 DLR 397 and an unreported judgment of the High Court Division passed in writ petition no. 2175 of 2002.

37. In the case of Zahirul Islam Vs Bangladesh 65 DLR 168, eight notices were challenged and a Division Bench of this Court made the Rule absolute on the basis of the *ratio* laid down in the afore-cited 15-BLC case of Bhawal Raj Court of Wards Estate Vs. Rasheda Begum & others 15 BLC(AD) 115. But in the said case the differential factors of the cited 15-BLC case and the said case were not discussed. Therefore, we are of the view that this Court is not bound to follow the decision of this case as the same renders to be *per incuriam.*

38. We have taken into judicial notice that, in these days, the learned members of the Bar tend to refer to their chosen case-laws without minutely looking at the facts of the said referred cases so as to tally the facts of the case under adjudication with that of the referred

cases, rather by simply skimming through the Head Notes at a glance, they try to fit their cases into the referred cases. The learned Advocates are the officers of the Court and their efforts should be directed towards properly assisting the Court by placing the true position of a *ratio* laid down in a case-law, as opposed to their endeavour of achieving a favourable application of the referred case-law by bringing to the notice of the Court only the part which seems to be relevant and, thereby, abstain from placing the other part of the referred case-law which does not match with the case at hand. The 15-BLC case [Bhawal Raj Court of Wards Estate Vs. Rasheda Begum & others 15 BLC(AD) 115] is a milestone judgment on the application of the Tenancy Rules, particularly of the provision of Rules 27 to 42A of the same. But due to non-placement of the fact of the 15-BLC case [Bhawal Raj Court of Wards Estate Vs. Rasheda Begum & others 15 BLC(AD) 115], the Division Bench considered that the *ratio* of the 15-BLC case [Bhawal Raj Court of Wards Estate Vs. Rasheda Begum & others 15 BLC(AD) 115] is applicable. The background fact of the said mile-stone case is that the writ petition was filed against an order of direction of the Settlement Authority who had removed the names of the present recorded tenants, whereas the case of 65 DLR 168 is merely with regard to challenging the legality of the notices for appearing before the concerned Settlement Authority; non-disclosure of the preceding differential features of the above-mentioned two cases led the Division Bench to hold a view that the *ratio* of the mile-stone ease is squarely applicable.

39. The decision of the case of Romisa Khanam 61 DLR 20 does not require discussion as the case having been appealed by the writ-respondent-Bhawal Raj in the Appellate Division was upheld and was reported in the above 15-BLC (AD) 115 case.

40. In the case of Aftab Ali Sheikh (Md.) Vs. Director, Land Records & others 58 DLR 397, when the Director of Land records and Survey being the highest Settlement Authority ordered excision of an entry, the aggrieved party's move before this Court was not questioned. In the case at hand as well, if the petitioner moves before this Court after passing an order by the Settlement Authority, availing writ jurisdiction would be the proper course of action, as there is no appellate forum against such order. Moreover, in the said case the High Court Division having not found any element of fraud, it rightly held that correction done by the said highest Settlement Authority in the record-of-rights exercising his power under Rule 42A was improper.

41. In the cited unreported case (Writ Petition no. 2175 of 2002), when the petitioner was asked to attend hearing of appeal for the third-time on a matter which was previously twice dealt with and disposed of by the Appeal Officers, this Court found the issuance of the impugned notice to be beyond of competency of the Appeal Officer. The differentiating features of the above case are that in the said case there was no allegation of fraud and the notice was not issued aiming at exercising power under Rule 42A of the Tenancy Rules and, secondly, there cannot be a second appeal on the same matter among the same parties.

42. On the other hand, the following cases have been referred to by Mr. Md. Aminul Haque, the learned Advocate for respondent nos. 3 and 8; (i) Md. Saiful Alam Vs Bangladesh Bank & others 19 BLD (AD) 249, (ii) Abdullah Ahsan Vs. Bangladesh Bank & others 20 BLD (AD) 260 and (iii) ACC Vs Sheikh Hasina 60 DLR (AD) 172 (relevant Para-41).

43. The facts of the first two cases [(i) Md. Saiful Alam Vs Bangladesh Bank & others 19 BLD (AD) 249, (ii) Abdullah Ahsan Vs. Bangladesh Bank & others 20 BLD (AD) 260] are with regard to challenging a notice issued by Bangladesh Bank whereupon the writ petitioner

of the said writ petition was asked to furnish some documents within 30 days with an explanation as to whether he was a loan defaulter and thereby was competent to hold the position as a director of the Bank. When the writ petitioner, without appearing before the notice-issuing authority, challenged the said notice, the High Court Division summarily rejected the writ petition which was affirmed by the Appellate Division having held that the writ petitioner does not have anything to be aggrieved with a notice which has not been apparently issued without any jurisdiction or lawful authority.

44. In the afore-referred case no. iii [ACC Vs Sheikh Hasina 60 DLR (AD) 172], when the ACC issued a notice upon the writ petitioner, she challenged the notice and it was observed at Para-41, albeit impliedly, that issuance of a mere notice does not amount to any accusation so as to placing the notice-receiver in the position of an aggrieved person.

45. The above discussions on the referred case-laws amply demonstrate that while the cases referred to by the learned Advocate for the petitioner do not help him to directly invoke writ jurisdiction, on the contrary, the *ratio* of the case-laws referred to by the learned Advocate for respondent nos. 3 & 8 do fit in the case at hand.

46. Accordingly, the Rule is liable to be discharged on the maintainability ground as well, for, we find that there is nothing to be aggrieved by the writ petitioner with the impugned notice at this stage inasmuch as he has the opportunity to explain his position by submitting papers and documents before the notice-issuing authority who is competent to deal with the petitioner's grievance and upon examining the papers regarding title and possession as well as record-of-rights, when the Settlement Officer would pass an order, or give a decision, exercising the power under Rule 42A of the Tenancy Rules, at that juncture, if the writ petitioner is unhappy with the said order or decision, he would be competent to invoke writ jurisdiction.

47. Before parting with this judgment, we feel it pertinent to observe that there should be a fixed time-frame for the concerned Revenue/Settlement Officers, who are performing functions upon exercising their powers under Rule 42A of the Tenancy Rules, 1955 in entertaining applications from the applicants or in *suo motu* undertaking any step by them and also a time-frame for disposal of the matters pending before them on top of providing a limitation of filing an application or time-limit of *suo motu* taking up a matter under the authority of the said Rule 42A after exhausting the stage of Rule 31. More importantly, there must be some instructions or guidelines on exercising powers by the Settlement Officers under Rule 42A of the Tenancy Rules stating as to what type of allegation by an applicant or a report from a Tahshilder would constitute a fraudulent entry. The Settlement Department should not be allowed to delay in publishing the final record, otherwise the procedures laid down in the Rules would turn to be an endless process causing persistent harassment to the people of Bangladesh and thereby frustrating the scheme of the SAT Act. Also, there should be a clear-cut guide-line for exercising power by the Settlement Officers under Rule 42 outlining under what circumstances an already-completed work can be cancelled.

48. It is our considered view that since in the SAT Act there is a provision of getting a fraudulent-entry corrected through challenging the same in the Tribunal, vesting power in the Settlement Officers under Rule 42A appears to be an excessive provision in the SAT Act, for, it creates an opportunity for the ill-motivated litigants to harass the original land owners. The rationale behind taking the above view is that in course of dealing with the cases under Rule 42A of the Tenancy Rules, 1955, this Court has taken in its judicial notice that in the pretext

of exercising power under Rule 42A of the Tenancy Rules, the concerned authorities are always procrastinating the final publication of the record-of-rights despite completing all the stages under Rules 26-32 of the Tenancy Rules. In this case as well, although the stages under Rules 26-32 have been completed, each time a new Settlement Officer upon taking over his charge is re-opening the file instead of finally publishing the records-of-rights of the petitioner. Furthermore, the other point of the balance of convenience is that apparently the provision of Rule 42A has been inserted for removing the fraudulent entry, therefore, even if the fraudulent entry is traced after the final publication, the affected person is not left without any remedy, as we find that if there is any fraudulent entry or there remains any other fault in the process of completing the tasks starting from Rules 26 to 35, the same can be corrected by invoking the jurisdiction of the Tribunal under Section 145A of the SAT Act.

49. In the result, the Rule is discharged, however, there shall be no order as to costs. The order of stay granted at the time of issuance of the Rule is hereby vacated.

50. The writ petitioner shall be at liberty to appear before the notice issuing Settlement Authority, namely respondent no. 5, within 30 (thirty) days from the date of receipt of this judgment and order.

51. Office is directed to send an advance copy of this judgment and order to respondent nos. 3 and 8. If the writ petitioner appears before respondent no. 5 within 30 (thirty) days from the date of receipt of this judgment following this judgment and order, the latter shall dispose of the matter under the impugned notice dated 28.10.2009 within 7 (seven) days from the date of the writ petitioner's appearance before him.

52. Office is further directed to send a copy to (i) the Bangladesh Law Commission, (ii) Secretary, Ministry of the Land and (iii) the Director General of the Settlement Department to let them peruse and consider the observations made hereinbefore concerning deletion of the provisions of Rule 42A of the Tenancy Rules, 1955 or, in the alternative, incorporation of the appropriate provisions in Rule 42A of the Tenancy Rules, 1955 to prevent its colourable exercise.

7 SCOB [2016] HCD 148

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 14059 OF 2012

Asoke Das Gupta
-------Petitioner.

Versus

Ministry of Finance and others
---------Respondents.

Ms. Nazmus Saliheen, Advocate,
------- For the Petitioner.

Mr. Saikat Basu, A.A.G.
----For the Respondents

Heard on: The 20.11.2013, 14.11.2013
And Judgment on 25.11. 2013.

Present:
Justice A.F.M Abdur Rahman
And
Justice Kashefa Hussain

Gift Tax Act, 1990
Section 4(ja)
And
Income Tax Ordinance, 1984
Section 53M:
The intention of the legislators when the Gift Tax Act, 1990 was enacted was to exempt certain persons from tax if the gift was made to the persons stated in Section 4(ja) of the Gift Tax Act, 1990. Moreover, we have also found that the impugned Section 53M of ITO was only inserted in the Finance Act 2010, while the Gift Tax Act, which was enacted in 1990, is an earlier law and is still very much a provision of law, since no amendment or changes to the law have been brought to till present. Therefore the provisions the Gift Tax Act, 1990 shall prevail over any insertion that might have been brought into the ITO 1984 and there can be no room for any presumptions or assumptions that tax must be paid by all in case of any gift which might be made to any person irrespective of his or her relationship with the donee of the gift and to presume such a thing is a serious misinterpretation of the law and is a misinterpretation of the intention of the legislators and shall result in serious miscarriage of justice. ... (Para-15)

Income Tax Ordinance, 1984
Section 48(2):
There cannot be any doubt left that tax may be imposed only on 'income'.
... (Para-21)

Income can arise out of a transferor of any capital asset only if any profit or gain has accrued to the transferor of the asset. And therefore it is only logical to conclude that if no "profit" or 'gain' has accrued to the transferor there can be no "income" and if there is no "income" there can be no question of the transferor being subject to tax.
... (Para-23)

Income Tax Ordinance, 1984
Section 53M Explanation 1:
This section in our opinion is against the whole spirit of the Ordinance. Because none of the terms mentioned here including gift are transfers for consideration and none of these modes of transfer contemplate income of any kind, in whatever form on the part of the transferor. The transferor or donor in performing his act of transfer does not receive anything in return and therefore these modes of transfer being transfers by way of gift, bequest etc. can under no circumstances be the source of "income" of any kind.
... (Para- 27)

Gift Tax Act, 1990
Section 4
And
Income Tax Ordinance, 1984
Section 53M:
Section 53M Explanation 1 is contrary to the rest of the provisions of the ITO, 1984, being against the sprit and intent of the Ordinance and also contrary to the Section 4 of Gift Tax Act, 1990. Therefore the impugned collection of advance tax against transfer of shares to the daughter of the petitioner is unlawful and without lawful authority.
... (Para-29)

Judgment

Kashefa Hussain, J:

1. This Rule Nisi was issued calling upon the respondents to show cause as to why Section 53M of the Income Tax Ordinance, 1984 (hereinafter called ITO 1984) shall not be declared contrary to section 4(ja) of the Gift Tax Act, 1990 and shall have no legal effect and (B) why the collection of advance tax of Tk.63,69,350 against transfer of 51,30,000 shares of One Bank Limited of Tk.10 each to the petitioner's daughter shall not be declared without lawful authority and shall be refunded against the petitioner's TIN number 142-100-0038 and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The facts in short relevant for the purpose of the case are that the petitioner Mr. Asoke Das Gupta being Hindu by religion is a reputed businessman and regular income tax payee holding Tin Number 142-100-0038 and is a sponsor shareholder and Vice-Chairman of One Bank Limited, a Public Limited Company listed with the Stock Exchange. The Respondent No.1 is the Ministry of Finance, Represented by its Secretary, the Respondent No.2 is the Chairman, the National Board of Revenue. The Respondent No.3 is the Member (Income Tax), National Board of Revenue, the Respondent No.4 is the First Secretary, Income Tax Regulation and Budget, National Board of Revenue, the Respondent No.5 is the 2nd Secretary, Income Tax Regulation and Budget, National Board of Revenue. The Respondent No.6 is the Commissioner of Tax, Large Taxpayer Unit (LTU). The Respondent No.7 is the Deputy Commissioner of Tax, (LTU) and they are engaged in the collection of National Revenue and monitoring and the Respondent No.8 is the Dhaka Stock Exchange hereafter called DSE, represented by its Chief Executive Officer (CEO) and is engaged in monitoring stock trading and collection of tax arising out of the stock trading.

3. The petitioner being a sponsor shareholder and Vice-Chairman of One Bank Limited, a listed company listed with the Respondent No.8, Dhaka Stock Exchange. The petitioner holding TIN No.142-100-0038/LTU/Dhaka is a sponsor shareholder and Vice-Chairman of

One Bank Limited. The petitioner gifted and thereupon transferred 51,30,000 shares of One Bank Limited of Taka 10 each to his daughter Anannya Das Gupta by way of gift out of his own shares. Since the process of transfer is carried out through off market settlement it requires prior approval from the Respondent No.8 Dhaka Stock Exchange (hereinafter called DSE). Therefore the petitioner applied to the Respondent No.8 to approve the transfer and further advised to pay an advance income tax as per Section 53M of the Income Tax Ordinance, 1984. The petitioner acting upon such advice deposited an Advance Income Tax at (AIT) of an amount of Tk.63,69,350 through three pay orders to the Respondent No.8 DSE on 09.05.2012, 15.05.2012 and 21.05.2012 respectively.

4. The petitioner asserted in the Writ Petition that he has not derived any income out of this transfer by way of gift to his daughter and the petitioner alleges that section 53M of the Ordinance is contrary to Section 4(ja) of the Gift Tax Act, 1990 and he also states that in the Demanded of Justice Notice to the respondent he claimed refund of Tk.63,69,350 from the respondents, but he has still got no response against that notice. The petitioner in his application states that he is aggrieved by such contrary provision of section 53M of the Ordinance, which empowers the Respondent No.8 to collect advance income tax against the transfer of shares by the sponsor shareholder by way of gift. The petitioner also states that Section 53M of the Ordinance is contrary to Section 4(ja) of the Act and shall have no legal effect. He states that Section 4(ja) of Gift Tax Act clearly makes any transfer to wife, son, daughter, father, mother, original sister and brother by way of gift tax free and therefore this provision shall be applicable for every transfer by way of gift. The petitioner states that since Section 4(ja) of Gift Tax Act, 1990 is the governing law for tax against gift, consequently Section 53M of the Ordinance being contrary to Section 4(ja) of the Act of 1990 shall have no legal effect. He also states that the Gift Tax Act being the governing law for gift tax therefore the Income Tax Ordinance shall not be applicable for any transfer by way of gift.

5. That notice of the writ petition filed by the petitioner was duly served upon the Respondent pursuant to which the learned Deputy Attorney General Mr. Rashed Jhangir along with Mr. Saikat Basu representing the respondents filed Affidavit-in-Opposition on the Respondent's behalf. In the affidavit-in-opposition it is stated inter alia, that there is no ambiguity in Section 53M of the Income Tax Ordinance, 1984 and the said Section 53M clearly states that tax shall be collected at the rate of 5% if and when a sponsor shareholder transfers securities. In the Respondents in the Affidavit-in-opposition refers to the explanation given in Section 53M ITO, 1984 which reads thus;

> " Collection of tax from transfer of securities or mutual fund units by sponsor shareholders of a company etc.-
>
> The Securities and Exchange Commission or Stock Exchange, as the case may be, at the time of transfer or declaration of transfer or according consent to transfer of securities or mutual fund units of a sponsor shareholder or director or placement holder of a company or sponsor or placement holder of a mutual fund listed with a Stock Exchange shall collect tax at the rate of five per cent on the difference between transfer value and cost of acquisition of the securities or mutual fund units.
>
> Explanation. – For the purpose of this section ---
>
> (1) 'transfer' includes transfer under a gift, bequest, will or an irrevocable trust;

> (2) 'transfer value' of a security or a mutual fund unit shall be deemed to be the closing price of securities or mutual fund units prevailing on the day of consent accorded by the Securities and Exchange Commission or the Stock Exchange, as the case may be, or where such securities or mutual fund units were not traded on the day such consent was accorded, the closing price of the day when such securities or mutual fund units were last traded. "

6. The Respondents in their Affidavit-in-opposition on this explanation given in Section 53M and upon such reliance go onto state that the transfer is taxable at source by the designated authority. That it is stated in the Affidavit-in-opposition that the petitioner may be correct in so far that a gift from a father to a daughter is exempt under Section 4(ja) of the Gift Tax Act, 1990. However the respondents further persuade that this exemption under Section 4(ja) of Gift Tax Act, 1990 that this does not automatically exclude the transfer from the imposition of Income Tax under the ITO, 1984. The Respondents also state that exemption under Section 4(ja) of the Gift Tax Act, 1990 is irrelevant and immaterial for the purpose of income tax where transfer by way of gift entails the imposition of Income Tax according to the provisions of Section 53M of the Income Tax Ordinance, 1984 and the Respondent further insist that this being the law of the land should be abided by all citizens.

7. Ms. M. Nazmus Saliheen the learned Advocate appeared on behalf of the petitioner while Mr. Shaikat Basu, the learned Assistant Attorney General appeared on behalf of the Respondents resist the Rule.

8. M. Nazmus Saliheen, the Learned Advocate appearing on behalf of the petitioner took us through the impugned order inter alia, other documents/papers and materials available on record. She argued that Section 53M of the Income Tax Ordinance is contrary to Section 4(ja) of the Gift Tax Act, 1990 and therefore the two Sections are in conflict and contrary to each other. She argued that the said Section 4(ja) of Gift Tax Act, 1990 is the governing law for any transfer by way of gift and the said Section clearly exempts any transfer to wife, son, daughter, father, mother, original sister and brother from the provision of tax and therefore Section 53M of the Ordinance being contrary to Section 4(ja) of the Gift Tax Act, 1990 shall have no legal effect and bears no relevance in the petitioner's case. She also draws our attention to Section 48(2) of the Ordinance which reads as under:-

> " Any sum deducted or collected, or paid by way of advance payment, in accordance of this chapter, shall, for the purpose of computing the income of an assessee, be deemed to be the income received and be treated as payment of tax in due time, by the assessee "

9. The learned Advocate by inferring to this particular section argues that from a plain reading of the above Section, it is clear that any sum that may be deducted or collected by way of advance payment shall be only collected for the purpose of computing " income " of any assessee and do not make provision for computing anything else otherwise than income and to only those payments may shall treated as tax. The learned Advocate persuaded that Chapter VII of the Ordinance therefore, makes provision only to compute the income of the assessee for an assessment year. In the instant case she argues that the petitioner by transferring the shares to his daughter by way of gift did not earn anything, rather on the contrary he reduced his assets up to the gifted amount. Therefore, since no income was at all derived from the instant transfer there can be no question of calculating any tax arising out of such gift. She also submits that the action of the respondents in imposing tax upon a gift

which he has made to his daughter is violative of the petitioner's fundamental rights conferred to him under Articles 27 and 31 of the Constitution of Bangladesh.

10. Mr. Saikat Basu, the learned Assistant Attorney General appearing on behalf of the respondents makes his arguments that though it is correct that the gift from a father to a daughter is exempt from Gift Tax under the provision of section 4(ja) of the Gift Act, 1990, however this does not automatically exclude this transfer from the imposition of Income Tax under the Income Tax Ordinance, 1991. He also submits that the provision for exemption under Section 4(ja) of Gift Act, 1990 is irrelevant and immaterial for the purpose of income tax where transfer by way of gift of securities invites the imposition of Income Tax according to Section 53M of the Income Tax Ordinance, 1984.

11. We have heard the learned Advocates of both sides and perused the documents and other materials available on record. We have also read the impugned section, that is Section 53M of the ITO, 1984 and Section 4(ja) of Gift Tax Act, 1990. Section 4(ja) of Gift Tax Act, 1990 reads as under -

> "dj¡l¡-৪ঃ কতিপয় দানের ক্ষেত্রে অব্যাহিত।- 1) ‡ejAvZa ক্ষেত্রসমূহে কোন ব্যক্তির কৃত দানের উপর এই আইনের অধীনে কোন দানকর আরোপযোগ্য হইবে না , যথা-
> (জ) দান যদি পুত্র, কন্যা, পিতা, মাতা, স্বামী, সহোদর ভাই অথবা সহোদর বোনকে করা হয়।"

12. The petitioner has impugned the whole of Section 53M of the ITO as being contrary to Section 4(ja) of ITO, 1984. But upon a close scrutiny of the relevant section we find that explanation I of Section 53M is actually the relevant portion which requires our attention. Section 53M of the ITO is itself relatively a new provision of the statute since it was only inserted in the Ordinance by Finance Act, 2010, whereas Section (4(ja) of Gift Tax Act, 1990 was brought in to force in 1990 and is a settled provision of law since then. From this we come to understand that before the insertion of Section 53M for our purposes Section 53M explanation (1) the question of paying tax for making a gift to certain persons, those exempted under Section 4(ja) of Gift Tax Act, 1990 shall be the governing law.

13. From a plain reading of Section 53M of the Ordinance it follows that the whole of Section 53M is not contrary to Section 4(ja) of Gift Tax Act, 1990. The rationale behind this view of ours is that the first portion of the impugned Section and likewise explanation (2) of the said section is not in conflict with Section 4(ja) of Gift Tax Act, 1990. We hold this view because upon scanning the whole section we have been able to distinguish that save for explanation (1), the rest of Section 53M do not come into conflict with Section 4(ja) of Gift Tax Act. The rest of other parts of Section 53M refers to transfer, but does not mention the type or kind of transfer. Transfer can be of different modes it may be by way of sale, mortgage or any transfer for consideration and we have no conflict with those modes of transfers. With regard to that we can say that the other portions of Section 53M are a little vague in that if does not explain the mode of transfer. But since it does not directly mention the term "Gift" or bring it within its purview we can leave if at that. But Section 53 Explanation 1 directly brings 'gift' within the scope of income tax.

14. Section 53M Explanation 1 reads

> Explanation. – For the purpose of this section ---
> (1) 'transfer' includes transfer under a gift, bequest, will or an irrevocable trust;

15. Now, for our purposes we cannot accept this provision as a part of law. In the first place, this provision is in direct conflict with Section 4(ja) of Gift Tax Act, 1990. Section

4(ja) of Gift Tax Act, 1990 unequivocally states that son, daughter, father, mother, husband or sister shall be exempted from the tax by way of gift. The provisions of Gift Tax Act, 1990 shall prevail over the provisions ITO, 1984 so far as any transfer by way of 'Gifts' are concerned since the Gift Tax Act, 1990 was particularly enacted by the legislators for the purpose of gift. We can therefore understand from the unambiguous language used therein, that the intention of the legislators when the Gift Tax Act, 1990 was enacted was to exempt certain persons from tax if the gift was made to the persons stated mentioned in Section 4(ja) of the Gift Tax Act, 1990. Moreover, we have also found that the impugned Section 53M of ITO was only inserted in the Finance Act 2010, while the Gift Tax Act, which was enacted in 1990, is an earlier law and is still very much a provision of law, since no amendment or changes to the law have been brought to till present. Therefore the provisions the Gift Tax Act, 1990 shall prevail over any insertion that might have been brought into the ITO 1984 and there can be no room for any presumptions or assumptions that tax must be paid by all in case of any gift which might be made to any person irrespective of his or her relationship with the donee of the gift and to presume such a thing is a serious misinterpretation of the law and is a misinterpretation of the intention of the legislators and shall result in serious miscarriage of justice.

16. Upon a close reading of the Income Tax Ordinance and especially Section 48(2) of the Ordinance, we are in agreement with the petitioner in that, Section 53M(1) actually is in conflict with the scheme and object of the Ordinance. The Ordinance is Income Tax Ordinance. Let us draw our attention to the word 'Income'. The word 'Income' comes across us all through the Ordinance particularly for the purposes of tax. We have tried to detect and interpret the meaning of Income which is very much relevant for our purposes. Income in the Oxford Dictionary is defined as "money received, especially or a regular basis for work or through investments".

17. Macmillan's Dictionary defines income thus:-
"money that someone gets from working or form investing money".

18. From the above we can assume that the term income must presuppose a consideration and does contemplate a consideration received by the person receiving the income in whatever form it may be.

19. Now let us closely read Chapter VII Section 48(2) of the ITO 1984 to which the petitioner had drawn our attention to and which we have inserted above. Section 48(2) of the Ordinance provides an overall explanation as to the source of collectability or deductibility of taxes. We have already quoted Section 48(2) of ITO, 1984 elsewhere in this judgment.

20. The words used in Section 48(2) as we have seen are quite unambiguous and leaves no scope for any presumptions on our part. The said section clearly sets out the intention of the Ordinance that any sum that may be deducted; or 'collected' shall be only for the purpose of computing the 'income' of the assessee and only those shall be treated as payment of tax. Therefore from the language of Section 48(2) it is crystal clear that tax has been contemplated in the scheme of the Ordinance only as far as 'income' is concerned. We earlier defined income in the meaning of referring to some dictionaries and which we do not feel necessary to repeat. The mode of income however may be of different varieties and genres. But an "income" has to be received to fall under the provisions of the Ordinance and thereupon be subject to be tax.

21. Section 48(2) gives an overall explanation as to the source of collectability or deductibility of taxes and that source we repeat is 'income'. Therefore upon reading the different Heads under chapter VII and the rest of the provision there cannot be any doubt left that tax may be imposed only on 'income'; whatever head it might come under is however a different question and which have been quite exhaustively been dealt with in different provisions of chapter VII.

22. The petitioner has also cited a case in her support being the case of Commissioner of Taxes -Vs- Ahsanul Haque reported in 60 DLR (HCD) 2008 where in para 12 of the Judgment 'income' has been defined as :-

> " Any profits and/or gains that accrue from transfer of a capital asset shall be deemed to be income and classified and computed under the head, " Capital gains " under section 20 of the Ordinance."

23. This view also comes to aid and support of our assertion that income can arise out of a transferor of any capital asset only if any profit or gain has accrued to the transferor of the asset. And therefore it is only logical to conclude that if no "profit" or 'gain' has accrued to the transferor there can be no "income" and if there is no "income" there can be no question of the transferor being subject to tax.

24. Now let us try to ascertain the meaning of the word "gift". According to Oxford Dictionary 'gift' means "a thing given willingly to someone without payment" Accordingly to Macmillan's Dictionary, gift means 'some thing that you give to someone as a present'. Therefore, it cannot be more clear and unambiguous that the word 'gift' does not entail or presuppose any consideration of any kind and therefore a gift is a transfer without any consideration received. Gift is a transfer belonging to a different genre and a gift is not given in exchange for anything and therefore the question of income here is irrelevant and the two words 'Income' and "Gift" read along with their respective meanings cannot be connected or brought together.

25. Transfer of any property, object or anything else can be of different kinds for example, transfer can be by way of sale, lease etc. which are transfers for consideration as opposed to gift which is without any consideration.

26. Section 53M Explanation 1 reads :-

> "'transfer' includes transfer under a gift, bequest, will or an irrevocable trust."

27. This section in our opinion is against the whole spirit of the Ordinance. Because none of the terms mentioned here including gift are transfers for consideration and none of these modes of transfer contemplate income of any kind, in whatever form on the part of the transferor. The transferor or donor in performing his act of transfer does not receive anything in return and therefore these modes of transfer being transfers by way of gift, bequest etc. can under no circumstances be the source of "income" of any kind.

28. Upon a reading and comparison of the two sections i.e. section 53M of ITO, 1984 and the Gift Tax Act, 1990, it is our view that for the purpose of the case we are addressing, at present, only the Explanation 1 of Section 53M of ITO, 1984 which was inserted through Finance Act, 2010 is contrary to Section 4(ja) of the Gift Tax Act, 1990 and actually Section 53M Explanation 1 is also in conflict with the rest of the Income Tax Ordinance and particularly Section 48(2) of the Ordinance. The Respondents seem to have failed to

understand that for the purpose of gift the Gift Tax Act, 1990 is the governing law and not the ITO, 1984. The ITO 1984 is out side the purview of any sort of "gift" since tax as we emphasized above may be imposed only upon income as envisaged in Section 48(2) of the Ordinance. However, after reading the entire Section 53M of the Ordinance we disagree with the petitioners in so far as that she has alleged that the entire Section 53M is contrary to the Gift Tax Act, 1990. Our finding is that Section 53M Explanation 1 is only contrary to the Gift Tax Act, 1990 and the said Explanation 1 of Section 53M is also in conflict with the other provisions of the ITO, 1984 inter alia Section 48(2) of the Ordinance. However we are not concerned with the rest of the Section 53M which is not in conflict in our case since they do not contain or contemplate any provision relating to transfer by way of 'gift'.

29. The ratio decidendi of this case is that Section 53M Explanation 1 is contrary to the rest of the provisions of the ITO, 1984, being against the sprit and intent of the Ordinance and also contrary to the Section 4 of Gift Tax Act, 1990. Therefore the impugned collection of advance tax against transfer of shares to the daughter of the petitioner is unlawful and without lawful authority.

30. Under the foregoing facts and circumstances and upon consideration of all the laws and considering the materials placed before us we find merit in the Rule.

31. In the Result, the Rule is made absolute in modified form and therefore Section 53M Explanation (1) of the Income Tax Ordinance, 1984 is declared contrary to Section 4(ja) of the Gift Tax Act, 1990 and is also declared contrary to provisions of Income Tax Ordinance, 1984 and the collection of advance tax of Tk.63,69,350 against transfer of 51,30,000 shares of One Bank Limited of Tk.10 each to the petitioner's daughter is hereby declared without lawful authority and the Respondents are directed to refund the advance tax paid by the petitioner against the petitioner's TIN number 142-100-0038.

32. However, there shall be no order as to costs.

7 SCOB [2016] HCD 156

HIGH COURT DIVISION

(Civil Appellate Jurisdiction)

FIRST APPEAL No. 312 of 1996.

Sonali Bank, Islampur Brahch, Jamalpur
……..Appellant

Versus

Md. Abu Baker Sarker
……Respondent

Mr. Mohammad Ali, Advocate
……For the appellant

No one appears
……For the respondent.

Judgment: on 31.05.2015.

Present:
Mr. Justice Muhammad Abdul Hafiz
And
Mr. Justice S.M. Mozibur Rahman

Artha Rin Adalat Ain, 2003
Section 50:
The court has no power to exempt the defendant respondent from the liability of paying up interest however high rate it may be ... since the financial institution bank itself preserves the exclusive right to exempt any-body from payment of interest of loan they sanctioned. ... (Para 12)

Judgment

S.M. Mozibur Rahman, J:

1. This Appeal is directed against the judgment and decree dated 29.02.1996 passed by the learned Judge of Artha Rin Adalat, Jamalpur in Mortgage Title Suit No. 4 of 1993.

2. The plaintiff's case, in short, is that the appellant Sonali Bank, Islampur Branch, Jamalpur instituted mortgage Title Suit No. 04 of 1993 before the Artha Rin Adalat Jamalpur praying for realization of Tk. 1,84,697/15 against the defendant respondent who was a Cloth Traders of Islampur Bazar, Jamalpur. For the purpose of smooth running of his business, defendant respondent took loan of Tk. 70,000/- (Seventy thousand) from the plaintiff appellant Sonali Bank Islampur Branch, Jamalpur at the rate of 20% interest up to the period of 20.07.1993. Since the defendant respondent did not pay up the loan money with interest at the specified rate plaintiff appellant instituted the original mortgage suit for realization of Tk. 1,84,697/15 up to the period of 20.07.1993.

3. The defendant contested the suit by filing a written statement and contended inter alia that the original suit is false, fabricated and barred by limitation. Generally denying the material allegations made in the content of the plaint the defendant stated as real facts that the manager of Sonali Bank, Islampur Branch, Jamalpur inspired him to take loan from his Bank

and being instincted with the advice of the Manager of the Bank, thinking the betterment of his running business defendant respondent took loan of Tk. 70,000/- by executing a deed of mortgage on condition that if the face amount is paid up along with interest thereof he will be free from all encumbrances incorporated in the deed of mortgage. Thereafter defendant paid-up the loan of Tk. 70,000/- along with interest thereof.

4. Subsequently, the then Bank manager, Sonali Bank, Islampur Branch allured the defendant respondent to take loan again and sanctioned Tk. 63,000/- as hypothecation loan infavour of the defendant in the year 1987. In this way while defendant was carrying out his cloth business smoothly next year in 1988 the whole area of the country was seriously affected by flood causing unlimited loss of lives and property over turning entire situation of the country in a vulnerable position. As a result, people over all the country suffered mount due to such terrible flood massively held in the year 1988 perishing wealth and properties of peoples of all sectors. Messrs Bilkis Cloth Store belonging to the defendant himself was also floated away due to the irresistible flow of flood water inundating different area of Jamalpur district in that year of 1988. A great number of people and properties perished in the flood of 1988 causing terrible havoc over all area of the country. So, the defendant respondent also became penniless losing everything of his cloth store and domestic house. Subsequently he brought the matter to the notice of the Bank authority who immediately one year before the flood of 1988, sanctioned hypothecated loan in his favour. Having come to learn about the loss of the defendant due to such natural calamity, the officers of the local bank inspected the affected area of the defendant and found his claim to be true and just. Yet without considering his financial inability they instituted a mortgage suit against the defendant for realization of Tk. 1,84,697/15 which is not possible to pay up by the defendant due to damage and misery which suddenly dwindled in to his life as a result of natural calamity like terrible flood of 1988. Accordingly, he prayed for exempting him from the liability of hypothecated loan sanctioned in his favour by the plaintiff appellant.

5. In view of the above pleadings the learned Trial Judge of Artha Rin Adalat framing the issues as usual concluded the trial of the suit and passed the impugned preliminary decree dated 29.02.1996 deducting from the face amount all interest payable by the defendant in case of the hypothecated loan.

6. Being aggrieved by and dissatisfied with the impugned preliminary decree dated 29.02.1996 passed by the learned Joint District Judge and Judge of the Artha Rin Adalat, Jamalpur, the plaintiff preferred this appeal amongst others on the main grounds that the learned Judge erred in law and facts in not giving any findings or observation for the payment of the interest which is the main source of income of the plaintiff appellant Bank who deals with the public deposit. The learned Judge of Artha Rin Adalat erred in law as well as in fact by discarding interest incurring pecuniary losses to the plaintiff-appellant for sum of Tk. 1,30,464/15 upto the period of 20.07.1993 and further interest @ 20% till realization of loan money which the plaintiff-appellant is entitled as per terms and condition of the sanctioned letter and other documents which were admittedly accepted by the defendant-respondent and hence the impugned preliminary decree is liable to be set aside. The learned Judge of Artha Rin Adalat most arbitrarily and without applying his judicial mind passed the judgment and decree for Tk. 54,233/- only instead of Tk. 1,84,697/15 and thus erred in law and fact and as such the judgment and the decree are liable to be set aside. The learned Judge of the Artha Rin Adalat below erred in law and facts in allowing most arbitrarily allowed 6(six) installments giving total period of 1(one) year time without ascertaining the actual insolvency of the defendant-respondent for payment of the decreetal amount of Tk. 54233/- only

without adding any interest over face amount. The learned Judge of Artha Rin Adalat erred in law and facts in not giving importance in the prayer portion of the plaint of the plaintiff-appellant and for which the appellant has been deprived from substantial amount of interest for the period of pendentelite without making any findings and hence the impugned judgment and decree being bad in law is liable to be set aside. The learned Judge of Artha Rin Adalat below erred in law in not believing the statement of accounts produced from the custody of the Bank as per section 4 of the Banker's Books of Evidence Act. The learned Judge of Artha Rin Adalat by not giving any findings about the interest as lawfully claimed by the appellant as per terms and conditions of the sanctioned letter and the documents of the plaintiff bank thereby committed error in law and fact and hence the impugned judgment and decree are liable to be set aside.

7. In view of the above situations the only point needs to be decided in this civil appeal is whether the impugned judgment and preliminary decree of the original suit is tenable in law or not.

8. We have heard the learned lawyers for both sides. Mr. Mohammad Ali, the learned Advocate appearing on behalf of the plaintiff-appellant supporting the grounds of the memorandum of appeal submits that the learned Judge of Artha Rin Adalat erred in law as well as in fact to evaluate the effects of the documents submitted as Exhibits No. 1 to 10 at the time of deposition of the plaintiff's Bank which were admittedly executed by the defendant. He further submits that learned Judge of Artha Rin Adalat erred in law in wrongly interpreting the relevant section of the Banker's Books evidence Act (Act No. XVIII of 1891 not Act No. XXIII of 1891) in as much as the defendant-respondent admittedly prayed for renewal of loan on 02.03.1987 by Exhibit.4 and executed the letter of continuity dated 03.09.1987 by Exhibit. 1, Demand Promissory Note and Delivery Letter Exhibit 1(Ka), Revival Letters dated 02.09.1990 and 30.12.1992 Exhibit. 2 and 2 (Ka) and as such the impugned Judgment and order is liable to be set aside. He further submits that the deed of Mortgage has since been not redeemed by the defendant-respondent there was no illegality in the eye of law for renewal of the loan by executing a deed of continuity dated 03.09.1987 (Ext 10) which is the usual and normal practice for allowing and availing the loan when the stipulated period expires and hence the learned Judge thereby erred in law and fact and as such the impugned judgment and decree are liable to be set aside. The learned Judge of Artha Rin Adalat erred in law as well as in fact discarding all sorts of interest like previous, pendentelite and after decree till realization of loan money by giving importance to the deposition of the D/W-2 who is a bargader of the defendant-respondent and in the absence of any neutral or neighbouring witnesses presuming the washing away of shop's materials of the defendant respondent by flood of 1988 and hence the impugned judgment and preliminary decree are liable to be set aside. The learned court below erred in fact and in law in believing the alleged damages of the clothes of the defendant-respondent's business shop during flood of 1988 without ascertaining necessary report from the authority concerned though the flood affected major part of the country in the month of September, 1988 that is well after 15.08.1988 which was last date of adjustment and also by wrongly emphasizing Money Lender Act, 1933 and the reported case in 27 DLR page 1, 42 DLR page 107, 43 DLR page 27 and BCR 1985 page 376 in which cases interest were exempted considering extraordinary and special circumstances and not colourable circumstances and hence the impugned judgment and decree are liable to be set aside.

9. No one appears for the respondent.

10. In the light of the above arguments agitated by the learned Advocate for the appellant we have examined the impugned judgment and preliminary decree passed by the learned Judge of the Artha Rin Adalat, Jamalpur and found that the original suit was decreed in preliminary form for the amount of Tk. 54,233/- only deducting Tk. 8767/- deposited by the defendant from the face amount of Tk. 63,000/- excluding the total interest claimed by the plaintiff. It has been submitted by the learned Advocate for the appellant that as per provision of the Artha Rin Adalat Ain, 2003 learned Judge has no power to exempt anybody from paying up interest of loan taken by any person from any bank or financial institution. In this regard he referred section 50 of the Artha Rin Adalat Ain, 2003 which runs as follows:-

d¡l¡-50

(1) ধারা ৪৭ এর বিধান সাপেক্ষে, এই আইনের অধীন কোন আদালত, ঋণ প্রদানের দিবস হইতে মামলা দায়েরের দিবস পর্যন্ত সময়কালে কোন ঋণের উপর আর্থিক প্রতিষ্ঠান কর্তৃক আইনানুগভাবে ধার্যকৃত সুদ, বা ক্ষেত্রমত, মুনাফা বা ভাড়া হ্রাস, মাফ বা নামঞ্জুর করিতে পারিবে না।

(২) অর্থ ঋণ আদালত কর্তৃক প্রদত্ত ডিক্রীর বিরুদ্ধে বিবাদী-দায়িক পক্ষ কোন আপীল, রিভিশন, আপীল বিভাগে আপীল বা অন্য কোনরুপ দরখাস্ত কোন উচ্চতর আদালতে দায়ের না করিলে, মামলা দায়েরের দিবস হইতে ডিক্রীর টাকা আদায় হইবার দিবস পর্যন্ত সময়ের জন্য ডিক্রীকৃত টাকার উপর ৮% (আট শতাংশ) বার্ষিক সরল হারে, কোন আপীল, রিভিশন বা অন্য কোন দরখাসৈ কোন উচ্চতর আদালতে দায়ের করিলে পূর্বোক্ত সময়কালের জন্য ১২% (বারো শতাংশ) বার্ষিক সরল হারে এবং আপীল বা উচ্চতর আদালতের ডিক্রী বা আদেশের বিরুদ্ধে আপীল বিভাগে আপীল করিলে, পূর্বোক্ত সময়কালের জন্য ১৮% (আঠার শতাংশ) বার্ষিক সরল হারে, উপ-d¡l¡ (৩) এর বিধান সাপেক্ষে, সুদ, বা, ক্ষেত্রমত, মুনাফা আরোপিত হইবে।

(3) Ef-ধারা (২) এর বিধান সত্ত্বেও উচ্চতর আদলত আপীল, রিভিশন, আপীল বিভাগে আপীল বা অন্য কোন দরখাস্তে আপীলকৃত বা বিতর্কিত ডিক্রি বা আদেশের গুণগত পরিবর্তন করিয়া কোন আদেশ বা ডিক্রী প্রদান করিলে, উক্ত আদালত, উপরি-উল্লিখিত সংশ্লিষ্ট বর্ধিত সুদ বা মুনাফার হার আপীল বা দরখাস্ত কারীর ক্ষেত্রে প্রযোজ্য হইবে না মর্মে আদেশ প্রদান করিতে পারিবে।

11. So, we find substance in the argument of the learned Advocate for the appellant that learned Judge of the Artha Rin Adalat without applying his judicial mind passed the impugned Judgment and preliminary decree for Tk. 55,233/- only instead of Tk. 1,84,697/15 exempting stipulated rate of interest causing financial loss to the plaintiff appellant for sum of Tk. 1,29464/15 up to the period of 20.07.1993.

12. On perusal of the documents which were admitted in to evidence and marked as Exhibit No. 1-10 and the deposition of D.W. 1 Md. Abu Bakker, it appears that he took loan of Tk. 63,000/- from the appellant bank in the year of 1987 which has been increased up to Taka 1,84697/15 due to the inclusion of prescribed rate of interest per annum. This large quantity of amount is too high to pay up for him as he has become very much insolvent having been seriously affected by massive natural calamity like unprecedented flood situation happened over all the country in the year 1988. So it is seen that the defendant respondent is not denying the face amount of loan money he took from the appellant bank authority but having been seriously affected by the natural calamity like the terrible flood of 1988, he has lost his capacity to refund the loan money including the highest rate of interest fixed by the bank authority. He has stated in his deposition as D.W. 1 that if he is given a chance of paying up only the face amount he would try to return back the amount due to him. As a result it is clearly seen that owing to the high rate of interest over the face amount of Tk. 63000/- the total figure of loan money has been stood at Tk. 1,84,697/15. However since the court has no power to exempt the defendant respondent from the liability of paying up interest however high rate it may be and since the financial institution bank itself preserves the exclusive right to exempt any-body from payment of interest of loan they sanctioned, we think it would be just and proper if we leave it to the bank authority for the purpose of mitigating the matter by taking lenient view in respect of exempting their rate of interest

incurred upon the defendant considering the defendant's insolvency as victim of natural calamity like unprecedented flood of 1988 when a great number of people's wealth and properties were demolished causing terrible havoc over all area of the country.

13. In view of the discussion made above we are of the view that the impugned judgment and preliminary decree passed by the learned Judge of the Artha Rin Adalat is liable to be set-aside.

14. In the result, the appeal is allowed without any order as to cost. The impugned judgment and preliminary decree dated 29.02.1996 passed by the learned Judge of Artha Rin Adalat, Jamalpur in Mortgage Suit No. 4 of 1993 is hereby set-aside. The original Mortgage Suit be decreed in preliminary form. The plaintiff appellant is entitled to recover an amount of Tk. 1,84,697/15 up to the period of 20.07.1993 from the defendant respondent No. 1. The defendant respondent is directed to pay up the decreetal amount as early as possible if he fails to persuade the bank authority about exemption from interest wholly or in part as per observation made in the body of this judgment. Otherwise the appellant plaintiff Bank will take appropriate step to realize the loan money payable by the defendant respondent by initiating execution case as per law.

15. Send down the L. C. Record along with a copy of this Judgment to the Court concerned at once for information and necessary steps.

7 SCOB [2016] HCD 161

High Court Division
(Criminal Appellate Jurisdiction)

Jail Appeal No. 116 of 2011

Afangir @ Kalu.....Convict-Appellant

-Versus-

The State.....Respondent

Mr. Md. Sanower Hossain, Panel Advocate
…For the Appellant
Mr. Md. Harun-Ar-Rashid, D.A.G. with
Mr. Shah Md. Abdul Hatem, A.A.G
Mr. M.A. Kamrul Hasan Khan Aslam, A.A.G
…For the State-Respondent

Heard on : 02.08.2016 & 04.08.2016
Judgment on : 09.08.2016

Present
Justice A.K.M. Abdul Hakim
And
Justice Md. Farid Ahmed Shibli

Explosive Substance Act, 1908
Section 4/6:
Mere knowledge of an accused or his equivocal disclosure about existence of bomb-making powders during his police custody shall not expose him to any criminal liability of possessing or controlling that illegal substance. ... (Para 24)

Judgment

Md. Farid Ahmed Shibli, J.

1. This Jail Appeal, at the instance of the Convict-Appellant Afangir @ Kalu, is directed against the Judgment and order of conviction dated 28.03.2011 passed by learned Judge of Special Tribunal No.4, who is also the Joint Session Judge, Jhenaidah, in Special Tribunal Case no. 47 of 2006 arising out of Jhenaidah Police Station Case no. 14 dated 14.05.2006 corresponding to G.R. Case no. 119 of 2006 sentencing the convict-appellant to suffer rigorous imprisonment for 7 years under section 4/6 of the Explosive Substance Act, 1908 (shortly "the Act").

2. Case of the prosecution in a nutshell is as follows: On 14.05.2006 acting on a tip-off P.W.1 S.I. Sikder Matiar Rahman i.e. the informant flanked by his companion force arrested the convict-appellant Afangir @ Kalu (shortly "Afangir") in front of Amtala Cadet College at Jhinukmala Abasan Project, Charkhajura under P.S. Jhenaidah in connection with P.S. Case no. 05 dated 04.03.2006. During interrogation in the police custody, Afangir expressed his identity as a member of "the Purba Bangla Communist Party" and disclosed existence of some packets of bomb-making powders, books, leaflets, etc. of the Communist Party (i.e. the *alamats* of this case) at the house of co-accused Karim @ Bijoy situated at Charkhajura area. On the basis of such information the police squad headed by P.W.1 took Afangir with them and raided the house of Karim@Bijoy located at House no. 8, Barack no. 13 of the Charkhjura area. It is alleged that at the showing of accused Afangir the police recovered a huge quantity of bomb-making powders and other *alamats*. In presence of some local

witnesses, P.W.1 recovered those incriminating materials and seized them preparing a seizure-list (Ext.2) to that effect. Subsequently, figuring himself as the informant P.W.1 lodged the Ejahar (Ext.1) with Jhenaidah Police Station, where it was registered as P.S Case no. 14 dated 14.05.2006.

3. Being entrusted with the responsibility P.W.16 S.I. Abul Kashem conducted investigation of the case visiting the place of occurrence, preparing sketch-map, index etc. and recording the statements of witnesses under section 161 of the Code of Criminal Procedure. P.W.16 i.e. the Investigating Officer (I.O.) obtained the opinion from an expert of the Bangladesh Army regarding the *alamats* seized and on analysis of all evidence procured finding prima-facie truth in the allegations submitted the charge-sheet having no. 125 dated 31.07.2006 against the accused Afangir and others under section 4/6 of the Act.

4. On receipt of the record learned Senior Special Tribunal of Jhenaidah took cognizance of the offence, framed charge under section 4/6 of the Act against Afangir and 8 others and finally transferred the record to Special Tribunal No. 4 for trial and disposal. Learned Judge of the Tribunal has recorded testimony of 19 (nineteen) witnesses and exhibited relevant documents with incriminating materials of the case. On conclusion of the trial, the Tribunal found the accused Afangir guilty of the charge under section 4/6 of the Act and sentenced him thereunder to suffer rigorous imprisonment for 7 (seven) years. It is noted that during trial 2 co-accused persons namely- A. Rashid @ Dada Tapan and Karim @ Bijoy died and for that reason the Tribunal could not award any sentence against them.

5. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction accused Afangir has preferred this Jail Appeal contending inter alia that he had no involvement with the alleged occurrence of possessing any bomb-making powders or *alamats* rather because of some village feud he has been implicated falsely. It is claimed in the petition of Jail Appeal that the convict-appellant Afangir is a poor Rickshaw-puller having no such financial ability to defend or represent him in this case and due to long absence his family members have been starving and passing their days in untold sufferings.

6. Out of the charge-sheet named 22 witnesses, the prosecution has produced only 19 witnesses. Let us now discuss identity and status of those witnesses. P.W.1 S.I. Sikder Matiar Rahman is the informant of the case, P.W.11 Constable Hironmoy Chanda Roy, P.W.12 Constable Md. Masudul Haque, P.W.14 S.I Md. Ataur Rahman, P.W.15 Constable Tariqul Islam, P.W.17 S.I Faruque Hossain are the members of raiding party. Other witnesses namely- P.W.2 Abul Kalam Biswas, P.W.4 Md. Monwar Hossain and P.W.13 Haran Ali are public seizure-list witnesses. Amongst others P.W.3 Abul Kashem Munshi, P.W.5 Moinuddin Biswas, P.W.6 Most. Saleha, P.W.7 Md. Rezaul Islam, P.W.8 Rahima Begum, P.W.9 Israil Hossain and P.W.10 Parimol chakraborti are the charge-sheet named local witnesses.

7. Remaining witnesses namely- P.W.18 P.S.I Molla Khalid Hossain is the F.I.R-recording officer and P.W.16 S.I. Abul Kashem is the Investigating Officer. P.W.19 S.I Abul Bashar verified the address and character of accused Afangir on the basis of an inquiry slip.

8. Out of the above named witnesses the following witnesses namely- P.W.6, P.W.8, P.W.10, P.W.14 and P.W.15 were tendered by the prosecution and the defence declined to cross-examine them.

9. Learned Panel Advocate Mr. Md. Sanower Hossain appearing for the Convict-Appellant and learned Deputy Attorney-General Mr. Harun-Ar-Rashid appearing for the State have participated in hearing of this Jail Appeal. We have heard the learned Advocates above and perused the record along with all evidence and incriminating materials.

10. In course of hearing Mr. Sanwer Hossain contends that although the alleged quantity of bomb-making powders and other *alamats* of the case were not recovered from possession or control of Afangir i.e. the convict-appellant, but the Tribunal has failed to appreciate the evidence on record in true perspective and ultimately pronounced the impugned judgment and order of conviction against accused Afangir which seriously suffers from grave errors on both questions of fact and law.

11. Mr. Hossain contends that since the prosecution has failed to prove the charge against the accused Afangir beyond all shadow of doubt, it was thus incumbent for the Tribunal to record its decision acquitting Afangir.

12. In reply, learned Deputy Attorney-General Mr. Harun-Ar-Rashid representing the State retorts and submits that in the Tribunal the prosecution took all out efforts to prove the case producing adequate number of witnesses and adducing available incriminating materials and being convinced the Tribunal rightly convicted Afangir awarding a sentence of 7 years imprisonment and in doing that no kind of error as alleged has been occasioned.

13. We have given our anxious consideration to the submission as advance by the learned Advocates above and perused the record along with the evidence enclosed therewith. Crux of the problem to be resolved here is- whether the alleged quantity of bomb-making powders and *alamats* of the case were found in exclusive possession and effective control of the convict-appellant Afangir or not. In order to examine those points, let us have a peep to the relevant portion of the ejahar (Ext.1) and the statement made by Afangir under section 164 of the Cr.P.C.

14. In the ejahar, it is stated:- *"Kvjyv‡iv Rvbvq †h, K‡qKw`b c‡e cyj‡ki nv‡Z wgjb I †mv‡nj aŸ nIqvi c‡i weRq Zvnv‡K e‡j †h, Zvnvi evmvq `‡ji KZK¸wj wjd‡jU, eB, †evgv evbv‡bvi miÄvgw` A‡Q| H¸wj mivBqv Avmvgx cv‡fj, gwbK I iZb‡`i Kv‡Q †cŠQvBqv †`Iqvi Rb¨ ewjqwQj| wKš† m Zvnv †cŠQvBqv †`q bvB| Avmvgx Kvjyv †`Iqv Z_¨g‡Z ¯vbxq ¯v¶x‡`i Dcw¯Z‡Z ivÎ Abyôvb 01.00 Uvi mgq Avmvgx weRq @ Kwig Gi emZ N‡ii ivbvNi nB‡Z Avmvgx Avdv½xi I: Kvjyv‡Gi †`Lv‡bv I ewnni Kwiqv †`Iqv g‡Z Dc‡iv³ Avjvg Z D×vi Kwiqv Rã Zwjkv ˆZix ceK mv¶x‡`i mwn jBqv †ndvR‡Z jB|"*

15. In his statement under section 164 of Cr.P.C, the convict-appellant Afangir states:- *"Gi 2/3 ci weRq e‡j Avevm‡b Avgi gviqi Kv‡Q GK e¯—v eB I wKQyi evgvi gvjvgvj A‡Q A¸‡jv wb‡q Avq| Awg Awb bvB| Gici Avgvi Ri n‡j Awg evox‡Z wQjvg| H mgq wgjb I †mv‡nj aiv c‡o| Zviv Avgvi bvg e‡j| c‡i Avgv‡K cyjk a‡i| a‡i Avgv‡K wRÁvmv Ki‡j Awg eB I †evgvi gmলাচার কথা cyjk‡K e‡j †`B|"*

16. On juxtaposing the excerpted version of the ejahar and the 164 statement of the accused above it becomes evident that apart from giving some information regarding existence of *alamats* at the house of co-accused Karim@Bijoy, there was no manner of connection or control of Afangir over the bomb-making powders and other *alamats*. Being quizzed by the police Afangir narrated a story as to how he came to know about existence of the *alamats* at the house of Bijoy. It is noted that knowledge of Afangir about location of the *alamats* was not so complete or accurate and that was why the police after making intensive search recovered them from a kitchen of Bijoy's mother, not exactly from the house of Bijoy.

17. P.W.1 i.e. the informant deposes that pursuant to the disclosure made by Afangir the police went to the house of Karim @ Bijoy and recovered the *alamats* including 3 or 4 types of bomb-making powders preparing a seizure-list to that effect, whereas the seizure-list provides that *alamats* were recoverd from a kitchen located in northern side of the house. In this context, the seizure-list witness P.W.2 in cross states that some powders and books were recovered from the house of Karim's mother. P.W.2 deposes that being directed by the police he signed a paper without being conversant about its contents. P.W.4, who is also a seizure-list witness, in cross-examination states that the police took his signature in a paper and he (P.W.4) did not see recovery of any *alamat* from Kanchannagar or from house of the accused Afangir. Another seizure-list witness P.W.13 in his cross-examination claims that during search and recovery of the *alamats,* he (P.W.13) did not find any accused present there and the police also not told him the name of any accused. On analysis of the above testimony of P.W.2,4&13, it becomes evident that the police did not carry out search or recover of the *alamats* in presence of the above named witnesses and that is why apart from identifying signatures in the seizure-list, they (P.W.2,4&13) have not espoused the alleged complicity of Afangir possessing the bomb-making powders.

18. Other witnesses namely- P.W.3 deposes that he did not see the alleged recovery of the *alamats.* According to P.W.5, although the *alamats* were recovered from the kitchen of some Madina Begum, but he (P.W.5) did not know anything about Afangir @ Kalu. P.W.7 claims that he saw alleged recovery of the bomb-making powders, but at that time he (P.W.7) did not see Afangir present there. P.W.9 states that police accompanied by some other persons recovered the *alamats,* but at that time he (P.W.9) did not find Afangir there with the police.

19. On scrutiny of the evidence given by P.W.3,5,7&9, it becomes clear like anything that the alleged *alamats* were recovered not from the possession of Afangir, who at the very time of search and seizure allegedly conducted by the police was not even present at the place of occurrence.

20. Section-4(b) read with section-2 of the Arms Act provides that when any person keeps in his possession or under his control any material used for making any explosive substance shall be punished with imprisonment for a term which may extend to 20 years, shall not be less than 2 years to which fine may be added.

21. In order to constitute an offence under the above provision of the Explosive Substance Act, 1908, the facts of exclusive possession and effective control of the convict-appellant are to be proved beyond all reasonable doubt. In this case it is beyond our comprehension as to how and on the basis of which, the prosecution has attempted to prove any fact that the *alamats* were recovered from possession of the accused Afangir. It is evident that Afangir was nabbed beforehand of the alleged occurrence in connection with Jhenaidah P.S. Case no. 05 dated 04.03.2006 from the house of Sadeque Ali, who is the father-in-law of Afangir, situated at House no. 2, Barack no. 15 of Charkhajura area. Regarding the fact of recovery P.W.16 i.e. the Investigating Officer testifies- *ÔÔAvmvgx Avdv½xi cKvk Kvjyj evwo wc‡ivRcÿvi B›`ÿKvbx Z_v wRqvbMi _vbvi DËi Kj‡ivb Mv‡g Ges nvj mvs KvÂbbMi †` Iqv Av‡Q Awf‡hvMc‡Î| Avmvgxi eZgvb wVKvbv KvÂbbMi nB‡Z †Kvb we‡ùviK`e¨ D×vi nq bvB|ÕÕ*

22. On perusal of the evidence above, it reveals that the police did not recover any *alamat* from the present address of Afangir or from the house of his father-in-law Sadeque Ali. During the police custody, as claimed by P.W.1, Afangir gave an information that accused

Bijoy once asked him (i.e. Afangir) to fetch the *alamats* from his (Bijoy's) house. But accused Afangir, as gathered from the evidence, did not go to the house of Bijoy or comply with his direction. Nevertheless, on such disclosure of Afangir, the police raided the house of accused Karim@Bijoy situated at House no. 8, Barack no. 13 and allegedly recovered the *alamats.* So, it is transparent that all those *alamats* including bomb-making powders had been laying in exclusive possession and effective control of accused Bijoy, not in the possession of accused Afangir.

23. The prosecution, as noted, has maintained complete silence about the fact as to who carried and stored those bomb-making powders at the house of Bijoy or his mother's kitchen. No witness has found Afangir carrying or keeping the *alamats* at the house of the occurrence. On this point, all the prosecution witnesses are found in mute. So, we can safely hold that the convict-appellant Afangir had no manner of connection with the possession or control of the bomb-making powders and that is why he cannot be held liable for those.

24. It becomes abundantly clear that the bomb-making powders were recovered not from the possession of Afangir, who therefore cannot be liable for an offence under section 4/6 of the Act. We are of the view that mere knowledge of an accused or his equivocal disclosure about existence of bomb-making powders during his police custody shall not expose him to any criminal liability of possessing or controlling that illegal substance. The learned Judge of Tribunal, so far as we understand, has failed to assess the evidence on record in their real perspective and being misconceived passed the impugned judgment finding the accused Afangir guilty of the charge in an abrupt manner, which clearly warrants interference of this Court of appeal. Although it is proved in trial that accused Karim@Bijoy had exclusive possession and control over the bomb-making powders, but the Tribunal, as it appears, could not inflict any punishment upon Bijoy because of his death during the trial.

25. Be that as it may, we are inclined to hold that the prosecution has clearly failed to prove the charge against the convict-appellant Afangir beyond all reasonable doubt and the learned Judge of Tribunal No.4 has committed an error finding Afangir guilty of the charge under section 4/6 of the Act.

26. Consequently, this Jail Appeal is allowed setting aside the impugned judgment and order of conviction against the convict-appellant passed in Special Tribunal Case no. 47 of 2006. We find the convict-appellant Afangir not guilty of the charge under section 4/6 of the Code and acquit him accordingly. Let he be set at liberty if not wanted in any other connection.

27. Office is directed to transmit copy of this judgment to all concerned.

28. Send down the Lower Court's Records.