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Justice Sheikh Hassan Arif

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92. Mr. Justice Kazi Zinat Hoque

Justice Syed Mahmud Hossain
Chief Justice of Bangladesh

Supreme Court of Bangladesh
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Message

An independent, capable and proactive judiciary is indispensable for protection and advancement of democracy and rule of law. In Bangladesh, the Judiciary also plays very significant role in securing rule of law and democracy.

The Judiciary, which is the last hope of the citizen, contributes vitally to the preservation of the social peace and order to settling legal disputes and thus promotes a harmonious and integrated society. The quantum of its contribution, however, largely depends upon the willingness of the people to present their problems before it and to submit to its judgments. What matters most, therefore, is the extent to which people have confidence in judicial impartiality. According to Justice Frankfurter "the confidence of the people is the ultimate reliance of the Court as an institution."

Article 111 of the Constitution of the People's Republic of Bangladesh envisages that the law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division shall be binding on all subordinate courts. By its different judgments, the Supreme Court, from time to time, enunciates some principles in order to keep the law predictable. The ratio and obiter of those judgments help the subordinate courts, government and other authorities in taking appropriate decision and thereby they may render even-handed justice to the people. The editors of the Supreme Court Online Bulletin (SCOB) took infinite pains in selecting some landmark judgments of the Supreme Court. Thereby, the judges, lawyers, law-makers, government executives, law-students, academics etc. will immensely be benefited.

I conclude by expressing my deepest appreciation to the editors, Mr. Justice Moyeenul Islam Chowdhury and Mr. Justice Sheikh Hassan Arif, and the research team who are rendering tremendous service in publishing SCOB.

In fine, I wish continuous and unremitting success as well as wider readership of this on line bulletin.

Justice Syed Mahmud Hossain
Chief Justice of Bangladesh

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Editorial

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

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

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

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

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

Thank you all.

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

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Appellate Division

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Cases of the Appellate Division

Sl. No.	Name of the Parties, Citation and Key Words	Summary of the case	Key Ratio
1.	**Ataur Mridha alias Ataur** Vs. **The State** 15 SCOB [2021] AD 1 (*Syed Mahmud Hossain, CJ, Muhammad Imman Ali, J & Hasan Foez Siddique, J*) **Key words** : Meaning of Imprisonment for life; Code of Criminal Procedure, 1898 Section 35A; Penal Code 1860 Section 45, 53, 55, 57	The question arose in this case was whether imprisonment for life means imprisonment for rest of convict's natural life. In this case the petitioner sought review of the judgment by the Appellate Division dated 14.02.2017 passed in Criminal Appeal No.15 of 2010 in which his sentence of death was commuted to imprisonment for rest of his natural life. The Appellate Division by a majority decision disposed of the review petition observing that imprisonment for life prima-facie means imprisonment for the whole of the remaining period of convict's natural life but it would be deemed equivalent to imprisonment for 30 years if sections 45 and 53 are read along with sections 55 and 57 of the Penal Code and section 35A of the Code of Criminal Procedure. However, while expressing his dissenting view honorable Justice Muhammad Imman Ali, J held that Supreme Court or any other Court cannot award a sentence which is not sanctioned by law and life imprisonment is not 20 or 25 or 30 years, but for the sake of calculating any benefit to be given to a convict, it can be reckoned to be equivalent to a finite term of years. His lordship was also of the view that section 35A of Code of Criminal Procedure, 1898 is a mandatory provision and applicable to life convicts' as well.	**Meaning of Imprisonment for life** **Majority view:** If we read Sections 45, 53, 55 and 57 of the Penal Code with Sections 35A and 397 of the Code of Criminal Procedure together and consider the interpretations discussions above it may be observed that life imprisonment may be deemed equivalent to imprisonment for 30 years. The Rules framed under the Prisons Act enable a prisoner to earn remissions- ordinary, special or statutory and the said remissions will be given credit towards his term of imprisonment. However, if the Court, considering the facts and circumstances of the case and gravity of the offence, seriousness of the crime and general effect upon public and tranquility, is of the view that the convict should suffer imprisonment for life till his natural death, the convict shall not be entitled to get the benefit of section 35A of the Code of Criminal Procedure. In the most serious cases, a whole life order can be imposed, meaning life does mean life in those cases. In those cases leniency to the offenders would amount to injustice to the society. In those cases, the prisoner will not be eligible for release at any time. The circumstances which are required to be considered for taking such decision are: (1)surroundings of the crimes itself; (2) background of the accused; (3) conduct of the accused; (4) his future dangerousness; (5) motive; (6) manner and (7) magnitude of crime. This seems to be a common penal strategy to cope with dangerous offenders in criminal justice system. (Per Hasan Foez Siddique, J) **Minority View** On the question of sentence, I have to say first and foremost that the Supreme Court is neither above nor beyond the law of the land and is bound to award a sentence which is permitted by law. Hence, when awarding sentence for an offence under section 302 of the Penal Code, just as the Supreme Court could not award a sentence of "rigorous imprisonment for 20 years", it cannot also award a sentence of "imprisonment for rest of the life".

Cases of the Appellate Division

Sl. No.	Name of the Parties, Citation and Key Words	Summary of the case	Key Ratio
			Neither of those two punishments mentioned is permitted by the Penal Code. Section 302 provides that, "Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine." Without amendment of the Penal Code, when an accused is convicted of an offence under section 302 of the said Code, the Supreme Court or any other Court cannot award any sentence of fixed term of imprisonment for a finite number of years nor "imprisonment for the natural life" or any such term. ...Quantifying the term "imprisonment for life" to any duration measured in years is a legal fiction created in order to give benefit. Hence, it can be categorically stated that life imprisonment is not 20 or 25 or 30 years, but for the sake of calculating any benefit to be given to a convict, it can be reckoned to be equivalent to a finite term of years. (Per Muhammad Imman Ali, J)
2.	**Md. Abdul Haque** Vs. **The State** (*Syed Mahmud Hossain, CJ*) 15SCOB [2021] AD 58 **Key Words:** Evidence Act 1872 Section 118; Competence of a child witness; Dowry demand; Nari-O-Shishu Nirjatan Daman Ain 2000, Section 11(Ka); Plea of alibi in a wife killing case	The Appellant was convicted under section- 11 (KA) of the Nari-O –Shishu Nirjatan Daman Ain, 2000 and sentenced to death for killing his wife for dowry. The High Court Division confirmed the death sentence. The convict preferred Jail appeal before the Appellate Division. The Appellate Division dismissed the Jail Appeal and affirmed the judgment of the High Court Division. The Appellate Division also determined the competence of a child witness discussing the relevant laws and held that preliminary examination of a child witness is not at all necessary	**<u>Competence of a Child Witness:</u>** A child as young as 5/6 years can depose evidence if she understands the questions and answers in a relevant and rational manner. The age is of no consequence, it is the mental faculties and understanding that matter in such cases. Their evidence, however, has to be scrutinised and caution has to be exercised in each individual case. The Court has to satisfy itself that the evidence of a child is reliable and untainted. Any sign of tutoring will render the evidence questionable if the Court is satisfied, it may convict a person without looking for corroboration of the child's evidence. As regards credibility of child witness, it is now established that all witnesses who testify in Court must be competent or able to testify at trial. In general, a witness is presumed to be competent. This presumption applies to child witnesses also. ..... Testing of intelligence of a witness of a tender age is not a condition precedent to the reception of his evidence. Therefore, preliminary examination of a child witness is not at all necessary.

Cases of the Appellate Division

Sl. No.	Name of the Parties, Citation and Key Words	Summary of the case	Key Ratio
3.	**নুর মোহাম্মদ** -বনাম- **সরকার এবং অন্যান্য** (*বিচারপতি মোহাম্মদ ইমান আলী*) 15 SCOB[2021]AD 71 **গুরুত্বপূর্ণ শব্দাবলীঃ** প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০, ধারা:৫; প্রবেশন	মামলার সার সংক্ষেপ এই যে, এজাহার দায়ের করার পর তদন্তকারী কর্মকর্তা আসামীগণের বিরুদ্ধে দন্ডবিধির ১৪৭/১৪৮/১৪৯/৩২৩/৩২৪/৩২৫/৩২৬ /৩০৭/৩৫৪/৩৪ ধারায় অভিযোগপত্র দাখিল করে। বিচারকালে আসামীদের বিরুদ্ধে দন্ডবিধির ৩২৩/৩২৪/৩২৫/ ৩২৬/৩০৭ /৩৪/১৪৭ ধারায় অভিযোগ গঠন করা হয়। বিচার শেষে আসামী নুর মোহাম্মদকে দন্ডবিধি ৩২৫ ধারার অপরাধের জন্য এক বছরের সশ্রম কারাদন্ড এবং ৩২৩ ধারার অপরাধের জন্য ২,০০০/- টাকা জরিমানা, অনাদায়ে আরো তিন মাসের সশ্রম কারাদন্ড এবং অন্যান্য আসামীদের বিভিন্ন মেয়াদের সাজা ও জরিমানা প্রদান করা হয়। এই রায়ের বিরুদ্ধে আসামীগণ আপীল করলে তা খারিজ হয়। এরপর আসামীগণ হাইকোর্ট বিভাগে ক্রিমিনাল রিভিশন দায়ের করলে সেটাও শুনানী অন্তে খারিজ হয়। হাইকোর্ট বিভাগের উক্ত খারিজ আদেশে সংক্ষুব্ধ হয়ে আসামী-নুর মোহাম্মদ এই ক্রিমিনাল পিটিশন ফর লীভটু আপীল দায়ের করেন। আপীল বিভাগ এই মামলার রায়ে উল্লেখ করেন যে তুচ্ছ ঘটনা হতে উদ্ভূত এই মামলায় আসামীকে ১(এক) বছরের জন্য জেলে না পাঠিয়ে প্রবেশনে রাখা সমীচিন ছিল। অতপর আপীল বিভাগ দরখাস্তকারী নুর মোহাম্মদ-এর দোষী সাব্যস্তের আদেশ এবং জরিমানা বহাল রেখে তিনি যত দিন কারাদন্ড ভোগ করেছেন ততদিনই তার দন্ড হিসেবে গণ্য করার আদেশ প্রদান করেন।	**প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০** দায়রা আদালত হিসেবে ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল এবং ১ম শ্রেণীর ম্যাজিস্ট্রেটের ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল-এই আইনের বিধান প্রয়োগ করতে পারবে। সুতরাং বিশেষ ক্ষমতা আইন, ১৯৭৪ (Special Powers Act, 1974)-এর ধারা ২৯, সন্ত্রাস বিরোধী আইন, ১৯৯২ (Anti-Terrorism Act, 1992)-এর ধারা ১৫(১), সন্ত্রাস বিরোধী আইন, ২০০৯ (Anti-Terrorism Act, 2009)-এর ধারা ২৭(৩), নারী ও শিশু নির্যাতন (বিশেষ বিধান) আইন, ১৯৯৫-এর ধারা ২৩(১), জন নিরাপত্তা (বিশেষ বিধান) আইন, ২০০০-এর ধারা ২১(১), নারী ও শিশু নির্যাতন দমন আইন, ২০০০-এর ধারা ২৫(১), ক্রিমিনাল ল এ্যামেন্ডমেন্ট এ্যাক্ট, ১৯৫৮-এর ধারা ৬(১)(ক) এবং ফরেন এক্সচেঞ্জ রেগুলেশন এ্যাক্ট, ১৯৪৭-এর ধারা ২৩ক(৩)-এ উল্লেখিত বিধান অনুসারে ক্ষেত্রমতে ট্রাইব্যুনাল অথবা আদালতসমূহ দায়রা আদালত বলে গণ্য হবে। দ্রুত বিচার আইন, ২০০২-এর ধারা ১২(২) অনুসারে ১ম শ্রেণীর ম্যাজিস্ট্রেট আদালত বলে গণ্য হবে এবং ফরেন এক্সচেঞ্জ রেগুলেশন এ্যাক্ট, ১৯৪৭-এর ধারা ২৩ক(৩) অনুসারে ক্ষেত্রবিশেষ ট্রাইব্যুনাল ১ম শ্রেণীর ম্যাজিস্ট্রেট আদালত অথবা দায়রা আদালত বলে গণ্য হবে। উপরোক্ত আলোচনার প্রেক্ষিতে দেখা যাচ্ছে যে, কোন কোন বিশেষ আইনে অপরাধের ক্ষেত্রেও "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" প্রয়োগ করা যাবে।
4.	**Md. Humayun Kabir** Vs. **The State** *(Hasan Foez Siddique, J)* 15SCOB[2021] AD 76 **Key Words:** Confessional Statement; TI Parade; Motive; Section 27 of Evidence Act; last seen together; Extra Judicial Confession;	In this case first information report was lodged against the appellant Humayun Kabir and his father Moulana Latifullah under Section 7/30 of Nari-O-Shishu Nirjatan Daman Ain, 2003, but the Investigating Officer, holding investigation, submitted charge sheet against the appellant Humayun Kabir under section 302/201 of the Penal Code and the learned Sessions Judge, Comilla, framed charge accordingly. On transfer Divisional Druto Bichar Tribunal, Chattogram tried the case and convicted the appellant	**Trustworthiness of the confessional statement which is incompatible with the prosecution case:** To prove the charge brought under Section 302 of the Penal Code primarily on the basis of the confessional statement it is duty of the Court to ascertain as to whether the confession was made voluntarily, and if so as to whether the same was true and trustworthy. Satisfaction of the Court is a sine qua non for the admissibility in evidence. True and complete disclosure of the offence is the soul of true confessional statement. In this case, the testimonies of P.Ws.1,2,3 and 4 and post-mortem report are inconsistent

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		under section 302 of the Penal Code and sentenced him to death. The High Court Division receiving the Death Reference accepted it upon hearing and dismissed the connected Jail Appeal and confirmed the order of conviction and sentence awarded by the Tribunal. Thereafter, the appellant preferred this Jail Appeal in the Appellate Division. There was no eyewitness in the case and the Appellate Division disbelieving the confessional statement of the accused which is inconsistent with the prosecution case allowed the appeal and set aside the judgment and orders of the Courts below.	with the contents of the confessional statement of the appellant which has made the confessional statement unreliable. In view of the evidence quoted above and the contents of the confessional statement, it is difficult for us to hold that the statements made in confession by the appellant are true and those were consistent with the prosecution case. It would be extremely unsafe to base conviction of the appellant on the basis of such confessional statement accepting the same as true.
5.	**Md. Hafiz Ibrahim, former Member of Parliament.** Vs. **The State represented by the Deputy Commissioner, Dhaka and another** (*Mirza Hussain Haider, J*) 15SCOB[2021] AD 89 **Key words:** Money Laundering; section 13 of the Money Laundering Prevention Act, 2002; section 4(2)/7 of the Money Laundering Prevention Act, 2009.	On 16.08.2011, one Deputy Director of Anti-Corruption Commission, Dhaka, lodged First Information Report (FIR) with the Gulshan Police Station implicating the accused petitioner and his wife under section 13 of the Money Laundering Prevention Act, 2002 read with section 4(2)/7 of the Money Laundering Prevention Act, 2009. A prima facie case of commission of such offence under section 13 of the Money Laundering Protirodh Ain, 2002 read with section 4(2)/7 of the Money Laundering Protirodh Ain, 2009 found to have been committed by the accused persons and charge was framed against them accordingly. Accused challenged the criminal proceeding against him in the High Court Division under section 561A of CrPC which was summarily rejected. Thereafter, he preferred this leave to appeal before the Appellate Division. The question raised in this petition is whether the investigation made and	**<u>Effect of Amendment or Repeal of an Act/Ordinance:</u>** It appears that whenever any Act was amended or repealed by any Ordinance the Legislature continued giving effect of the previous law as if the previous law has not been repealed. Thus, the offence committed by the accused petitioner between 19.12.2005 to 16.01.2008 being within the period of continuation of the aforesaid law which were amended/repealed subsequently by different Ordinances/Acts, it cannot be said that the ACC did not have any authority to initiate, investigate, lodge FIR and continue to proceed with the case under the amended law it is to be deemed to have been committed under the law which has got a new life by the saving clause.

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		proceeding initiated against the accused petitioner under the provisions of Money Laundering Prevention Act of 2002 and Anti-Corruption Commission Ain 2002 which were amended and repealed subsequently on several occasions and the money laundering offence which is claimed to have been a schedule offence of the ACC Act being not ratified by the parliament the ACC can investigate, lodge and initiate the proceeding against the accused petitioner. With various explanation of laws, the Appellate Division held that the ACC has such authority and dismissed the criminal petition.	
6.	**Md. Rabiul Islam and others** Vs. **Sultan Mahmud died leaving behind his heirs: (1) Md. Abu Hasnat (Bulbul)and others** (*Md. Nuruzzaman, J*) 15SCOB[2021] AD 95 **Key Words:** Pre-emption; Section 96 of the State Acquisition and Tenancy Act, 1950; Section 24 of the Non-Agricultural Tenancy Act, 1949	In this case of pre-emption the core question is whether a pre-emption application under section 24 of the Non-Agricultural Tenancy Act, 1949 can be converted to section 96 of the State Acquisition and Tenancy Act, 1950. On the rejection of the case by the trial court the pre-emptor-appellant-petitioner filed an appeal before the learned District Judge of Kushtia and that was transferred to the learned Additional District judge. In the appellate court the preemptor filed an application to convert his case as mentioned above. The learned Additional District Judge rejected the application. Against the rejection order preemptor preferred Civil Revision before the HCD and the HCD made the rule absolute. After that, the pre-emptee-opposite parties, being aggrieved, preferred Civil Petition for Leave to Appeal before Appellate Division and obtained leave giving rise to the	**Conversion of an application under section 24 of the Non-Agricultural Tenancy Act, 1949 to an application under section 96 of the State Acquisition and Tenancy Act, 1950:** The pre-emption application filed under section 96 of the Act, 1950 may be converted to a pre-emption case under section 24 of the Act, 1949 because the deposit of compensation would not be a impediment in case of such conversion allowing the amendment. It further be noted that the application filed under section 24 of the Act, 1949 may be converted to an application under section 96 of the Act, 1950 if such application for conversion is filed within 120 days, i.e. within period of limitation with rest of the deposit and concerned Court allowed such application of conversation. The application for conversation cannot be allowed after the expiry of limitation as stipulated in the section 96 of the State Acquisition and Tenancy Act.

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		instant appeal. In the result, the Appellate Division allowed the appeal.	
7.	**Md. Syedul Abrar, son of late Ahmed Hossain** Vs. **Government of Bangladesh and others** (*Obaidul Hassan, J*) 15 SCOB [2021] AD 102 **Key Words:** Administrative Tribunal; Administrative Appellate Tribunal; Departmental Inquiry Report; Natural Justice; Disciplinary proceedings	The petitioner was a teacher at a government primary school. A departmental proceeding was drawn against him for misconduct. An inquiry against him was conducted *ex parte* and second show cause notice was served to him without annexing the inquiry report for which he could not take any defense. The authority ultimately dismissed the petitioner from service. Being aggrieved, the petitioner filed a departmental appeal before the Appellate authority, but the same was not disposed within 2 months as per the provisions of the Administrative Tribunal Act. Therefore, he filed administrative tribunal case before the Administrative Tribunal, Chittagong. Administrative Tribunal set aside the impugned order of dismissal. On appeal the decision was reversed by the Administrative Appellate Tribunal. The petitioner then filed a leave to appeal before the Appellate Division of the Supreme Court. The impugned decision of the Administrative Appellate Tribunal was set aside by the Appellate Division on the ground, among others, that the petitioner was not given opportunity to cross-examine the witnesses or to produce evidence in his favour according to Rule 10 of the Government Servants (Discipline and Appeal) Rules 1985.	**Government Servants (Discipline and Appeal) Rules 1985, Rule 10:** In the instant case, the authority i.e. the respondents-opposite parties failed to follow the procedures provided in the Rules, 1985 accordingly. The petitioner was not given any opportunity to be heard. The inquiry proceeding was held ex-parte, which was not in accordance with law. At the same time the petitioner was not given opportunity to cross-examine the witnesses or to produce evidence in his favour according to Rule 10 of the Rules, 1985. Besides the respondents claimed that the date of hearing fixed on 10.04.2005 and 04.05.2005 were informed to the petitioner, but from the materials on record, it appears that the respondents had not produced any copy of notice given to the petitioner fixing the date of hearing on 10.04.2005 and 04.05.2005 respectively. ... However, in consideration of the matters discussed above, we are of the view that the Administrative Appellate Tribunal committed a serious error of law in not considering the provisions of the Government Servants (Discipline and Appeal) Rules, 1985 in toto and the principles of natural justice properly. So, we are constraint to interfere.

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1.	**M. Asafuddowlah** -VERSUS- **Government of Bangladesh** 15 SCOB [2021] HCD 1 (***Zubayer Rahman Chowdhury, J***) **Key Words**: Article 20(2), 31, 88 and 102 (2) of the Constitution of the People's Republic of Bangladesh; Constitutionality of posting Officers on Special Duty (OSD) for unlimited period;	The petitioner, a retired bureaucrat of the country, filed this writ petition through a Public Interest Litigation (PIL) under Article 102(2) of the Constitution of the People's Republic of Bangladesh challenging the process of designating any Officer serving under the Government as an Officer on Special Duty beyond the stipulated period of one hundred and fifty days and thereby allowing such Officer to receive salary and other benefits without rendering any service, being in violation of the Constitution, apart from being detrimental to the interest of the taxpayers of the country. Consequently, a Rule was issued to show cause as to why the current trend of making/posting the Civil Servants as Officers on Special Duty (OSD) without assigning any special duty, whatsoever, beyond stipulated time should not be declared illegal, ultra vires the Constitution and as such of no legal effect. Ultimately, the Rule was made absolute and the continuation of the process of keeping an Officer as on OSD beyond the stipulated period of 150 days was declared ultra vires and, therefore, without lawful authority.	In the event of any Officer being designated as an OSD, the Government must, without undue delay, form a Committee and undertake an inquiry so as to ascertain the veracity of such allegation/complaint. If the allegation/complaint is found to have substance, the Government should take appropriate action against the concerned Officer, in accordance with law. However, the process of enquiry must be completed within the stipulated period of 150 days. In view of the foregoing discussion and being mindful of the mandate, as contained in Article 20(2) and Article 88 of the Constitution, we are inclined to hold that the continuation of the process of keeping an Officer as an OSD beyond the stipulated period of 150 days is ultra vires and, therefore, without lawful authority.
2.	**মোঃ হৃদয়** -বনাম- **রাষ্ট্র** 15 SCOB[2021] HCD 13 (*বিচারপতি এম. ইনায়েতুর রহিম*) **Key Words**: ধারা ২৮, নারী ও শিশু নির্যাতন দমন আইন ২০০০; ধারা ১৫ক, ২৯(১), ৫২(১) ও ৪১ শিশু আইন, ২০১৩	মাঠে শিশুদের ক্রিকেট খেলাকে কেন্দ্র করে কথা কাটাকাটি ও হাতাহাতির প্রেক্ষিতে সন্ধ্যায় আসামীরা ভিকটিমকে লাঠি, হকিস্টিক, লোহার রড ও ধরালো চাকু দিয়ে আঘাত করে গুরুতর জখম করলে পরবর্তীতে চিকিৎসাধীন অবস্থায় ভিকটিম মারা যায়। এই ফৌজদারী আপীলটি এ সংক্রান্ত মামলায় পরবর্তীতে নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনালের বিজ্ঞ বিচারক কর্তৃক আপীলকারী শিশুর জামিন না-মঞ্জুর আদেশ হতে উদ্ভূত। এই মামলায় প্রশ্ন উঠেছে যে, **প্রথমতঃ** শিশু আইনের অধীনে মামলার কার্যক্রম পরিচালনায় নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল এর নাম, সিল ও বিচারকের পদবী ব্যবহার সঠিক হয়েছে কিনা; **দ্বিতীয়তঃ** আইনের ধারা ১৫ক এর বিধান অনুযায়ী ম্যাজিস্ট্রেট কর্তৃক অপরাধ আমলে গ্রহণ করে শিশু আদালতে কাগজাদি প্রেরনের পূর্বে শিশু আদালতের জামিন বা বয়স নির্ধারণ সহ অন্যান্য	সরকার কর্তৃক আইনের যথাযথ সংশোধন বা স্পষ্টীকরণ সম্পর্কে প্রজ্ঞাপন না হওয়া পর্যন্ত শিশুর সর্বোচ্চ স্বার্থ রক্ষার্থে সংশ্লিষ্ট ম্যাজিস্ট্রেট ও শিশু আদালতসমূহ-কে নিম্নলিখিত কার্য পদ্ধতি/প্রণালী (procedure) অনুসরণে নির্দেশনা প্রদান করা যাচ্ছে- এক. সংশ্লিষ্ট ম্যাজিস্ট্রেট কেবল মাত্র মামলার তদন্ত কার্যক্রম তদারকী করবেন এবং এ সংক্রান্তে নিত্যনৈমিত্তিক (routine work) প্রয়োজনীয় আদেশ এবং নির্দেশনা প্রদান করবেন; দুই. রিমান্ড সংক্রান্ত আদেশ শিশু আদালতেই নিষ্পত্তি হওয়া বাঞ্ছনীয়। তবে, আইনের সংস্পর্শে আসা শিশু (ভিকটিম এবং সাক্ষী) বা আইনের সাথে সংঘাতে জড়িত শিশুর জবানবন্দী সংশ্লিষ্ট ম্যাজিস্ট্রেট লিপিবদ্ধ করতে পারবেন; তিন. তদন্ত চলাকালীন সময়ে আইনের সাথে সংঘাতে জড়িত শিশু-কে মামলার ধার্য তারিখে

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		আনুষাঙ্গিক বিষয়ে আদেশ দেয়ার এবং শিশু আদালত হিসেবে ক্ষমতা প্রয়োগের এখতিয়ার আছে কিনা; এবং **তৃতীয়তঃ** শিশু আইনের ধারা ১৫ক অনুযায়ী সংশ্লিষ্ট ম্যাজিস্ট্রেট কর্তৃক অপরাধ আমলে গ্রহণের পূর্বে ধারা ২৯(১) এবং ধারা ৫২(১) অনুযায়ী শিশু আদালত কর্তৃক জামিন এবং ধারা ২১ অনুযায়ী শিশু আদালত কর্তৃক শিশুর বয়স সম্পর্কিত বিষয় নিষ্পত্তির এখতিয়ার কতটুকু আইন সংগত। আপীলটি গ্রহণযোগ্যতার শুনানীকালে আদালত কর্তৃক নারী ও শিশু নির্যাতন দমন আইন ২০০০-এর ধারা ২৮ অনুযায়ী এর রক্ষণীয়তার বিষয়ে প্রশ্ন উত্থাপিত হলে আপীলকারীর বিজ্ঞ আইনজীবী আদালতের অনুমতিক্রমে আপীল দরখাস্তের (পিটিশন অফ আপীল) শিরোনাম (কজ টাইটেল) সংশোধনক্রমে ধারা ২৮, নারী ও শিশু নির্যাতন দমন আইন ২০০০-এর স্থলে ধারা-৪১, শিশু আইন-২০১৩ প্রতিস্থাপিত করেন; এবং আপীলটি শিশু আইন, ২০১৩-এর ধারা ৪১ অনুযায়ী দাখিল করা হয়েছে মর্মে গণ্য করা হয়। উক্ত ফৌজদারী আপীলটি নিষ্পত্তি করতে গিয়ে মাননীয় হাইকোর্ট ২০১৮ সালে আনীত সংশোধনীসহ শিশু আইন, ২০১৩ বিষয়ে বিশদ আলোচনা করেন। শিশু আইনে বিদ্যমান বিভিন্ন ধরনের সংশয়, বিভ্রান্তি ও অসংগতি দূরীকরণে দ্রুততার সাথে স্বল্পতম সময়ের মধ্যে সংশোধনীর প্রয়োজনীয়তার কথা উল্লেখ করেন। এছাড়া শিশু আইনের সংশোধন বা স্পষ্টীকরণ সম্পর্কে প্রজ্ঞাপন না হওয়া পর্যন্ত শিশুর সর্বোচ্চ স্বার্থ রক্ষার্থে সংশ্লিষ্ট ম্যাজিস্ট্রেট ও শিশু আদালতসমূহকে সাত দফা নির্দেশনা প্রদান করেন। মাননীয় হাইকোর্ট রায়ে উল্লেখিত পর্যবেক্ষণ, অভিমত ও নির্দেশনাসহ আপীলটি মঞ্জুর করে আপীলকারীকে জামিন প্রদান করেন।	ম্যাজিস্ট্রেট আদালতে হাজিরা হতে অব্যাহতি দেয়া যেতে পারে; চার. তদন্ত চলাকালে আইনের সাথে সংঘাতে জড়িত শিশুর রিমান্ড, জামিন, বয়স নির্ধারণসহ অন্তবর্তী যে কোন বিষয় শিশু আদালত নিষ্পত্তি করবে এবং এ সংক্রান্ত যে কোন দরখাস্ত ম্যাজিস্ট্রেট আদালতে দাখিল হলে সংশ্লিষ্ট ম্যাজিস্ট্রেট নথিসহ ঐ দরখাস্ত সংশ্লিষ্ট শিশু আদালতে প্রেরণ করবেন; এবং সংশ্লিষ্ট শিশু আদালত ঐ বিষয়গুলি নিষ্পত্তি করবে; পাঁচ. অপরাধ আমলে গ্রহণের পূর্বে নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল শিশু আইনের অধীনে কোন আদেশ প্রদানের ক্ষেত্রে 'শিশু আদালত' হিসেবে আদেশ প্রদান করবে এবং এ ক্ষেত্রে বিজ্ঞ বিচারক শিশু আদালতের বিচারক হিসেবে কার্য পরিচালনা এবং শিশু আদালতের নাম ও সিল ব্যবহার করবেন; ছয়. আইনের সুপ্রতিষ্ঠিত নীতি হলো এই যে, আইন মন্দ (bad law) বা কঠোর (harsh law) হলেও তা অনুসরণ করতে হবে, যতক্ষণ পর্যন্ত তা সংশোধন বা বাতিল না হয়। সে কারণে নালিশী মামলার ক্ষেত্রে শিশু কর্তৃক বিশেষ আইনসমূহের অধীনে সংঘটিত অপরাধ সংশ্লিষ্ট বিশেষ আদালত বা ক্ষেত্রমত, ট্রাইব্যুনাল শিশু আইনের বিধান ও অত্র রায়ের পর্যবেক্ষণের আলোকে অভিযোগ (complaint) গ্রহণের পর প্রয়োজনীয় আইনি কার্যক্রম গ্রহণের পরে অপরাধ আমলে গ্রহণের বিষয়ে সিদ্ধান্ত গ্রহণের জন্য কাগজাদি (নথি) সংশ্লিষ্ট ম্যাজিস্ট্রেট এর নিকট প্রেরণ করবে; অত:পর ম্যাজিস্ট্রেট অপরাধ আমলে গ্রহণের বিষয়ে প্রয়োজনীয় আদেশ প্রদান এবং অপরাধ আমলে গ্রহণ করলে পরবর্তীতে কাগজাদি বিচারের জন্য শিশু আদালতে প্রেরণ করবেন; সাত. শিশু আইনের প্রাধান্যতার কারণে বিশেষ আইনসমূহের অধীনে জি.আর মামলার ক্ষেত্রে শিশু কর্তৃক সংঘটিত অপরাধ এর জন্য পৃথক পুলিশ রিপোর্ট দেয়ার বিধান থাকায় সংশ্লিষ্ট ম্যাজিস্ট্রেট পুলিশ রিপোর্ট এর উপর ভিত্তি করে অপরাধ আমলে গ্রহণ করবেন।
3.	**Md. Lutfor Rahman and others** -Versus- **Govt. of Bangladesh and others**. 15 SCOB[2021] HCD 21 (***Naima Haider, J***) **Key Words**: Abandoned Property; Section 5(1)(a) of the Abandoned Buildings (Supplementary provisions) Ordinance, 1985; P.O. 16 of 1972;	This Writ Petition was filed challenging the enlistment of the disputed property in the Bangladesh Gazette dated 23.09.1986 as abandoned property under Section 5 (1)(a) of the Abandoned Building (Supplementary Provisions) Ordinance, 1985. The contention of the petitioners was that as the Government did not have any possession in the property, the alleged inclusion of the property under Section 5 (1)(a) of the Abandoned Building (Supplementary Provisions) Ordinance, 1985 is illegal. The Petitioners also stated that land tax had been paid by the predecessors	Section 5(1)(a) of the 1985 Ordinance is attracted if and only if the Government took possession of the property. So the attributable interpretation is that Section 5(1)(a) of the 1985 Ordinance can be applied if the possession has been taken by the Government under Order 7 of P.O. 1972. Order 18 of P.O. 16 of 1972 provides that the Government shall maintain a separate account for each abandoned property. P.O. 16 of 1972 also provides that Government shall impose fine on tress passers on abandoned property. In respect of the property in question, the respondents failed to show that the Government took possession in accordance with the provisions of P.O. 16 of 1972. The

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		of the petitioners prior to inclusion of the property in the Bangladesh Gazette. Furthermore, the Government accepted land tax on the property till 2015. Apart from that RAZUK issued permission for construction of multistoried building over the property in question. Thereby, they have control and possession over the alleged property. The Division Bench of the HCD considering the aforementioned documents stated that there is a presumption of possession in favour of the petitioners and their predecessors. But the Government did not annex any document to show that the Government took possession of the property in question. It is clear from the wordings of Section 5 (1) (a) of the Abandoned Buildings (Supplementary provisions) Ordinance, 1985 that the Government must take possession of the property in question; this is a mandatory precondition for inclusion of a property in the list of abandoned property under Section 5(1)(a) of the 1985 Ordinance. Accordingly, the Honorable Court directed all the respondents not to treat the property in question as abandoned property and formally release the property in question. Thereby, Honorable Court made the Rule absolute with observation and directions.	respondents also failed to show the account for the property in question. If the predecessors of the petitioners were infact unlawfully occupying the property in question, then the Government would have proceeded against them. No such evidence was shown. To the contrary, the petitioners have annexed documents which suggest that even in 1979, the predecessor of the petitioners was the owner on record of the property in question; even in 1979 the Government received land tax from the predecessor of the petitioners. Therefore, the only logical conclusion that this Division has arrived is that the property in question is not an abandoned property and the property was erroneously included in the impugned Gazette.
4.	**আব্দুল লতিফ** -বনাম- **মোহাম্মদ কামাল উদ্দীন এবং অন্যান্য।** 15 SCOB[2021] HCD 27 ***(বিচারপতি শেখ হাসান আরিফ)*** **Key Words**: সিভিল রুলস এন্ড অর্ডার এর চাপ্টার-১৭, বিধি ৬ এর অধীন উপবিধি ৩৯৬ এবং ৩৯৭; সম্ভাব্যতার ভারসাম্য (Balance of Probability); সাক্ষ্য আইন ১৮৭২ এর ৬৫ ও ১১৫ ধারা	এই দেওয়ানী আপিল মোকদ্দমাটি যুগ্ম জেলা জজ, দ্বিতীয় আদালত, ফেনী কর্তৃক দেওয়ানী ৪৩/২০০৮ নং মোকদ্দমায় প্রদত্ত রায় ও ডিক্রি হতে উদ্ভূত। উক্ত মামলায় নিম্ন আদালত আরজির তফসিল বর্ণিত ৭ শতাংশ জমিতে বাদীপক্ষে (অত্র আপিলের ১ নং প্রতিবাদী) স্বত্ব ঘোষনা এবং দখল উদ্ধারের রায় ও ডিক্রি প্রদান করেন। উক্ত রায় ও ডিক্রি দ্বারা সংক্ষুব্ধ হয়ে ১ নং বিবাদী অত্র আপিলটি দায়ের করেন। সাক্ষী গনের সাক্ষ্য এবং দালিলিক সাক্ষ্য সমূহ পর্যালোচনা করে এবং সাক্ষ্য আইনের ৬৫ ও ১১৫ ধারা এবং সিভিল রুলস এন্ড অর্ডার এর চাপ্টার-১৭, বিধি ৬ এর অধীন উপবিধি ৩৯৬ এবং ৩৯৭ বিশ্লেষণ করে হাইকোর্ট বিভাগ নিম্ন আদালতের রায় ও ডিক্রি বহাল রেখে অত্র আপিলটি খারিজ করেন ।	**<u>সাক্ষ্য হিসেবে গৃহীত কোন দলিল আদালত কর্তৃক প্রদর্শনী চিহ্নিত না করা হলে সাক্ষ্য হিসেবে উক্ত দলিলের গ্রহণযোগ্যতা :</u>** সি.এস. খতিয়ান নং ৪৫৮ এর অস্তিত্ব বিবাদী কর্তৃক স্বীকৃত। শুধুমাত্র উক্ত খতিয়ানের মর্ম নিয়ে পক্ষদ্বয়ের মধ্যে বিপত্তি বা বিরোধিতা রয়েছে। তাই পি.ডব্লিউ-১ এর সাক্ষ্য অনুযায়ী যেহেতু দেখা যায় যে, সি.এস. ৪৫৮ নং খতিয়ানটি কোনো ধরনের আপত্তি ছাড়া আদালতে দাখিল হয়েছে, সেহেতু এটি দালিলিক সাক্ষ্য হিসেবে গৃহীত হয়েছে বলে গণ্য করা গেল। আবার যেহেতু এটি দালিলিক সাক্ষ্য হিসেবে গৃহীত হয়েছে, সেহেতু সিভিল রুলস এন্ড অর্ডার এর চাপ্টার-১৭, বিধি ৬ এর অধীন উপবিধি ৩৯৬ এবং ৩৯৭ এর বিধান মতে এটিকে Exhibit বা প্রদর্শনী নাম্বার দিয়ে Vol-2 এর Form No. (J) 23 তে সংযুক্ত করা উচিত ছিল। যেহেতু এই কাজটি ভুলবশতঃ নিম্ন আদালত কর্তৃক করা হয় নাই, অত্র

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			আপীল আদালত কর্তৃক এটিকে প্রমানিত দালিলিক সাক্ষ্য হিসেবে প্রদর্শনী নাম্বার বা চিহ্ন প্রদান করা সমীচীন হবে বলে মনে করি। তাই এই দালিলিক সাক্ষ্যটিকে প্রদর্শনী-১ এর সাথে "প্রদর্শনী ১/ক" হিসেবে চিহ্নিত করা গেল। ফলশ্রুতিতে এটি সিভিল রুলস এন্ড অর্ডার্স এর Vol-2, Form No. (J) 23 তে অন্যান্য প্রদর্শনীর সাথে সংযুক্ত করা হলো।
5.	**Md. Anis Miah** -Versus- **The State** 15SCOB [2021] HCD 37 (***Md. Ruhul Quddus, J***) **Key Words**: Confession of a child in conflict with law; Constitution and Jurisdiction of a Juvenile Court; 5, 51, 52 and 66 of the Children Act, 1974; Shishu Ain, 2013, section 47 (1); expressum facit cessare tacitum; Section 2(n), 18 and 71 of Children Act, 1974; Scetion 2(3) and 42 of Shishu Ain, 2013; Section 164 read with section 364 of Code of Criminal Procedure, 1898	On a reference from a Division Bench, honourable Chief Justice of Bangladesh constituted Larger Bench (Full Bench) consisting of three honourable judges to decide the law point involved herein, namely, legal implication of confession made by child in conflict with law under section 164 of the Code of Criminal Procedure as well as jurisdiction of a juvenile court constituted under the Children Act, 1974 and that of different tribunals constituted under different special laws enacted before or after the Children Act came into force. The Full Bench after extensive hearing held amongst others that confession of a child in conflict with law recorded under section 164 of the Code of Criminal Procedure has no legal evidentiary value and, therefore, such confession cannot form the basis of finding of guilt against him.	In view of the discussions made above, our answers to the questions raised in this case are: (1) Confession of a child in conflict with law recorded under section 164 of the Code of Criminal Procedure has no legal evidentiary value and, therefore, such confession cannot form the basis of finding of guilt against him. (2) A Juvenile Court constituted under the Children Act, 1974 as was in force before and now under the Shishu Ain, 2013 has got exclusive jurisdiction to try the cases, where children in conflict with law are charged with criminal offences. No other Court or Tribunal constituted under any other special or general law irrespective of its age of legislation has jurisdiction to try such cases unless the jurisdiction of Juvenile Court is expressly excluded there. The Druto Bichar Tribunal constituted under the Druto Bichar Tribunal Ain, 2002 cannot assume the jurisdiction of Juvenile Court in any manner whatsoever. (3) In imposing punishment for offences punishable with death or imprisonment of life, the maximum term of imprisonment against a juvenile offender, or a person who crossed childhood during trial or detention, cannot be more than 10 years.
6.	**Engr. Md. Anwar Hossen** -VERSUS- **Chittagong Club Ltd and others** 15SCOB [2021] HCD 60 ***(Muhammad Khurshid Alam Sarkar, J)***	The petitioner approached the Company Court By invoking Section 43 of the Companies Act, 1994 for rectification of the Members' Register of the Chittagong Club Ltd, a private company limited by guarantee without having any share capital incorporated under the Companies Act towards restoration of the petitioner's name therein, through obtaining a declaration from the	**Section 43 and 44 of Companies Act, 1994:** In this case, if the meaning of the word 'omitted' is taken as 'suspended', then, it shall create a chaos and confusion for the persons who would approach this Court for striking down/deleting the name of a person from the Register of the Members of the company in that the respondent would have the scope to make out a case for suspending the

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	Key Words: Golden rule of statutory interpretation; Section 43 and 44 of Companies Act, 1994; Rule 8 of the Companies Rules, 2009; Section 2(1)(d), Section 3(1), Section 43 and Section 233 of the Companies Act, 1994	Court that the decision of the General Committee (GC) so far as it relates to suspension of the membership of the petitioner is illegal and not binding upon him. The High Court Division after elaborate discussion of the relevant provisions of the Companies Act, 1994 and rules framed under it, dismissed the petition on the ground of maintainability and held that the dispute being purely of civil nature, the petitioner's remedy lies in the civil Court. The Company court also imposed a cost of 100,000 taka upon the petitioner for wasting court's valuable time by pressing such meritless case before it.	name instead of omitting it, which this Court cannot do and, in fact, has never made any order in that direction making the operation, application and use of the provisions of Section 44 of the Companies Act nugatory. This Court, in the aforesaid type of scenario, either has rejected the petitioner's application for omitting a person's name from the Members' Register or has ordered the company for rectification of the Members' Register by omitting the name-in-question from the Members' Register. So, it is apparent that the facts and circumstances of the petitioner's case do not attract the provisions of Section 43 of the Companies Act.
7.	**Uthpal Kumar Roy and three others.** -Versus- **Meghnad Shaha and another.** 15SCOB [2021] HCD 77 (***Md. Badruzzaman, J***) **Key Words** : Section 11 (Ga), 23 and 32 of the of Nari-O-Shishu Nirjatan Daman Ain 2000; Section 319 of Penal Code, 1860; Medical examination certificate;	The main issue before the High Court Division in this case was whether in a case under section 11(Ga) of Nari O Shishu Nirjatan Daman Ain, 2000 charge can be framed against an accused for causing simple hurt to the wife by the husband or his relations for demand of dowry without any injury certificate upon medical examination of the victim wife under section 32 of the Ain, 2000. The court answered it in negative and held that during taking cognizance or framing of charge under section 11 (Ga) or 11(Ga)/30 of Nari-O-Shishu Nirjatan Daman Ain, 2000 the tribunal must satisfy itself that the prosecution has fulfilled two criteria to establish its case against the accused; Firstly, the victim wife, as per section 32 of the Ain, has been medically examined in the Government Hospital or in any private Hospital, recognized by the Government and; Secondly, in support of such examination there is a medical examination certificate before the tribunal issued by the Medical officer of the particular hospital showing therein that the victim wife has sign of simple hurt in her person.	**Section 11 (Ga) or 11(Ga)/30 of Nari-O-Shishu Nirjatan Daman Ain, 2000 read with section 32 of the same Act:** Our considered view is that during taking cognizance or framing charge of an offence against an accused under section 11 (Ga) or 11(Ga)/30 of Nari-O-Shishu Nirjatan Daman Ain, 2000, apart from considering other prosecution materials, the tribunal must satisfy itself that the prosecution has fulfilled two criteria to establish its case against the accused; Firstly, the victim wife, as per section 32 of the Ain, has been medically examined in the Government Hospital or in any private Hospital, recognized by the Government for that purpose regarding the injury caused by the accused and; Secondly, in support of such examination there is a medical examination certificate before the tribunal issued by the Medical officer on duty in the particular hospital showing therein that the victim wife has sign of simple hurt in her person. The tribunal shall not take cognizance or frame charge of an offence punishable under section 11 (Ga) or 11(Ga)/30 of the Ain, 2000 against an

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
			accused without having a medical examination certificate from Government Hospital or any private Hospital, recognized by the Government for that purpose in view of the provision under section 32 of the said Ain in support of simple hurt of the victim wife.
8.	**Md. Ahsan Ul Monir and others** -Versus- **Dr. Md. Fakhrul Islam and others** 15SCOB [2021] HCD 87 (***Khizir Ahmed Choudhury, J***) **Key Words**: Custody of a minor boy; Section 17 of Guardian and Wards Act, 1890; Section 357 of Mulla's Principles of Mahomedan Law; Section 7 and 25 of the Guardian and Wards Act, 1890; best interest of the child	The father of a minor child, who was a physician by profession and was undergoing trial for abetting suicide of his wife (mother of the child), instituted a suit in the Family Court seeking custody of the boy. The Family Court decreed the suit and Appellate Court affirmed the decree in spite of the fact that the boy expressed his preference of staying with his maternal relations before the Appellate Court. On revision the High Court Division taking into consideration the age of the child at the material time, likelihood of influencing his opinion by the maternal relations, acquittal of the father in the criminal case, relative advantage of the contesting parties to ensure the best interest of the child, relevant provisions of Guardians and Wards Act 1890, section 357 of Mulla's Principles of Mahomedan Law and judicial pronouncements of our apex court concluded that no illegality was committed by the Courts below in decreeing the suit. Therefore, the Rule was discharged.	**Custody of a boy of seven years of age:** Section 357 of Mulla's Principles of Mahomedan Law stipulates that, father and paternal male relation is entitled to custody of a boy of seven years of age....In the case in hand the minor boy now above seven years old and it is already found that his wellbeing and betterment will be protected at the hand of his father and grandparents and as such the findings and reasonings in deciding the custody of minor boy is sustainable for welfare of the minor boy.
9.	**The State** -Versus- **Md. Abdus Salam** 15SCOB [2021] HCD 94 (***Bhishmadev Chakrabortty, J)*** **Key Words**: Section 164 of Code of Criminal Procedure 1898; Section 11 (Ka) of Nari-o-Shishu	This is a case under section 11 (Ka) of Nari-o-Shishu Nirjatan Daman Ain, 2000. There was no ocular witness in the case and among the 12 witnesses examined, PWs 1, 2 and 4 were declared hostile and PWs 3, 6, 7 and 8 were tendered. On sifting, assessing and appraising evidence of witnesses, High Court Division found that the prosecution failed to bring home the charge of making demand of dowry and committing murder for its nonpayment. The autopsy report and evidence of PW10 proved that at first the victim was strangulated	**Section 100 of Penal Code, 1860:** Homicide in self-defence is justifiable only upon the plea on necessity and such necessity only arrived in the prevention of forcible and atrocious crime. A person who apprehends that his life is in danger or his body is in risk of grievous hurt, is entitled to defend it by killing his attacker. In order to justify his act, the apprehension must have to be reasonable and the violence used not more than what was necessary for self-defence. In the second clause it does not require as a condition precedent that grievous hurt must be

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
	Nirjatan Daman Ain, 2000; Section 100 of Penal Code, 1860; Right to private defence	to death and thereafter her body was set on fire as the burn was caused after the death of victim. The above fact was further corroborated by the confession of the condemned-prisoner. The High Court Division analyzing the confessional statement of the condemned prisoner found it to be true and made voluntarily. However, the High Court Division also found from the confessional statement that the act of wife killing was done by the condemned prisoner in exercise of his right to private defense. Consequently, the High Court Division found that the condemned prisoner was not guilty of murder, but he could have been awarded punishment under section 201 of the Penal Code. Considering the prison term already undergone by the condemned prisoner the High Court Division without sending the case in remand for trial of the condemned prisoner under section 201 of Penal Code, rejected the Death Reference and set aside the judgment and order of conviction and sentence of the tribunal.	caused by the aggressor. The accused may not even wait till the causing of grievous injury; apprehension of it that would be the consequence of the assault is enough for exercising the right. The right of private defence is available to a person who is suddenly confronted with immediate necessity of averting an impending danger of his life or property which is real or apparent but not of his creation. A person has the right to defend himself particularly when he has suffered a grievous injury or the apprehension of sustaining such injury in the event of taking recourse to such injury. This right subsists so long the apprehension of the aggressive attack continues.
10.	**Kazi Sanaul Karim alias Nadim** -VERSUS- **Advocate Md. Mozammel Haque & ors.** 15SCOB[2021]HCD 108 **(*S M Kuddus Zaman, J*)** **Key Words:** Section 18 of the House Rent Control Act, 1991; monthly tenant; ejectment, admission, possession, Rent Controller;	The predecessor of the opposite parties of this Civil Revision instituted S.C.C. Suit for a decree of ejectment against the defendant alleging, inter alia, that the defendant defaulted in paying rent and municipality taxes of the disputed premises, the disputed premises has become old and of dilapidated condition which requires immediate refurbishment and the plaintiff requires the disputed premises for starting a business by her youngest son. The trial court on the basis of a reply of D.W.1 to an extraneous question in cross-examination which was out of pleadings, held the defendant a defaulter in paying rent and decreed the suit. A single Bench of the High Court Division appreciating the evidence adduced by both parties came to the conclusion that finding of the trial court as to the admission of the DW-1 was erroneous and the	**<u>An admission must be in clear, consistent and unambiguous terms:</u>** An admission is an acceptance or endorsement of a claim or statement of the opposite parties which is against the interest of the party making the admission. Admission is an important legal evidence which does not require further prove and can be used against its maker. As such, an admission must be in clear, consistent and unambiguous terms. For making an admission there must have a specific claim or statement of the opposite party which can be admitted.

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
		plaintiff-opposite parties could not substantiate their claim in the suit. The High Court Division also pointed out that the House Rent Control Act, 1991 does not provide for eviction of a tenant on the ground that the premises is necessary for use of a son of the owner. Consequently, the judgment and order of the trial court was set aside.	

15 SCOB [2021] AD 1

APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain,
Chief Justice
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique
Mr. Justice Mirza Hussain Haider
Mr. Justice Abu Bakar Siddiquee
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

CRIMINAL REVIEW PETITION NO.82 OF 2017

(From the judgment and order dated 14.02.2017 passed by this Division in Criminal Appeal No.15 of 2010)

Ataur Mridha alias Ataur		Petitioner.
Vs.		
The State		Respondent.
For the Petitioner	:	Mr. Khandker Mahbub Hossain, Senior Advocate, instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For the Respondent	:	Mr. Mahbubey Alam, Attorney General (now dead) Mr. A. M. Aminuddin, Attorney General with Mr. Biswajit Debnath, Deputy Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.
As Amici Curiae to assist the Court	:	Mr. Rakanuddin Mahmud, Senior Advocate with Mr. A.F. Hassan Ariff, Senior Advocate and Mr. Abdur Razzaque Khan, Senior Advocate.

Date of hearing : 20.06.2019, 11.07.2019, 24.11.2020.

Date of judgment: 01.12.2020.

Editor`s Note:

The question arose in this case was whether imprisonment for life means imprisonment for rest of convict's natural life. In this case the petitioner sought review of the judgment by the Appellate Division dated 14.02.2017 passed in Criminal Appeal No.15 of 2010 in which his sentence of death was commuted to imprisonment for rest of his natural life. The Appellate Division by a majority decision disposed of the review petition observing that imprisonment for life prima-facie means imprisonment for the whole of the remaining period of convict's natural life but it would be deemed equivalent to imprisonment for 30 years if sections 45 and 53 are read along with sections 55 and 57 of the Penal Code and section 35A of the Code of Criminal

Procedure. However, while expressing his dissenting view honorable Justice Muhammad Imman Ali, J held that Supreme Court or any other Court cannot award a sentence which is not sanctioned by law and life imprisonment is not 20 or 25 or 30 years, but for the sake of calculating any benefit to be given to a convict, it can be reckoned to be equivalent to a finite term of years. His lordship was also of the view that section 35A of Code of Criminal Procedure, 1898 is a mandatory provision and applicable to life convicts' as well.

Key Words:
Meaning of Imprisonment for life; Code of Criminal Procedure, 1898 Section 35A; Penal Code 1860 Section 45, 53, 55, 57

Majority view

Per Mr. Justice Syed Mahmud Hossain, CJ, concurring with the majority decision:

Section 35A of the Code of Criminal Procedure:

Having gone through substituted section 35A of the Code of Criminal Procedure, it appears that there is no scope to say that the power conferred on the Court is a discretionary power. The language used in amended section 35A is clear and unambiguous and that the Court cannot disregard the intention of the legislature expressed in plain language and is to deduct the period of actual detention from imprisonment for life prior to his conviction. ... (Para 21)

Section 59 (f) of the Prisons Act 1894, Chapter XXI of the Jail Code and section 401 of the Code of Criminal Procedure 1898:

In exercise of the power conferred by section 59, sub-section (5) of the Prisons Act,1894 (IX of 1894) Rules were made in chapter XXI of the Jail Code to regulate the shortening of sentences by grant of remission. Any remission calculated by jail authorities under the provisions of the Jail Code are to be referred to the Government for release under section 401 of the Code of Criminal Procedure. But such remission recommended by the Jail Authority cannot be turned down by the Government without assigning any valid reason in writing as the rules relating to remission under Chapter XXI of the Jail Code were made under the mandate of section 59(f) of the Prisons Act,1894.

... (Para 31)

The power of commutation and remission is within the domain of the executive Government, but the Courts have the jurisdiction to determine the entitlement:

The power of commutation and remission as contained in the Penal Code, Code of Criminal Procedure and the Jail Code are within the domain of the executive Government and such privilege may be extended by the Government to the convicts undergoing imprisonment for life. But the Courts have the jurisdiction in certain circumstances to pass an order directing that the accused shall not be entitled to the benefit of Penal Code, the Code of Criminal Procedure and the Jail Code in respect of commutation, deduction and remission. ...(Para 34 & 35)

Per Mr. Justice Hasan Foez Siddique, J, Honorable Author Judge of the Majority Decision:

Section 35A of the Code of Criminal Procedure is applicable to convict sentenced to life imprisonment:
Thus, the convicts who are convicted and sentenced of the offences not punishable only with death are entitled to get the benefit of section 35A of the Code of Criminal Procedure in respect of the period of their imprisonment which was spent during investigation or inquiry or trial in a particular case. To deny the benefit of section 35A of the Code of Criminal Procedure the convict sentenced to life imprisonment would be to withdraw the mandatory application of a benevolent statutory provision.
... (Para 186)

Sections 45, 53, 55 and 57 of the Penal Code with Sections 35A and 397 of the Code of Criminal Procedure:
If we read Sections 45, 53, 55 and 57 of the Penal Code with Sections 35A and 397 of the Code of Criminal Procedure together and consider the interpretations discussions above it may be observed that life imprisonment may be deemed equivalent to imprisonment for 30 years. The Rules framed under the Prisons Act enable a prisoner to earn remissions- ordinary, special or statutory and the said remissions will be given credit towards his term of imprisonment. ...(Para 201)

A whole life order can be imposed in serious case:
If the Court, considering the facts and circumstances of the case and gravity of the offence, seriousness of the crime and general effect upon public and tranquillity, is of the view that the convict should suffer imprisonment for life till his natural death, the convict shall not be entitled to get the benefit of section 35A of the Code of Criminal Procedure. In the most serious cases, a whole life order can be imposed, meaning life does mean life in those cases. In those cases leniency to the offenders would amount to injustice to the society. In those cases, the prisoner will not be eligible for release at any time. The circumstances which are required to be considered for taking such decision are: (1) surroundings of the crimes itself; (2) background of the accused; (3) conduct of the accused; (4) his future dangerousness; (5) motive; (6) manner and (7) magnitude of crime. This seems to be a common penal strategy to cope with dangerous offenders in criminal justice system. ... (Para 202)

Summary of the majority view:
In view of the facts and circumstances, the discussion made above the review petition is disposed of with the following observations and directions:

1. Imprisonment for life prima-facie means imprisonment for the whole of the remaining period of convicts natural life.

2. Imprisonment for life be deemed equivalent to imprisonment for 30 years if sections 45 and 53 are read along with sections 55 and 57 of the Penal Code and section 35A of the Code of Criminal Procedure.

3. However, in the case of sentence awarded to the convict for the imprisonment for life till his natural death by the Court, Tribunal or the International Crimes Tribunal under the International Crimes (Tribunal) Act, 1973 (Act XIX of 1973), the convict will not be entitled to get the benefit of section 35A of the Code of Criminal Procedure.

... (Para 207)

Minority View

Per Mr. Justice Muhammad Imman Ali J:

A convict sentenced to imprisonment for life also gets benefit of section 35A of CrPC:
A Court cannot take away the benefit given to a citizen by law. When a law is enacted by a democratic Parliament every citizen is duty bound to abide by it. Equally, no Court of law can ignore a mandatory provision of a validly enacted statute without first striking down that provision as *ultra vires* the Constitution. Accordingly, in the case of any convict sentenced to any term of imprisonment, including imprisonment for life, the Court passing sentence shall deduct the total period spent by the convict in custody in connection with that offence before the date of his conviction, as provided by section 35A of the said Code. ...(Para 53 and 54)

A Court cannot award any sentence other than that provided by the law:
On the question of sentence, I have to say first and foremost that the Supreme Court is neither above nor beyond the law of the land and is bound to award a sentence which is permitted by law. Hence, when awarding sentence for an offence under section 302 of the Penal Code, just as the Supreme Court could not award a sentence of "rigorous imprisonment for 20 years", it cannot also award a sentence of "imprisonment for rest of the life". Neither of those two punishments mentioned is permitted by the Penal Code. Section 302 provides that, "Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine." Without amendment of the Penal Code, when an accused is convicted of an offence under section 302 of the said Code, the Supreme Court or any other Court cannot award any sentence of fixed term of imprisonment for a finite number of years nor "imprisonment for the natural life" or any such term. Equally, when commuting the sentence of death, a Court cannot award any sentence other than that provided by the law, which in the case of conviction under section 302 would have to be "imprisonment for life". ... (Para 57)

JUDGMENT

Syed Mahmud Hossain, CJ (Majority View)

1. I have had the privilege of going through the judgments written by my brothers Muhammad Imman Ali, J. and Hasan Foez Siddique, J. While concurring with the judgment and order written by my brother Hasan Foez Siddique, J. I would like to add a few sentences since the question involved in this criminal review petition is of greater public importance.

2. Facts of the case and the relevant decisions have fully been noticed in the majority judgment. I, therefore, avoid repetition.

3. The core question in this criminal review petition is what is meant by life imprisonment in the context of the provisions of the Penal Code, the Criminal Procedure Code, the Prisons Act and the Jail Code.

4. Imprisonment for life prima facie means the whole of the remaining life. The term "imprisonment for life" has not been defined in any of the statutes including the Penal Code.

Section 45 of the Penal Code defined the word "life" as follows:

> "45. The word "life" denotes the life of a human being, unless the contrary appears from the context."

5. Section 53 of the Penal Code states about various forms of punishments. Section 53 of the Penal Code runs as follows:

> "53. Punishments- The punishments to which offenders are liable under the provisions of this Code are,-
> Firstly,- Death;
> Secondly,- Imprisonment for life;
> Thirdly,-[Omitted by the Criminal Law (Extinction of Discriminatory Privileges) Act 1949 (Act No. II of 1950];
> Fourthly,-Imprisonment, which is of two descriptions, namely:- (1) Rigorous, that is, with hard labour; (2) Simple;
> Fifthly,- Forfeiture of property;
> Sixthly,- Fine.
> Explanation.-In the punishment of imprisonment for life, the imprisonment shall be rigorous."

6. Section 53 of the Penal Code is almost similar to section 53 of the Indian Penal Code except that the explanation appended to section 53 of the Penal Code has not been incorporated in section 53 of the Indian Penal Code. Section 55 of the Penal Code provides that Government has the power to commute the sentence of imprisonment for life to a term not exceeding 20 years. On the other hand, in India Government has the power to commute imprisonment for life to a term of either description not exceeding 14 years. In our case too it was 14 years but in 1985 by the Penal Code (Amendment) Ordinance,1985 (Ordinance No.XLI of 1985) 20 years was substituted for 14 years. For better appreciation section 55 of the Penal Code is quoted below:

> "55. Commutation of sentence of imprisonment for life-In every case in which sentence of imprisonment for life shall have been passed, the Government may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding twenty years."

7. According to section 57 of the Penal Code fractions of terms of punishment of imprisonment for life shall be calculated as equivalent to rigorous imprisonment for 30 years. In India, the language of section 57 of the Indian Penal Code is almost similar but in their case the period shall be reckoned as equivalent to imprisonment for 20 years. For better understanding, we should have a look on section 57 of the Penal Code, which is quoted below:

> "57. Fractions of terms of punishment-In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for thirty years."

8. With a view to giving a meaningful interpretation of imprisonment for life some of the provisions of the Code of Criminal Procedure are also required to be considered.

9. At the very outset it would be relevant to consider the introduction of section 35A of the Code of Criminal Procedure which was not in the original Code of Criminal Procedure. Section 35A of the Code of Criminal Procedure was first introduced by way of amendment of the Code of Criminal Procedure by Ordinance No.12 of 1991, which was subsequently

enacted by way of amendment of the Code of Criminal Procedur,1898 (Act V of 1898). The then section 35A introduced by the Ordinance No.12 of 1991 is quoted below:

> "35A. Term of imprisonment in cases where convicts are in custody.- Where a person is in custody at the time of his conviction and the offence for which he is convicted is not punishable with death or imprisonment for life, the Court may, in passing the sentence of imprisonment, take into consideration the continuous period of his custody immediately preceding his conviction.
>
> Provided that in the case of an offence for which a minimum period of sentence of imprisonment is specified by law, the sentence shall not be less than that period."

10. However, the Ordinance was repealed by the Act No.16 of 1991 but at the time of enactment the proviso appended to section 35A was omitted.

11. Having gone through the section 35A of the Code of Criminal Procedure as introduced by Act No.16 of 1991, we find that when an accused is sentenced to death or imprisonment for life or sentenced for an offence which is punishable with death or imprisonment for life he is not entitled to get the benefit of section 35A of the Code of Criminal Procedure for deduction of sentence for the period during which he was in custody prior to his conviction and sentence. Section 35A introduced by Act No.16 of 1991 conferred a discretionary power on the Court to take into consideration the continuous period of custody of a convict prior to his conviction provided that his offence was not punishable with death or imprisonment for life.

12. In India, the corresponding section is 428 of the Indian Code of Criminal Procedure, 1973 which runs as under:

> "428.Period of detention undergone by the accused to be set-off against the sentence of imprisonment.- Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set-off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him:
>
> Provided that in cases referred to in section 433A, such period of detention shall be set- off against the period of fourteen years referred to in that section."

13. On consideration of section 428 of the Indian Code of Criminal Procedure, it appears that an accused who is convicted for imprisonment for a term the period of detention, if any, undergone by him during the investigation, inquiry or trial before the date of conviction shall be entitled to set-off against the term of imprisonment imposed on him on conviction. A convict is entitled to the benefit of section 428 of the Indian Code of Criminal Procedure irrespective of the fact that he has been sentenced to suffer imprisonment for life and since the right of set-off is mandatory the period undergone by the convict before such conviction shall be set-off from his term of imprisonment. The proviso appended thereto provides that in cases referred to in section 433A such period of detention shall be set-off against the period of 14 years referred to in that section. Before adding the proviso to section 428 in 2005, the

words, "imprisonment for life" were conspicuously absent in section 428 of the Indian Code of Criminal Procedure. For such reason in ***Kartar Singh and Others vs. State of Haryana***, **AIR 1982 SC 1439** the Supreme Court of India held that the benefit of set-off contemplated in section 428 of Code of Criminal Procedure would not be available to life convicts. Butthis decision was overruled in ***Bhagirath and others Vs. Delhi Administration,*** **AIR 1985 SC 1050** wherein the the court held:

> "5. The neat and, we believe, the simple question for decision is whether imprisonment for life is imprisonment "for a term". The reason why it is urged that imprisonment for life is not imprisonment for a term is that the latter expression comprehends only imprisonments for a fixed, certain and ascertainable period of time like six months, two sears, five years and so on. Since the sentence of life imprisonment, as held by this Court in *Gopal Vinayak Godse v. The State of Maharashtra,(1961) 3 SCR 440* is a sentence for life and nothing less and since, the term of life is itself uncertain the sentence of life imprisonment is for an uncertain term, that is to say, that it is not imprisonment for a term.
>
> 6. ...The relevant question and, the only one, to ask under Section 428 is : Has this person been sentenced to imprisonment for a term ? For the sake of convenience, the question may be split into two parts. One, has this person been sentenced to imprisonment? And, two, is the imprisonment to which he has been sentenced an imprisonment for a term? There can possibly be no dispute that a person sentenced to life imprisonment is sentenced to imprisonment. Then, what is the term to which he is sentenced? The obvious answer to that question is that term to which he has been sentenced is the term of his life.**Therefore, a person who is sentenced to life imprisonment is sentenced to imprisonment for a term**.*"*

14. The Supreme Court of India then held in ***Bhagirath*** (supra) that the question of setting off the period undergone by an accused before his conviction order is passed against the sentence of life imprisonment only arises when an appropriate authority passes an order under Section 432 or Section 433 of the Code. In the absence of such order, imprisonment for life would mean, imprisonment for the remainder of life. (Emphasis supplied)

15. In 2005, long after *Bhagirath* case (ibid) was decided, the legislature added a proviso to the section 428 of the Code of Criminal Procedure, 1973 by an amendment that clarifies that the life convicts would also get the benefit of section 428. The language of section 428 of the Indian Code of Criminal Procedure is mandatory in nature. In the case of *Ranjit Singh Vs. State of Panjab (2010)12 SCC 506,* the view taken in *Bhagirath* (supra) was affirmed and the benefit of set-off mentioned in section 428 of the Indian Code of Criminal Procedure was given to the life convict. In the judgment under review reliance was placed on the case of *Kartar Singh and others (supra)* though the said case was overruled in the case of *Bhagirath* (supra).

16. In India, the reason which impelled introduction of section 433A of the Code of Criminal Procedure was that sometimes due to grant of remission even murderers sentenced or commuted to imprisonment for life were released at the end of 5 to 6 years. In order to circumvent this, the legislature incorporated section 433A of the Indian Code of Criminal Procedure by Act No.45 of 1978 providing that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments

provided by law or where the sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life such person shall not be released from prison unless he had served 14 years including set-off as mentioned in section 428. By the aforesaid section, the Indian legislature has put a fetter on the appropriate Government by restricting its power of remission and commutation in case of a life convict to 14 years of actual imprisonment.

17. On consideration of original section 35A of the Code of Criminal Procedure in Bangladesh and section 428 of the Indian Code of Criminal Procedure, we find that the original section 35A was introduced in 1991 but not in line with section 428 of the Indian Code of Criminal Procedure.

18. In Bangladesh subsequently section 35A of the Code of Criminal Procedure was substituted by section 2 of the Code of Criminal Procedure (Amendment Act, 2003) (Act No.XIX of 2003). The substituted section 35A is reproduced below:

> "Deduction of imprisonment in cases where convicts may have been in custody- (1) Except in the case of an offence punishable only with death, when any court finds an accused guilty of an offence and, upon conviction, sentences such accused to any term of imprisonment, simple or rigorous, it shall deduct from the sentence of imprisonment, the total period the accused may have been in custody in the meantime, in connection with that offence.
>
> (2) If the total period of custody prior to conviction referred to in sub-section (1) is longer than the period of imprisonment to which the accused is sentenced, the accused shall be deemed to have served out the sentence of imprisonment and shall be released at once, if in custody, unless required to be detained in connection with any other offence; and if the accused is also sentenced to pay any fine in addition to such sentence, the fine shall stand remitted."

19. On comparison of original section 35A and substituted section 35A, we find that the legislature knowing full well did not give the benefit of the discretionary power of the Court under section 35A to a person sentenced to imprisonment for life by the aforesaid un-amended provision. The legislature keeping in mind about the original section substituted section 35A where it has been stated that the benefit of section 35A will not be available in the case of an offence punishable only with death. This substituted section 35A also allowed the Court to deduct the sentence from the sentence of imprisonment for life the total period during which the accused was in custody in connection with that offence. By using the words 'except' and 'only' in section 35A the legislature intended to givethe benefit of section 35A to the accused who have been sentenced to imprisonment for life also.

20. In the judgment under review, it has been held that section 35A of the Code of Criminal Procedure is not applicable to an offence punishable with death or with imprisonment for life. But the original section 35A of the Code of Criminal Procedure has not been taken into consideration at the hearing of Criminal Appeal Nos.15-16 of 2010 from which this criminal petition for review has arisen. The judgment under review reveals that a convict cannot claim deduction of the period in custody prior to his conviction as of right and that it is a discretionary power of the Court and that it cannot be applicable in respect of an offence which is punishable with death (should have been imprisonment for life). Another finding of the judgment under review is that though the word 'only' is used in section 35A,

the legislature without considering section 401 of the Code of Criminal Procedure and section 53 of the Penal Code has inserted the word 'only' but the use of word 'only' will not make any difference since under the scheme of the prevailing laws any remission/deduction of sentence has been reserved to the Government only.

21. Having gone through substituted section 35A of the Code of Criminal Procedure, it appears that there is no scope to say that the power conferred on the Court is a discretionary power. The language used in amended section 35A is clear and unambiguous and that the Court cannot disregard the intention of the legislature expressed in plain language and is to deduct the period of actual detention from imprisonment for life prior to his conviction.

22. It is a cardinal rule of construction that normally no word or provision should be considered redundant or superfluous in interpreting the provisions of a statute. In the field of interpretation of statues, the Courts always presume that the legislature inserted every part thereof with a purpose and the legislative intention is that every part of the statute shall have effect. It may not be correct to say that a word or words used in a statute are either unnecessary or without any purpose to serve, unless there are compelling reasons to say so looking to the scheme of the statute and having regard to the object and purpose sought to be achieved(S*ankar Ram & Co. Vs. Kasi Nicker and others (2003)11 SCC 699)*.

23. "Ut res magis valeat quam pereat"-the literal meaning of this maxim is that it is better for a thing to have effect than to be made void. According to Maxwell, the function of a Court is to interpret a statute according to intent of the legislature and in doing so it must bear in mind that its function is *jus dicere not jus dare*: the words of a statute must not be overruled by the judges, but reform of law must be left in the hands of Parliament (Maxwell-Interpretation of Statutes, 12th edition, page-1-2). It is a cardinal rule of construction that normally no word or provision should be considered redundant or superfluous in interpreting the provisions of a statute.

24. In the case of *Shafiqur Rahman Vs. Idris Ali, (1985) 37 DLR (AD)71* it has been held that a cardinal principle of construction is that it must be presumed that the legislature does not use any word unnecessarily or without any meaning or purpose.

25. In the case of *Shamsuddin Ahmad, Advocate Vs. Registrar, High Court of East Pakistan (1967) 19 DLR (SC) 483,* it has been held that it is an universally accepted rule of construction that no words in a statute are redundant or surplusage. Meaning must be given to every word in a statute reading its provisions as a whole in a fair and impartial manner in the ordinary and general sense.

26. In view of principle expounded in the cases referred to above, it cannot be said that the word 'only' is used in section 35A of the Code of Criminal Procedure without considering section 401 of the Code of Criminal Procedure and section 53 of the Penal Code.

27. Under substituted section 35A of the Code of Criminal Procedure, an accused is entitled to deduction of the actual period during which he was in custody prior to passing of his sentence from his sentence of imprisonment for life.

28. In India, from the case of *Pandit Kishori Lal Vs. The King-Emperor (1944) 26 ILR (Lahore) Privy Council 325*, till date the consistent view is that life imprisonment means the whole of remaining life. But in most of these cases, the dispute arose when the executive did give remission under different sections of the Indian Code of Criminal Procedure and when the Court debarred the executives from exercising the power of remission or from exercising such power until certain period.

29. It has already been discussed that in the context of Bangladesh from the date of partition of India till pronouncement of the judgment under review, the consistent practice was that imprisonment for life be reckoned as 20 years rigorous imprisonment which is by subsequent amendment increased to rigorous imprisonment for 30 years as contained in amended section 57 of the Penal Code.

30. It is, however, true that section 57 of the Penal Code is for calculating fractions of terms of punishment for imprisonment for life which shall be equivalent to rigorous imprisonment for 30 years. Though section 57 of the Penal Code was enacted for calculating the fractions of the imprisonment for life, the period of imprisonment for life always deems to be rigorous imprisonment for 30 years (prior to amendment of section 57, it was rigorous imprisonment for 20 years). We were blessed with legendary Judges in this Court and while passing sentence under section 302 of the Penal Code, they used the statutory words".....punished with death or imprisonment for life....." without adding the words "till the end of the natural life of the convict" which are not in the statute. What would be the tenure of imprisonment for life has been left open to the executive who may or may not give remission. But under section 35A of the Code of Criminal Procedure power has been vested in the Court to deduct the period of incarceration undergone by the convict prior to passing of the verdict of sentence from the total period of sentence awarded.

31. In exercise of the power conferred by section 59, sub-section (5) of the Prisons Act,1894 (IX of 1894) Rules were made in chapter XXI of the Jail Code to regulate the shortening of sentences by grant of remission. Any remission calculated by jail authorities under the provisions of the Jail Code are to be referred to the Government for release under section 401 of the Code of Criminal Procedure. But such remission recommended by the Jail Authority cannot be turned down by the Government without assigning any valid reason in writing as the rules relating to remission under Chapter XXI of the Jail Code were made under the mandate of section 59(f) of the Prisons Act,1894.

32. In order to give a harmonious construction of sections 45 and 53 of the Penal Code, we have to read those two sections in conjunction with sections 55 and 57 of the Penal Code and section 35A of the Code of Criminal Procedure and we are of the view that imprisonment for life should be reckoned to a fixed period of rigorous imprisonment.

33. Interpretation of law is absolutely within the domain of Court and this question was settled long ago by the John Marshall, CJ in 1805 A.D. in the case of *Marbury Vs. Madison* (5 U.S. 137). Marshall's famous lines in that case are, " It is emphatically the province of the judicial department to say what law is." Those famous lines are inscribed on the wall of U.S. Supreme Court in Washington, D.C.

34. The power of commutation and remission as contained in the Penal Code, Code of Criminal Procedure and the Jail Code are within the domain of the executive Government and such privilege may be extended by the Government to the convicts undergoing imprisonment for life.

35. But the Courts have the jurisdiction in certain circumstances to pass an order directing that the accused shall not be entitled to the benefit of Penal Code, the Code of Criminal Procedure and the Jail Code in respect of commutation, deduction and remission and the details of such authority of the Court have been explained in the judgment written by my brother Hasan Foez Siddique, J.

36. In the light of the findings made before, I am of the view that the impugned judgment should be reviewed and a definite time frame has to be provided for imprisonment for life till the question is resolved by the legislature once and for all.

Muhammad Imman Ali, J (Minority View):

37. This criminal review petition is directed against the judgement and order dated 14.02.2017 passed by this Division in Criminal Appeal No. 15 of 2010 maintaining the conviction passed by the High Court Division and commuted the order of sentence to imprisonment for rest of his natural life.

38. The facts of the case in brief are that Druto Bichar Tribunal, Dhaka vide its judgement and Petition order dated 15.10.2003 convicted the petitioner, Ataur Mridha @ Ataur and two others under sections 302/34 of the Penal Code and sentenced them to death in Druto Bichar Tribunal Case No.34 of 2003. Reference was made to the High Court Division for confirmation of the sentence of death, which was registered as Death Reference No.127 of 2003. The petitioner filed Criminal Appeal No.3895 of 2003 and Jail Appeal No.739 of 2003before the High Court Division against the said judgement and order of the Druto Bichar Tribunal. After hearing the death reference and the criminal appeal along with the jail appeal, the High Court Division by judgement and order dated 30.10.2007 accepted the reference, dismissed the appeal, thus maintained the conviction, and confirmed the sentence of death of the petitioner and the other two absconding condemned convicts. The petitioner filed Criminal Petition for Leave to Appeal No.116 of 2008 and co-convict Md. Anwar Hossain filed Criminal Petition for Leave to Appeal No.136 of 2008 before this Division, which upon hearing leave was granted and the cases were registered respectively as Criminal Appeal Nos.15 and 16 of 2010.By the judgement and order dated 14.02.2017 this Division dismissed both the appeals and maintained the conviction but commuted the sentence of death of the appellants to "imprisonment for rest of the life".

39. The appellant in Criminal Appeal No.15 has filed the instant petition to review the judgement and order of this Division.

40. On behalf of the petitioner, it was argued that this Division committed error apparent on the face of the record in failing to reconcile with the previously pronounced judgement of a co-equal Bench of the same Division dated 13.04.2013. This was on the same point of law as reported in 19 BLC (AD) 204 and as such has rendered the impugned judgement of the Appellate Division as being *'per incuriam'* and, thereby, created judicial anarchy and the resulting in inconsistency and uncertainty in the law of the land relating to computation of period of custody for convicts who have been sentenced to imprisonment for life. This Division committed error apparent on the face of the record in failing to harmoniously interpret the provisions of Article 152 of the Constitution of the People's Republic of Bangladesh, section 57 of the Penal Code, 1860, section 35A of the Criminal Procedure Code, 1898, section 59 of the Prisons Act, 1894, Chapter XXI (remission) of the Jail Code and the previous judgement of a co- equal Bench of the same Division, and as such, the impugned judgement is liable to be reviewed by this Division in order to ensure certainty and consistency in the law of the land. This Division committed error apparent on the face of the record in failing to appreciate that Rule 751 of Chapter XXI of the Jail Code which provides that 'life convict means a prisoner whose sentence amounts to 30 years imprisonment' having been framed pursuant to section 59 of the Prisons Act, 1894 (Act No.IX of 1894) falls within the definition of law as contained in Article 152 of the Constitution of the People's Republic of Bangladesh, and as such, the findings of this Division in the impugned judgement that 'this conversion of life sentence into one of fixed term by the Jail Authority is apparently without jurisdiction' suffers from infirmity in law and is liable to be set aside. This Division committed error apparent on the face of the record inasmuch as the impugned judgement,

without assigning proper reason, negated the application of the provision of section 35A of the Code of Criminal Procedure, 1898 regarding computation of periodof custody for life convicts thereby frustrating the intention of the legislature as contemplated by the Code of Criminal Procedure **(**Amendment**)** Act, 2003 (Act No.XIX of 2003), and as such, the impugned judgement having usurped the functions of the Legislature and violated the principle of separation of powers, the same is bad in law and liable to be set aside for ends of justice.

41. It was further argued that at the time of hearing the appeals of the convicts before this Division, the facts of the occurrence and the trial culminating in conviction of the accused of offences under sections 302/34 of the Penal Code were not under challenge. The only prayer in the appeal was for commutation of the sentence of death to one of imprisonment for life. By the impugned judgement and order, the death sentence of the appellants was commuted, but the life imprisonment was for the rest of the appellants' life. And that is now under challenge in this review.

42. On a broader perspective, in this review we are concerned with sentencing in cases where serious and the most heinous offences are committed which result in imposition of the death sentence or imprisonment for life, but primarily the point in issue is the length of the period that a convict would serve when sentenced to imprisonment for life.

43. Sentencing is never an easy task for any judge, more so because it concerns the life/liberty of a citizen, though convicted of a crime, whose interests are also protected by the Constitution and the law. In the absence of sentencing guidelines, the decision on the sentence to be awarded is bound to be subjective and guided by the perception and degree of abhorrence created in the mind of the trial/appellate judge. It is also human nature for some persons to be more disgusted by certain types of offences, while others may have a different perception about the commission of any particular type of crime. Equally, some may be abhorred to the extreme by a crime that is against a child as opposed to an adult victim. Hence, subjectivity in sentencing will remain and will be guided by human vagaries, until objective criteria are set out in guidelines. Of course, it cannot be denied that such objective and sometimes mathematical guidelines will take away the human element often applied by judges in exercising their discretion. But unless guidelines are given, uniformity in the sentencing process cannot be achieved. Moreover, in our criminal justice process, there is no date fixed for a separate sentence hearing; hence, there is no scope for the accused to plead any mitigating facts or extenuating circumstances which might help to reduce his sentence.

44. The matters in issue in this review have been elaborately and painstakingly discussed by my esteemed, learned brother Hasan Foez Siddiqui, J. and I need not repeat the same. Suffice it to say that the matter before us concerns the duration of a sentence of imprisonment for life; whether it is till the end of the last breath of the prisoner or whether it can be for a term which may end at any time after the date of conviction and before the prisoner dies.

45. The other substantive issue arising in this case relates to whether the convict, who has been sentenced to imprisonment for life, is entitled to deduction of the period spent in jail during the trial from his sentence. It is in this regard that I could not agree with the majority view and feel constrained to write a separate judgement expressing my own views.

46. In the impugned judgement this Division took into consideration the definition of 'life' under section 45 read with section 57 of the Penal Code. The sum and substance of the

decision is that in offences punishable with death which are commuted to imprisonment for life, there is necessity to direct that the prisoner serves in prison for the rest of his natural life in view of the gross and heinous nature of the offence. It was further held that deduction of the period of custody during enquiry, investigation or the trial process would not be allowable taking in aid section 35A of the Code of Criminal Procedure. Reliance was placed, amongst others, on the decision of the Indian Supreme Court in the case of **Swami Shraddananda vs. The State of Karnataka and another, (2016) SCC 1**.In this regard, it was held that,*"Section 35A of the Code of Criminal Procedure is not applicable in case of an offence punishable with death or imprisonment for life. An accused person cannot claim the deduction of the period in custody prior to the conviction as of right. It is a discretionary power of the court"*. Perhis Lordship Mr. S.K. Sinha, C.J.

47. To appreciate the provision of deduction of any period of custody from the ultimate sentence of imprisonment imposed upon any convict, it is necessary to consider that the idea behind incarcerating any convicted criminal is to ensure that he does not commit any further offence, that society is kept secure from his criminal activity and that he realises his wrong and is deterred from engaging in any further criminal activity. The obvious result of incarceration is that the convict criminal is deprived of his liberty and is confined in institutional custody, i.e. prison.

48. There is no difficulty in understanding that if a convicted person is sentenced to imprisonment for ten years and during the period before his conviction, he had suffered five years in jail, then the five years of custody before conviction would be deducted from his final order of sentence of imprisonment because he would have already suffered the loss of liberty inside the jail while the trial was going on.

49. This provision giving benefit of deduction of time spent in custody by the convict before his conviction was enacted by the Code of Criminal Procedure (Second Amendment) Ordinance, 1991 by introducing section 35A of the Code of Criminal Procedure, which provided for deduction from the period of sentence awarded any period that the convict spent in custody before his conviction. At that time, the provision did not apply to convicts sentenced to death or imprisonment for life. Section 35A of the Code was amended in 2003, as a result of which the deduction of the period of custody before conviction was made mandatory for those convicts who were sentenced to imprisonment for life. Thus, the amendment in 2003 purposely gave benefit to a convict imprisoned for life to have that period of pre-conviction custody deducted from his sentence. Hence, when any convict is sentenced to imprisonment for life it shall be the duty of the Court to deduct the period spent in custody before his conviction from the sentence awarded. There can be no doubt that the provision is mandatory.

50. Before amendment in 2003 section 35A provided as follows:

> "35A. Term of imprisonment in cases where convicts are in custody- Where a person is in custody at the time of his conviction and the offense for which he is convicted is not punishable with death or imprisonment for life, the Court may in passing the sentence of imprisonment, take into consideration the continuous period of his custody immediately preceding his conviction.
>
> Provided that in the case of an offence for which a minimum period of sentence of imprisonment is specified by law, the sentence shall not be less than that period." [s.2 The Code of Criminal Procedure (Second Amendment)

Ordinance 1991.]

51. This provision was amended by s.2 of the Code of Criminal Procedure (Amendment) Act, 2003, which is currently in force and provides as follows:

> "35A. Deduction of imprisonment in cases where convicts may have been in custody.- (1) Except in the case of an offence punishable only with death, when any Court finds an accused guilty of an offence and upon conviction, sentences such accused to any term of imprisonment, simple or rigorous, it shall deduct from the sentence of imprisonment, the total period the accused may have been in custody in the meantime, in connection with that offence."

52. The word "may" appearing in the earlier law was changed to "shall". Hence, there cannot be any doubt that the provision is now mandatory, and the duty is upon the Court to make the deduction of the period spent by the convict in custody before pronouncement of judgement from the sentence awarded.

53. A Court cannot take away the benefit given to a citizen by law. When a law is enacted by a democratic Parliament every citizen is duty bound to abide by it. Equally, no Court of law can ignore a mandatory provision of a validly enacted statute without first striking down that provision as *ultra vires* the Constitution.

54. Accordingly, in the case of any convict sentenced to any term of imprisonment, including imprisonment for life, the Court passing sentence shall deduct the total period spent by the convict in custody in connection with that offence before the date of his conviction, as provided by section 35A of the said Code.

55. However, to give effect to the provision of law, in case of any convict sentenced to imprisonment for life, difficulty arises because there is no quantification of life imprisonment; it is an indeterminate period. The Legislature could easily have added a provision in aid of section 35A of the Code that for the purpose of the deduction, life imprisonment shall be taken to be equivalent to 30 years (or any other figure deemed appropriate by the Legislature).The problem can be solved just as easily by a small legislative amendment to that effect. However, until such time, in calculating what is the duration of a life sentence, the yardstick provided in section 57 of the Penal Code for calculating fractions of a sentence of life, may be used in aid of section 35A of the Code of Criminal Procedure. Alternatively, the benefit can be given by reference to the other benefits provided under the Jail Code where rule 751 provides that life convict means, for a class I and class II prisoner, imprisonment for 25 years, and 20 years for a class III prisoner. In the same vein, the benefit of deduction may be given by use of the provision under section 57 of the Penal Code, as was suggested by the Supreme Court of Pakistan in **Bashir and 3 Others Vs. The State, PLD 1991 (Supreme Court) 1145**, per Rustam S. Sidhwa, J. who pointed out that "in respect of a sentence of imprisonment for life which is treated as one for 25 years under Section 57 of the Penal Code, but it is basically for the limited purpose of the remission system." Certainly, rather than deny the benefit to a convict because of a lacuna in the law, the Court should follow the Latin maxim "ubi jus, ibi remedium", meaning, where there is a right, there is a remedy. Undoubtedly, the right to a remedy is a fundamental right recognised in all legal systems. In the present scenario, the right to have the period of under-trial custody deducted from the ultimate sentence, including sentence of life imprisonment, is a right enshrined in law and cannot be taken away due to inadequacy in the system in not specifying the yardstick with which to calculate the deduction from the sentence of imprisonment for life, which is

clearly intended to be allowed under the amended law.

56. It must be clearly understood that whereas the benefits by way of remission, commutation, pardon etc. are discretionary, the benefit of deduction under section 35A of the Code of Criminal Procedure is mandatory. The grant of benefits by way of remission etc. under the Jail Code and the Code of Criminal Procedure are not within the function of the Court, whereas the deduction mentioned under section 35A is a duty imposed squarely upon the Court.

57. On the question of sentence, I have to say first and foremost that the Supreme Court is neither above nor beyond the law of the land and is bound to award a sentence which is permitted by law. Hence, when awarding sentence for an offence under section 302 of the Penal Code, just as the Supreme Court could not award a sentence of "rigorous imprisonment for 20 years", it cannot also award a sentence of "imprisonment for rest of the life". Neither of those two punishments mentioned is permitted by the Penal Code. Section 302 provides that, "Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine." Without amendment of the Penal Code, when an accused is convicted of an offence under section 302 of the said Code, the Supreme Court or any other Court cannot award any sentence of fixed term of imprisonment for a finite number of years nor "imprisonment for the natural life" or any such term. Equally, when commuting the sentence of death, a Court cannot award any sentence other than that provided by the law, which in the case of conviction under section 302 would have to be "imprisonment for life".

58. Moreover, there is no provision in the law to distinguish between a convict who has been sentenced to imprisonment for life at the first instance and a convict whose sentence of death is commuted to one of imprisonment for life. In both cases, imprisonment for life must have the same meaning. The fact of commuting the sentence from death to imprisonment for life signifies that the culpability or heinousness is recognised by the appellate Court as lesser than was perceived by the trial Court. That is not to say that two convicts having exerted different degrees of heinousness in the commission of murder, will not be treated differently when exercising any discretion to release the prisoner from custody under any law which allows such release. Whichever authority, be it executive or judicial, considers early release, must take into consideration the propensity of the convict to do further harm to the community.

59. The wording of section 45 of the Penal Code is such that sentence of life imprisonment *per se* means that the imprisonment shall be for the rest of the convict's natural life. To give the section any other interpretation would, in my humble opinion, be wrong. Hence, to mention that the life imprisonment would be for the "rest of the convict's natural life" would be superfluous. In the case of **Rokia Begum Vs. State, 13 ADC (2016) 311**, it was held that to say that life sentence means 22½ years' of imprisonment "as used in Bangladesh is utterly a misnomer; indeed it appears to be an erroneous interpretation."The interpretation of the term "life imprisonment" in the Penal Code means 'life till death'. However, that is not to say that any convict sentenced to imprisonment for life will necessarily end his days in prison until he dies. The sentence, unless reversed on appeal, will remain, but still the prisoner may be released due to benefits provided by any other law. As I shall discuss later, provisions of other statutes and laws are to be implemented according to the demands of those statutes and laws. Hence, where the Constitution or provision of another law allows the convict to be released from jail before he dies, then that provision is equally worthy of implementation, if any other required qualifications of that law is met. This aspect

will be discussed below.

60. At this juncture one may profitably look to see how India and Pakistan, who have similar legal provisions, have dealt with the matter of life imprisonment. The Penal Code of Bangladesh has the same origin as that of India and Pakistan. However, over the years Pakistan appears to have settled views regarding the meaning of life imprisonment. The Supreme Court of Pakistan has held in some cases that life imprisonment means imprisonment till the end of the convict's life but went on to conclude that it is the accepted view that life imprisonment means imprisonment for 25 years. This has been decided in view of the provision in section 57 of the Pakistan Penal Code, rule 140 of the Pakistan Prison Rules, 1978 framed under the Prisons Act which provide that "imprisonment for life" would mean 25 years. With respect, such view does not do justice to the language used in section 57 of the said Code, which provides that, "**57. Fractions of terms of punishment. In calculating fractions of terms of punishment**, imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for 25 years." [the corresponding period of imprisonment in section 57 of the Penal Code is 20 years in the case of India and 30 years in the case of Bangladesh].

61. In my humble opinion, the section quoted above does not say that life imprisonment is equivalent to 25 years, nor should we overlook the fact that the equivalence is meant for the purpose of reckoning/calculating fractions of terms of imprisonment, for example, to give benefit of awarding a lesser sentence to a convict who abets the commission of an offence which is not committed in consequence of that abetment [section 116 Penal Code]. Similarly, for the purpose of giving benefits of remission under the Jail Code, life imprisonment is to be reckoned as 25 or 20 years, depending on the gravity of the offence. Thus, quantifying the term "imprisonment for life" to any duration measured in years is a legal fiction created in order to give benefit. Hence, it can be categorically stated that life imprisonment is not 20 or 25 or 30 years, but for the sake of calculating any benefit to be given to a convict, it can be reckoned to be equivalent to a finite term of years.

62. The Supreme Court of India has decisively taken the view that life imprisonment means till the end of the convict's natural life. Bangladesh, in my humble opinion, has now correctly taken the same view. The most quoted decision in this regard is **Vinayak Godse v. The State of Maharastra and others, AIR 1961 SC 600**, where the Indian Supreme Court held, per K. Subba Rao, J.

> "Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words "imprisonment for life" for "transportation for life" enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."

63. A similar view was taken by the English Court of Appeal in **R. v. Foy, 1962 All ER 246**, where it was held as follows:

> "Life imprisonment means imprisonment for life. No doubt many people come out while they are still alive, but, when they do come out, it is only on license,

and the sentence of life imprisonment remains on them until they die."

64. Thus, clearly there is the recognition that even a convict sentenced to imprisonment for life may yet leave the prison before he dies. However, one must consider that just as the sentence of death is the end of all hopes, it is the end of everything, so is the sentence of life imprisonment till the end of the convict's natural life. In the USA this is termed as life without parole and in England the Courts have the discretion to specify a "whole life order", which means that the convict will spend his whole life behind bars. The only hope that remains in the prisoner is that he will live and breathe the air within the prison precincts until his death within the walls of the prison. It is a fate worse than death because the prisoner will continue to breath every moment in the knowledge that he will never again live with his family and within the community where he spent the best part of his life. A similar observation was made in the decision of **Rokia Begum**, cited above where reference was made to the case of the Yorkshire Moors murders where both convicts had been sentenced to imprisonment for life. One of the convicts died in prison and the other convict was declared insane and repeatedly asked to be allowed to die. That case clearly shows that for a criminal sentenced to imprisonment for life meaning the rest of his life, death would have been a less punitive option. Hindley who was sentenced to imprisonment for life in 1966 just after the death penalty was abolished wrote in a letter; "I knew I was a selfish coward but could not bear the thought of being hanged. Although over the years wish I had been" (as reported on BBC news dated 29.02.2000).

65. Commuting the sentence of death to imprisonment for life is in a way giving back hope to the convict that one day, maybe soon he will re-join his family. Having commuted the death sentence, telling any convict that he will spend the rest of his life in jail until the day he dies is taking away the goodness in life; it is worse than the sentence of death. It takes away the hope that he may once again live a normal life within the community, amongst his loved ones. Every day he will live with the thought that he will die within the precincts of the jail and only his dead body will be given back to his family for burial.

66. The Constitution, the Penal Code, the Code of Criminal Procedure and the Jail Code allow for pardon, reprieve, respite, commutation, reduction, suspension and remission of sentence. Taking away such powers would tantamount to overriding the Constitution/statute, which cannot be done by any Court or Tribunal. It is Parliament which has the constitutional mandate to enact laws. Courts of law are mandated to ensure that the law is implemented. Courts cannot make law. The High Court Division has power to declare any law enacted by Parliament to be *ultra vires* the Constitution but cannot make law or suggest how any law is to be formulated or enacted.

67. The President has a prerogative power under article 49 of the Constitution to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. This is confirmed by the Penal Code and Code of Criminal Procedure. Section 55A of the Penal Code provides that the Government's power to commute any sentence shall not derogate from the right of the President to grant pardons, reprieves, respites or remissions of punishment. The power of the President and power of the Government are constitutional/statutory powers which cannot be whimsically taken away. The Supreme Court has no authority to question the exercise of prerogative power of the President and only has the limited power to declare a statute or any provisions therein as ultra vires the Constitution, but until such time as it is declared ultra vires, the provisions of the statute are binding on all.

68. Hence, the provisions of the Constitution, the Penal Code, Code of Criminal Procedure, Jail Code, containing Rules enacted under power given in section 59 of the Prisons Act 1894 and any other law giving benefits to an accused or convicted person, are nevertheless discretionary. But discretion is to be exercised in favour of the accused or convicted person where the circumstances demand. Any remission calculated by the jail authorities under the provisions of the Jail Code are to be referred to the Government under section 401 of the Code of Criminal Procedure, to be considered for release of the prisoner. It is the discretion of the Government whether to exercise the powers of suspension or remission of sentence under section 401 of the Code of Criminal Procedure. The Government may require the Judge who passed the order of conviction or who confirmed the conviction on appeal to state his opinion as to whether the application should be granted or refused. It is also provided in section 401 of the Code of Criminal Procedure if any condition on which a sentence has been suspended or remitted is not fulfilled, the Government may cancel the suspension or remission, in which event the convict will have to undergo the unexpired portion of the sentence. This reinforces the view that the sentence of the convict remains as it was ordered by the trial Court and that only the punishment is suspended or modified.

69. It must be noted, however, that neither the constitutional power of the president nor the statutory power of the Government authorizes or in any way interferes with the order of conviction. Any conviction and sentence passed upon an accused found guilty of an offence remains valid until and unless it is overturned by any appellate or revisional court. Hence, the grant of pardon by the President allows the convict to go free but does not efface the finding of guilt and the conviction pronounced by the Court, nor does it extinguish the sentence. Similarly, any suspension, commutation, remission etc. of any sentence does not cancel or efface the order of sentence passed by the Court. The action of the President/Government simply allows the convict freedom from incarceration. The conviction and sentence remain on the record.

70. On the other hand, should a convict who has committed an abominable act which makes one shudder to the bone and for which the trial Judge expresses his abomination and orders that the convict ought not to be let out at all until he dies, for the sake of protecting the society from him, be released? Even in those circumstances there may arise some extenuating situation when humanity would call for his release. In that case it would not be right to put the judiciary in a straitjacket and compel an order requiring the convict never to be released. That would be tantamount to taking away the right of the Court to exercise discretion to act with common humanity. When any extenuating circumstance is brought to the notice of the Court, even if the original order was for the convict to die in jail, the Court may decide to release the convict for any specified length of time or release specifying conditions, considering the safety and security of the community. That gives the convict some hope that he will not necessarily die in jail. The other side of the coin is that, in any event, the President or the Government can at any time exercise power under the Constitution/the relevant law to grant his release.

71. It does not make sense to tell a convicted person that the death sentence is commuted to imprisonment for life, but he will not be permitted to leave the prison till his last breath because essentially the convict is being told that he is being sentenced to die in prison.

72. The conviction is never effaced other than by reversal on appeal or by way of revision. The sentence is for life and unless reduced on appeal or through revision it will remain so. If he is released before his death, it does not mean that the sentence is lesser than

life. His sentence remains, but he gets the benefit of provisions of law which allow reduction of his period of incarceration or early release. His release into freedom may be curtailed in case of breach of any conditions and the sentence is revisited/revived resulting in his return to custody to serve out the rest of the unexpired sentence.

73. The Penal Code in section 54 provides that "In every case in which sentence of death shall have been passed, the Government may, without the consent of the offender, commute the punishment for any other punishment provided by this Code."Section 55 of the said Code provides that in every case in which sentence of imprisonment for life shall have been passed, the Government may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding 20 years. Section 55A of that Code provides that nothing in section 54 or section 55 shall derogate from the right of the President to grant pardons, reprieves, respites or remissions of punishment. Section 402A of the Code of Criminal Procedure provides that the powers conferred by sections 401 and 402 of the said Code upon the Government may, in the case of sentences of death, also be exercised by the President.

74. Mr. Khandker Mahbub Hossain arguing in favour of the review, brought to our notice several decisions of the Supreme Court of India wherein life sentence was awarded specifying that the terms of imprisonment shall not be less than 20 years, 25 years, or 30 years. He pointed out that, on the other hand, the Supreme Court of Pakistan has consistently held that life imprisonment is to be taken as equivalent to 25 years' rigorous imprisonment. He pointed out that the Courts in the United Kingdom when passing a life sentence specify the minimum term or tariff which an offender must spend in prison before becoming eligible to apply for parole. For example, where murder is committed with a knife or other weapon, the starting point is 25 years before which the prisoner would not be considered for release on parole. Exceptionally, it is specified that the offender will spend the rest of his life in prison. This is termed as a "whole life order" and is applied in the most serious cases such as those of serial killers. The position in the United States of America is that in most States it is required that a prisoner be considered for parole after a certain period of time as specified by the Court. He submitted that since in Bangladesh the criminal jurisprudence had developed considering life imprisonment to be 30 years in prison, that should be allowed to continue until such a time as and when the law is changed.

75. It appears that the argument on behalf of the review petitioners has stemmed from the interpretation of section 57 of the Penal Code, which provides, "In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for thirty years." According to Mr. Khandker, the interpretation of this provision has always been to the effect that a sentence of imprisonment for life shall mean imprisonment for 30 years. In addition, the prisoner has been entitled to remission and other deductions under different provisions of law, such as the Penal Code, Code of Criminal Procedure, Prison Act and the Jail Code. He submitted that the provision appearing in section 45 of the Penal Code must be read harmoniously with the provisions in section 53, 54 and 55A of the Penal Code, which clearly indicate that life imprisonment need not necessarily be for the entire remaining life of the prisoner. However, for the reasons stated above, I would agree with Mr. Khandaker that life imprisonment need not necessarily mean incarceration for the rest of the prisoner's life, but I am constrained to take the view that the provision in section 57 of the Penal Code does not mean that imprisonment for life is equivalent to imprisonment for 30 years.

76. I may add at this juncture that the benefits of remission, deduction etc. available to a convict under the Code of Criminal Procedure will not be available to any convict serving a sentence for an offence under the International Crimes (Tribunals) Act, 1973, because section 23 of the said Act specifically excludes the application of the provisions of the Criminal Procedure Code, 1898 in any proceedings under the said Act. For ease of reference section 23 of the Act, 1973 is quoted below:

> *"23. The provisions of the Criminal Procedure Code, 1898 (V of 1898), and the Evidence Act, 1872(I of 1872), shall not apply in any proceedings under this Act."*

77. Finally, there is one other aspect that I wish to advert to regarding sentencing policies. We find that in many countries, including England, after a sentence of life imprisonment is imposed the Judge may specifically order that the prisoner is not to be released before the expiry of a term of years which can be any number of years ranging from 10 to 60 years or even for the rest of his natural life, so long as the Judge follows the sentencing guidelines issued by the appropriate authority. In the past the Lord Chief Justice sitting in the Court of Appeal issued sentencing guidelines by way of judgments. The Sentencing Council for England and Wales was established in April 2010, replacing the Sentencing Guidelines Council and the Sentencing Advisory Panel, its predecessor bodies.

78. Since 2008, following the decision in **Swamy Shraddananda v. State of Karnataka (2008) 13 SCC 767**, the Supreme Court of India has adopted the practice of expressing in the judgement that the convict shall not be released until after the expiry of a fixed number of years specified by the Court. In the **Shraddananda** case, it was observed that where the death sentence would not be appropriate, and the Court strongly felt that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate, the Court may be tempted to impose the death sentence. It was decided that "*A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death.*" Their Lordships went on to hold that *"…we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.*"This has been followed in subsequent decisions. Some of those have been discussed in the majority judgement and hence I shall refrain from repeating those. The type of sentencing order passed by the Supreme Court of India is similar to the practice followed by the English Courts and is abundantly appropriate giving the Court the discretion to ensure that a convict who committed a most heinous crime is not let loose into society at its peril. However, the scheme followed in England and Wales is based on official authoritative guidelines, whereas the decisions of the Supreme Court of India are based on authority of earlier judgement of the same Court and are open to subjective opinions based on the individual judge's perception of the gruesomeness or heinousness of the crime.

79. In Bangladesh there is no specific authority to issue any sentencing guidelines and as

a result Judges are guided only by the sentences provided in the Penal Code and other special laws, and life sentence, in some cases, turns out to be a relatively lenient sentence, when under the earlier interpretation convicts were released after expiry of 22½ years in custody. It is in this backdrop that many Judges choose the sentence of death for crimes which they consider to be most heinous since that effectively is the harshest punishment.

80. Some guiding principles may be gleaned from the judgements of this Division, but those are only in relation to specific cases. There are no general guidelines which may be followed by the Judges of the trial Court. Had there been any provision in our law or in guidelines for gradation of the life sentence or for expressing the view that the convict shall not be released during his lifetime, or for a specified number of years, then perhaps the Judges would opt for the longer life imprisonment, rather than the death penalty. The sentence would still be "imprisonment for life" but the Judge would be able to pronounce the minimum number of years that the convict would serve in prison, thereby reflecting the heinousness of the crime.

81. Moreover, as we have explained above, the trial procedure does not allow for any effective plea in mitigation after the verdict is pronounced. As a result, sentencing in most cases is arbitrary and there is no scope for the accused to plead for a lesser sentence or for the trial Judge to consider any mitigating circumstances since there was no opportunity to place any before him. The reintroduction of a date to be fixed for sentence hearing which existed in our law earlier, would go some way towards allowing the accused to plead mitigation or extenuating circumstances at the time of sentence hearing.

82. The provision of a sentence hearing in conjunction with the ability of judges to specify the minimum number of years that a convict is to serve in custody before early release would result in a fairer and more rational sentence.

83. In the light of the above discussion, the following are the conclusions that I would draw:

1. In view of section 45 of the Penal Code, "life imprisonment" mentioned in passing sentence on any convict found guilty of any offence means the whole of the remainder of the natural life of the convict, i.e. unless the sentence is set aside or modified by an appellate authority it will remain in force until his death. This will be applicable to anyone sentenced to imprisonment for life at the conclusion of a trial, appeal, revision or review and anyone whose sentence of death is commuted to imprisonment for life. However, early release may be ordered to give effect to benefits accruing under any other law.

2. In section 57 of the Penal Code, the phrase "imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for thirty years" is applicable for the purpose of calculating fractions of terms of punishment occurring in the

Penal Code where calculation of fractions of terms of punishment is mentioned.

3. Remission or reduction of sentence is discretionary and cannot be claimed as of right and shall, in the case of a sentence of imprisonment for life, be subject to approval by the Government, as provided in the Code of Criminal Procedure and the Jail Code. In case of benefits to be given under the Jail Code, the duration of imprisonment for life shall be calculated in accordance with rules 751(f) of the said Code. A convict sentenced to imprisonment for life shall be entitled to be considered for release at any time before his death on account of remission for the period allowed by the jail authority due to good behaviour or services rendered while in prison, as provided by the Jail Code. But these are matters beyond the function of any Court.

4. The discretion of the President to grant pardons, reprieves, respites and to remit, suspend or commute any sentence under the Constitution, the Penal Code and the Code of Criminal Procedure shall not be fettered in any manner.

5. Early release may be subject to any reasonable condition to be imposed by the sentencing Court as mentioned in section 401(2) to (4A) of the said Code. Despite any reduction of sentence by way of remission or otherwise, it must be explained to the convict that the sentence of imprisonment for life shall remain and that he may be sent back to jail to serve the rest of his sentence if he is found in breach of any condition imposed upon him at the time of his early release.

6. There is no distinction between life imprisonment awarded on commuting sentence of death to imprisonment for life and the sentence of imprisonment for life awarded by any Court of first instance or appellate or revisional Court. But when considering early release, the authority concerned shall consider whether it is appropriate to do so in view of the heinousness of the offence and the safety and security of the public.

7. Time which any convict spends in custody before the date of his conviction shall be deducted by the Court at the time of pronouncing sentence. The aggregate period spent in custody shall be ascertained from the jail authority. As an ad-hoc measure, until appropriate amendment is made in aid of section 35A of the Code, in case of awarding sentence of imprisonment for life, the deduction of custody period during trial shall be made on the basis that life imprisonment is equivalent to rigorous imprisonment for 30 years.

84. In view of the above discussion, the judgement under review calls for interference and the review petition is accordingly disposed of in the light of the observations above.

Hasan Foez Siddique, J (Majority View):

85. This criminal review petition is directed against the judgment and order dated 14.02.2017 passed by this Division in Criminal Appeal No.15 of 2010 maintaining the order of conviction of the review petitioner and commuting the sentence of death with a direction to suffer imprisonment for rest of his natural life.

86. Earlier Druto Bichar Tribunal, Dhaka by its judgment and order dated 15.12.2003 convicted the petitioner Ataur Mridha @ Ataur and Anwar Hossain under sections 302/34 of the Penal Code and sentenced them to death in Druto Bichar Tribunal Case No.111 of 2003 on the charge of killing one Jamal on 16.12.2001 when he was gossiping with P.W.2 Aftabuddin, P.W.4 Abdul Barek and P.W.5 Md. Yeamin, beside the road adjacent to Charbag Madrasha. The accused persons shot the victim causing his death on the spot. He preferred Criminal Appeal No.3895 of 2003 in the High Court Division and the Tribunal sent the case record in the High Court Division for confirmation of sentence of death, which was registered as Death Reference No.127 of 2003. The High Court Division heard the said criminal appeal and death reference together and accepted the death reference and dismissed the criminal appeal by a judgment and order dated 29.10.2007 and 30.10.2007. Against the same, the petitioner preferred Criminal Appeal No.15 of 2010 in this Division wherein this Division maintained the conviction but commuted the sentence to imprisonment for rest of his natural life by a judgment and order dated 14.02.2017. The petitioner now has preferred this review petition for consideration.

87. Mr. Khandaker Mahbub Hossain, learned Senior Counsel appearing for the review petitioner, without entering into the merit of the case, simply submits that in view of the provision of Section 57 of the Penal Code, Section 35A of the Code of Criminal Procedure, Section 59 of the Prisons Act, 1894 and chapter XXI of the Jail Code the petitioner is entitled to get reduction and remission of sentence, the order of awarding sentence to the petitioner till his natural death deprives him from getting statutory benefits which has caused a failure of justice. He submits that a life convict is entitled to have the benefits in two stages, those are: (1) deduction and (2) remission, but the judgment under review rendered those benefits nugatory. He further submits that the Government is empowered to suspend/remit/commute the sentence of life convict exercising its power conferred under sections 401 and 402 of the Code of Criminal Procedure read with section 55 of the Penal Code. According to Mr. Hossain, for the purpose of calculating the period of sentence of imprisonment for life, the same should be reckoned as equivalent to rigorous imprisonment for 30 years as the base term, otherwise, the interpretation of section 57 of the Penal Code would result in apparent discrimination and intention of the legislature would be frustrated and rendered a portion of section 397 of the Code of Criminal Procedure nugatory. He, lastly, submits that formulation of a reasoned and comprehensive sentencing guideline is the only solution in this regard and, thus, he proposed the formation of a sentencing Commission to be constituted by experienced personalities to table the same for consideration. Mr. Hossain in his submission relied upon the cases of Union of India and others Vs. Dharam Paul reported in MANU/SC/0627/2019; Sachin Kumar Singhraha Vs. State of Madhya Pradesh reported in AIR 2019(SC) 1416; Dnyaneshwar Suresh Borkar Vs. State of Maharastra reported in AIR 2019 SC 1567; Nanda Kishore Vs. State of Madhya Pradesh reported in 2019(1) SCALE 500; Viral Gyanlal Rajput Vs State of Maharastra reported in (2019) 2 SCC 311; Babasaheb Maruti Kamble Vs. State Maharastra reported in 2018(15) SCALE 235. Tattu Lodhi Vs. State of Madhya Pradesh reported in (2016) 9 SCC 675; Amar Singh Yadab Vs. Estate of UP reported in (2014) 13 SCC 443; Sahib Hossain Vs. State of Rajstan reported in (2013) 9SCC 778; Gurvail Singh

and others Vs. State of Punjab reported in (2013) 2 SCC 713 and some other cases.

88. Mr. Mahbubey Alam, learned Attorney General appearing for the State, submitted that the sentence of imprisonment for life means imprisonment for the remainder of that person's natural life. He submitted that there is no scope to make any interpretation that life sentence means other than that of a person's natural life. He, further submitted that when Penal Code provides for only two kinds of punishments under sections 302/34 that is, death or imprisonment for life; the court, cannot introduce a third category of punishment which would be contrary to the provisions of law. He, lastly, submitted that the prescription of sentence is within the domain of the legislature and the Court can only impose such sentence what has been provided for by the legislature. Mr. Alam relied upon the following decisions: Kishori Lal Vs. Emperor reported in AIR 1945 (PC)64; Gopal Vinayek Godse Vs State of Maharastra reported in (1961) 3 SCR 440; State of Madhya Prodesh Vs. Ratan Singh and others reported in (1976) 3 SCC 470; Dalbir Singh and others Vs. State of Punjab reported in (1979) 3 SCC 745; Kartar Singh and others Vs. State of Hariyana reported in (1982) 3SCC 1; Ashok Kumar @ Gulu Vs. Union of India reported in (1991) 3SCC 498; Maru Ram VS. Union of India reported in (1981) 1 SCC 107; Subash Chander Vs. Krishan Lal and others reported in (2001) 4 SCC 458; Mohammad Munna Vs. Union of India and others reported in (2005) 7 SCC 417; Swamy Shraddananda @ Murali Monohar Misra (2) Vs. State of Karnataka reported in (2008) 13 SCC 767; Sangeet and another Vs. State of Haryana reported in (2013) 2 SCC 452; Union of India Vs. V. Sriharan @ Marugan and others reported (2016) 7SCC and Vikas Yadav Vs. State of Uttar Pradesh (2016) 9 SCC 541.

89. In course of hearing of this matter, this Court requested Mr. Rakanuddin Mahmud, Mr. A.F. Hassan Ariff, and Mr. Abdur Razzaque Khan, learned Senior Counsel to assist the Court as *amici curiae* who by appearing in the Court made their valuable submissions.

90. Mr. Rakanuddin Mahmud submits that the meaning of imprisonment for life is that a convict sentenced to imprisonment for life shall enter into the Jail vertically and come out horizontally, that is, he shall suffer imprisonment for the rest of his natural life. Mr. Ariff, learned Senior Counsel, submits that the provision of section 45 of the Penal Code defining life has made meaning of "life" flexible, which is apparent from the second portion of the section, that is, the words "unless the contrary appears from the context." He submits that it is true that section 57 of the Penal Code is a deeming provision and not substantive statute limiting life sentence to 30 years but it is significant that the legislature has deemed life sentence to mean 30 years duration. He submits that if sections 45 and 57 of the Penal Code are read with sections 35A and 397 of the Code of Criminal Procedure there is a strong case for the argument that life sentence denotes 30 years of imprisonment. Mr. Abdur Razzaque Khan, learned Senior Counsel submits that Supreme Court of India has expressly considered the Constitutional provision and the amended Criminal Procedure Code, 1973, particularly, sections 428, 432, 433and 433A which provisions are absent in our Criminal Procedure Code and in absence of such statutory provisions in our jurisdiction the Indian decisions have no relevance for consideration in awarding sentence of life imprisonment for the rest of natural life without any remission.

91. The point for consideration and decision, in this case, is whether a sentence of life imprisonment passed against an accused means imprisonment for the remaining biological life of the convict or any period shorter than that.

92. Life imprisonment is permissible under human rights law and many states around the

world use it to punish some of the most serious crimes. Despite their widespread use as a form of punishment in many jurisdictions, life sentences remain controversial. Some scholars deem a life sentence as tantamount to the death penalty because it constitutes a death sentence in itself. It has replaced capital punishment as the most common sentence imposed for heinous crimes worldwide. As a consequence, it has become the leading issue in international criminal justice system. Life imprisonment sentences cover a diverse range of practices, from the most severe form of life imprisonment without parole, in which a person is explicitly sentenced to die in prison, to more indeterminate sentences in which, at the time of sentencing, it is not clear how long the convict will spend in prison. The jurisprudence developed in this area of law raises many questions which remain unanswered and a lot still remains to be known about the punishment of "life imprisonment". The main reason for imposing indefinite sentences is to protect the community. The aim of general deterrence is to punish individuals who have committed crimes in order to send a message to others who might be contemplating criminal acts that they too will suffer punishment if they carry out their plans. An offender can then be kept behind bars until it is determined that the offender would not pose any danger to society. Generally, serious criminal behaviour is most common during young adulthood and then gradually tapers off.

93. The term life imprisonment is used to cover different realities. Important aspect is, can a life sentence for the remaining period of convicts natural life be justified considering the flaws of our criminal justice system. Recently Katie Reade in an article "life imprisonment: A Practice in desperate need of reform" has described a testimonial from a prisoner serving life without parole with the following words:

> "Life in prison is a slow, torturous death. May be it would have been better if they had just given me the electric chair and ended my life instead of a life sentence, letting me rot away in Jail. It serves no purpose. It becomes a burden on everybody." "It's like going deep sea diving. Going all the way down into the depths and losing your oxygen."

94. The concept of life imprisonment is confining a prisoner behind the walls of a jail waiting only for death to set him free. In some jurisdiction, it literally means that a prisoner spends the rest of his natural life in prison without the possibility of parole. In other jurisdictions, prisoners are sentenced to life imprisonment on the understanding that they will be considered for parole after serving a set number of years.

95. The term "life imprisonment" has not been specifically defined in the Penal Code. Generally, life imprisonment is a sentence, following criminal conviction, which gives the State the power to detain a person in prison for life, that is, until he dies there. In order to understand the correct legal position in regard to the true character and mode of carrying out of sentences of imprisonment for life, the history of life sentence and of relevant statutory provisions governing the nature and mode of its execution, provided for in the Penal Code, Criminal Procedure Code, Prisons Act, Prisoners Act and Cognate Laws, have to be examined along with views of the Apex Courts. It is useful to reproduce some provisions of law for consideration of the point raised, that is, as to whether imprisonment for life means till the end of convict's life with or without any deduction and remission.

96. Those provisions of law are as follow:-

Sections of Penal Code

45. "Life"- The word "life" denotes the life of a human being, unless the contrary

appears from the context.

46. "Death"- The word "death" denotes the death of a human being, unless the contrary appears from the context.

53. Punishment- The punishments to which offenders are liable under the provisions of this Code are-
Firstly,- Death;
Secondly, - [Imprisonment for life];
Thirdly,-[Omitted by the Criminal Law (Extinction of Discriminatory Privileges) Act 1949 (Act No. II of 1950)].
Fourthly, - Imprisonment, which is of two descriptions, namely:-
(1)Rigorous, that is, with hard labour;
(2) Simple;
Fifthly,- Forfeiture of property;
Sixthly, - Fine.
[Explanation.- In the punishment of imprisonment for life, the imprisonment shall be rigorous.]

53A. Construction of reference to transportation- (1) Subject to the provisions of sub-section (2), any reference to "transportation for life" in any other law for the time being in force shall be construed as a reference to "imprisonment for life".
(2) Any reference to transportation for a term or to transportation for a shorter term (by whatever named called) in any other law for the time being in force shall be deemed to have been omitted.
(3) Any reference to "transportation" in any other law for the time being in force shall-

(a) if the expression means transportation for life, be construed as a reference to imprisonment for life;
(b) if the expression means transportation for any shorter term, be deemed to have been omitted.

54. Commutation of sentence of death.- In every case in which sentence of death shall have been passed, [the Government] may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

55. Commutation of sentence of imprisonment for life- In every case in which sentence of [imprisonment] for life shall have been passed, [the Government]may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding [twenty] years.

55A. Saving for President prerogative- Nothing in section fifty- four or section fifty-five shall derogate from the right of the President to grant pardons, reprieves, respites or remissions of punishment.

57. Fractions of terms of punishment- In calculating fractions of terms of punishment, [imprisonment] for life shall be reckoned as equivalent to [rigorous imprisonment for thirty years.]

64. Sentence of imprisonment for non-payment of fine- In every case of an offence

punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

65. Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.- The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence is punishable with imprisonment as well as fine.

66. Description of imprisonment for non-payment of fine- The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

97. Sections 35A, 397, 401,402 and 402A of the Code of Criminal Procedure as follows:-

35A. (1) Except in the case of an offence punishable only with death, when any court finds an accused guilty of an offence and, upon conviction, sentences such accused to any term of imprisonment, simple or rigorous, it shall deduct from the sentence of imprisonment, the total period the accused may have been in custody in the meantime, in connection with that offence.

(2) If the total period of custody prior to conviction referred to in sub-section (1) is longer than the period of imprisonment to which the accused is sentenced, the accused shall be deemed to have served out the sentence of imprisonment and shall be released at once, if in custody, unless required to be detained in connection with any other offence; and if the accused is also sentenced to pay any fine in addition to such sentence, the fine shall stand remitted.

397. When a person already undergoing a sentence of imprisonment, or transportation, is sentenced to imprisonment, or transportation, such imprisonment, or transportation shall commence at the expiration of the imprisonment, or transportation to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence;

Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced.

Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

401.(1) When any person has been sentenced to punishment for an offence, the Government may at any time without conditions or upon any conditions which the person sentenced excepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the Government for the suspension or remission of a sentence, the Government, may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Government not fulfilled, the Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4A) The provision of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or impose any liability upon him or his property.

(5) Nothing herein contained shall be deemed to interfere with the right of the President to grant pardons, reprieves, respites or remissions of punishment.

(5A) Where a conditional pardon is granted by the President any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.

(6) The Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

402.(1) The Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it:-

death, transportation, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) Nothing in this section shall affect the provisions of section 54 or section 55 of the Penal Code.

402A. The powers conferred by sections 401 and 402 upon the Government may, in the case of sentences of death, also be exercised by the President.

98. The punishment of imprisonment for life as regards its nature and mode of execution and consequently its workability or executability, has been a subject matter of a wide-ranging debate in the higher echelons of the polity. To substantiate his submission, learned

Attorney General first cited the case of Kishori Lal Vs. Emperor reported in AIR 1945 (Privy Council) 64. In that case it was observed, "So, in India, a prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the jails in India appointed for transportation prisoners where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment. The appellant was lawfully sentenced to transportation for life ; at the time when he made his application to Monroe J. he was confined in a prison which had been appointed as a place to which prisoners so sentenced might be sent. Assuming that the sentence is to be regarded as one of 20 years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application and it was therefore rightly dismissed, but, in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than 20 years or that the convict is necessarily entitled to remission."

99. He next relied on the case of Gopal Vinayek Godse Vs. State of Maharastra reported in (1961) 3 SCR 440 which was called as mother judgment of the Supreme Court of India in this regard. In that case it was observed, "Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words imprisonment for life " for "transportation for life" enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."

100. He next cited the case of State of Madhya Pradesh Vs. Ratan Singh and others reported in (1976) 3 SCC 470. In which it was observed, "From a review of the authorities and the statutory provisions of the Code of Criminal Procedure the following propositions emerge:
(1) that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under section 401 of the Code of Criminal Procedure; (2) that the appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner; (3) that the appropriate Government which is empowered to grant remission under section 401 of the Code of Criminal Procedure is the Government of the State where the prisoner has been convicted and sentenced, that is to say, the transferor State and not the transferee State where the prisoner may have been transferred at his instance under the Transfer of Prisoners Act; and (4) that where the transferee State feels that the accused has completed a period of 20 years it has merely to forward the request of the prisoner to the concerned State Government, that is to say, the Government of the State where the prisoner was connected and sentenced and even if this request is rejected by the State Government the order of the Government cannot be interfered with by a High Court in its writ jurisdiction."

101. In the case of Maru Ram Vs. Union of India reported in (1981) 1 SCC 107 Mr. V.R. Krishna Iyer, J. observed, "A Constitution Bench, speaking through Subba Rao, J., took the

view that a sentence of imprisonment for life was nothing less and nothing else than an imprisonment which lasted till the last breath. Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so the prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. Release would follow only upon an order under Section 401 of the Criminal Procedure Code, 1898 (corresponding to Section 432 of the 1973 Code) by the appropriate Government or on a clemency order in exercise of power under Arts.72. or 161 of the Constitution. Godse (supra) is authority for the proposition that a sentence of imprisonment for life is one of "imprisonment for the whole of the remaining period of the convicted person's natural life". It was further observed, "A possible confusion creeps into this discussion by equating life imprisonment with 20 years imprisonment. Reliance is placed for this purpose on section 55 IPC and on definitions in various Remission Schemes. All that we need say, as clearly pointed out in Godse, is that these equivalents are meant for the limited objective of computation to help the State exercise its wide powers of total remissions. Even if the remissions earned have totalled upto 20 years, still the State Government may or may not release the prisoner and until such a release order remitting the remaining part of the life sentence is passed, the prisoners cannot claim his liberty. The reason is that life sentence is nothing less than life-long imprisonment. Moreover, the penalty then and now is the same-life term. And remission vests no right to release when the sentence is life imprisonment. No greater punishment is inflicted by Section 433A than the law annexed originally to the crime. Nor is any vested right to remission cancelled by compulsory 14 years jail life once we realise the truism that a life sentence is a sentence for a whole life."

102. Krishna Ayer, J. finally concluded, "We repulse all the thrusts on the vires of Section 433A.. Maybe, penologically the prolonged terms prescribed by the Section is supererogative. If we had our druthers we would have negatived the need for a fourteen-year gestation for reformation. But ours is to construe not construct, to decode, not to make a code." " We uphold all remissions and short-sentencing passed under Articles 72 and 161 of the Constitution but release will follow, in life sentence cases, only on Government making an order en masse or individually, in that behalf." "We hold that Section 432 and s. 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar, power, and Section 433, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like." " We follow Godse's case (supra) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government." "We declare that Section 433A, in both its limbs (i.e. 'both types of life imprisonment specified in it), is prospective in effect. To put the position beyond doubt, we direct that the mandatory minimum of 14 years' actual imprisonment will not operate against those whose cases were decided by the trial court before the 18th December, 1978 (directly or retroactively, as explained in the judgment) when Section 433A came into force. All 'lifers' whose conviction by the court of first instance was entered prior to that date are entitled to consideration by Government for release on the strength of earned remissions although a release can take place only if Government makes an order to that effect. To this extent the battle of the tenses is won by the prisoners. It follows, by the same logic, that short-sentencing legislations, if any, will entitle a prisoner to claim release thereunder if his conviction by the court of first instance was before Section 433A was brought into effect." " In our view, penal humanitarianism and rehabilitative desideratum warrant liberal paroles, subject to security safeguards, and other humanizing strategies for inmates so that the dignity and worth of the human person are not desecrated by making mass

jails anthropoid zoos. Human rights awareness must infuse institutional reform and search for alternatives."

103. In the case of Kartar Singh and others Vs. State of Hariyana reported in (1982) 3 SCC 1 Supreme Court of India has observed, "In the first place a perusal of several sections of the Indian Penal Code as well as Criminal Procedure Code will show that both the Codes make and maintain a clear distinction between imprisonment for life and imprisonment for a term; in fact, the two expressions 'imprisonment for life' and 'imprisonment for a term' have been used in contra-distinction with each other in one and the same section, where the former must mean imprisonment for the remainder of the natural life of the convict (vide: definition of 'life' in Section 45 I.P.C.) and the latter must mean imprisonment for a definite or fixed period. For instance sec. 304 I.P.C. provides that punishment for culpable homicide not amounting to murder shall be imprisonment for life or imprisonment of either description for a term which may extend to ten years'; Section 305 provides that punishment for abetment of a suicide of a child or insane person shall be 'death or imprisonment for life or imprisonment for a term not exceeding ten years'; Section 307 provides that punishment for an attempt to commit murder accompanied by actual hurt shall be imprisonment for life or imprisonment of either description which may extend to ten years; so also, voluntarily causing hurt in committing robbery is punishable under sec. 394 with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years. Sec. SS I.P.C. uses the two expressions in contra-distinction with each other and says that an appropriate Government may in every case in which sentence of imprisonment for life shall have been passed commute the punishment for imprisonment of either description for a term not exceeding fourteen years; similarly, Section 433(b) Cr. P.C. uses the two expressions in contra-distinction with one another. Having regard to such distinction which is being maintained in both the Codes it will be difficult to slur over the distinction on the basis that life convicts should be regarded as having been sentenced to life-term or to say that the two could be understood as interchangeable expressions because basically the life term of any accused is uncertain. Further, sec. 57 I.P.C. or the Remission Rules contained in Jail Manuals are irrelevant in this context. Section 57 I.P.C. provides that imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years for the specific purpose mentioned therein, namely, for the purpose of calculating fractions of terms of punishment and not for all purposes; similarly Remissions Rules contained in Jail Manuals cannot override statutory provisions contained in the Penal Code and the sentence of imprisonment for life will have to be regarded as a sentence for the remainder of the natural life of the convict. The Privy Council in Pandit Kishori Lal's case and this Court in Gopal Godse's case have settled this position once and for all by taking the view that a sentence for transportation for life or imprisonment for life must be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life. This view has been confirmed and followed by this Court in two subsequent decisions-in Ratan Singh's case (supra) and Maru Ram's case (supra). In this view of the matter, life convicts would not fall within the purview of sec. 428, Cr. P.C. Having regard to the above discussion, it is clear that the benefit of the set off contemplated by sec. 428 Cr. P.C. would not be available to life convicts."

104. His next citation is the case of Ashok Kumar @ Gulu Vs. Union of India and others reported in (1991) 3 SCC 498, it was observed in that case, "Counsel for the petitioner next submitted that after this Court's decision in Bhagirath's case permitting the benefit of set off under Section 428 in respect of the detention period as an undertrial, the ratio of the decision in Godse's case must be taken as impliedly disapproved. We see no basis for this submission. In Godse's case the convict who was sentenced to transportation for life had earned remission

for 2963 days during his internment. He claimed that in view of Section 57 read with Section 53A, IPC, the total period of his incarceration could not exceed 20 years which he had completed, inclusive of remission, and, therefore, his continued detention was illegal." "Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words "imprisonment for life" for "transportation for life" enable the drawing of any such all embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.

105. This interpretation of section 57 gets strengthened if we refer to sections 65, 116, 120 and 511, of the Indian Penal Code which fix the term of imprisonment thereunder as a fraction of the maximum fixed for the principal offence. It is for the purpose of working out this fraction that it became necessary to provide that imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. If such a provision had not been made it would have been impossible to work out the fraction of an in-definite term. In order to work out the fraction of terms of punishment provided in sections such as those enumerated above, it was imperative to lay down the equivalent term for life imprisonment. "

106. His next cited case is Subash Chander Vs. Krishan Lal and others reported in (2001)4SCC 458 wherein it was observed, " However, in the peculiar circumstances of the case, apprehending imminent danger to the life of Subhash Chander and his family in future, taking on record the statement made on behalf of Krishan Lal, we are inclined to hold that for him the imprisonment for life shall be the imprisonment in prison for the rest of his life. He shall not be entitled to any commutation or premature release under Section 401 of the Code of Criminal Procedure, Prisoners Act, Jail Manual or any other statute and the Rules made for the purposes of grant of commutation and remissions.*"*

107. In the case of Swamy Shraddananda @ Murali Monohar Misra (2) Vs. State of Karnataka reported in (2008) 13 SCC 767, Supreme Court of India has observed,

> "At this stage, it will be useful to take a very brief look at the provisions with regard to sentencing and computation, remission etc. of sentences. Section 45 of the Penal Code defines "life" to mean the life of the human being, unless the contrary appears from the context. Section 53 enumerates punishments, the first of which is death and the second, imprisonment for life. Sections 54 and 55 give to the appropriate Government the power of commutation of the sentence of death and the sentence of imprisonment for life respectively. Section 55A defines "appropriate Government". Section 57 provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. It is now conclusively settled by a catena of decisions that the punishment of imprisonment for life handed down by the Court means a sentence of imprisonment for the convict for the rest of his life."

108. It was further observed,

> "It is equally well-settled that Section 57 of the Penal Code does not in any way limit the punishment of imprisonment for life to a term of twenty years. Section 57 is only for calculating fractions of terms of punishment and provides that imprisonment

for life shall be reckoned as equivalent to imprisonment for twenty years. Gopal Vinayak Godse (supra) and Ashok Kumar alias Golu (supra). The object and purpose of Section 57 will be clear by simply referring to Sections 65, 116, 119, 129 and 511 of the Penal Code."

"This takes us to the issue of computation and remission etc. of sentences. The provisions in regard to computation, remission, suspension etc. are to be found both in the Constitution and in the statutes. Articles 72 and 161 of the Constitution deal with the powers of the President and the Governors of the State respectively to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. Here it needs to be made absolutely clear that this judgment is not concerned at all with the Constitutional provisions that are in the nature of the State's sovereign power. What is said hereinafter relates only to provisions of commutation, remission etc. as contained in the Code of Criminal Procedure and the Prisons Acts and the Rules framed by the different States."

109. It was further observed:

"From the Prisons Act and the Rules it appears that for good conduct and for doing certain duties etc. inside the jail the prisoners are given some days' remission on a monthly, quarterly or annual basis. The days of remission so earned by a prisoner are added to the period of his actual imprisonment (including the period undergone as an under trial) to make up the term of sentence awarded by the Court. This being the position, the first question that arises in mind is how remission can be applied to imprisonment for life. The way in which remission is allowed, it can only apply to a fixed term and life imprisonment, being for the rest of life, is by nature indeterminate."

110. Mr. Alam, thereafter, cited the case of Union of India Vs. V. Sriharan @ Marugan and others reported in (2016) 9SCC 541. In that case it was observed, "Section 53 IPC envisages different kinds of punishments while section 45 IPC defines the word "life" as the life of a human being unless the contrary appears from the context. The life of a human being is till he is alive that is to say till his last breath, which by very nature is one of indefinite duration. In the light of the law laid down in Godse and Maru Ram, which law has consistently been followed the sentence of life imprisonment as contemplated under section 53 read with section 45 IPC means imprisonment for rest of the life or the reminder of life of the convict. The terminal point of the sentence is the last breath of the convict and unless the appropriate Government comments the punishment or remits the sentence such terminal point would not charge at all. The life imprisonment thus means imprisonment for rest of the life of the prisoner."

111. On the other hand, Khandkar Mahbub Hossain appearing for the petitioner first relied on the case of Union of India (UOI) and others Vs. Dharam Pal (MANU/SC/0627/2019). In the cited case it observed, "In our considered opinion, having regard to the totality of facts and circumstances, and for the reasons mentioned supra, it would be appropriate to direct the release of the Respondent after the completion of 35 years of actual imprisonment including the period already undergone by him."

112. He next cited the case of Sachin Kumar Singhraha Vs. State of Madhya Pradesh reported in AIR 2019 SC 1417. In that case it was observed,

"Therefore, with regard to the totality of the facts and circumstances of the case,

we are of the opinion that the crime in question may not fall under the category of cases where the death sentence is necessarily to be imposed. However, keeping in mind the aggravating circumstances of the crime as recounted above, we feel that the sentence of life imprisonment simpliciter would be grossly inadequate in the instant case. In this respect, we would like to refer to our observations in the recent decision dated 19.02.2019 in Parsuram v. State of M.P. (Criminal Appeal Nos. 314315 of 2013) on the aspect of nonremissible sentencing:

As laid down by this Court in Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767, and subsequently affirmed by the Constitution Bench of this Court in Union of India v. V. Sriharan, (2016) 7 SCC 1, this Court may validly substitute the death penalty by imprisonment for a term exceeding 14 years, and put such sentence beyond remission. Such sentences have been awarded by this Court on several occasions, and we may fruitfully refer to some of these decisions by way of illustrations. In Sebastian alias Chevithiyan v. State of Kerala, (2010) 1 SCC 58, a case concerning the rape and murder of a 2 year old girl, this Court modified the sentence of death to imprisonment for the rest of the appellant's life. In Raj Kumar v. State of Madhya Pradesh, (2014) 5 SCC 353, a case concerning the rape and murder of a 14 year old girl, this Court directed the appellant therein to serve a minimum of 35 years in jail without remission. In Selvam v. State, (2014) 12 SCC 274, this Court imposed a sentence of 30 years in jail without remission, in a case concerning the rape of a 9 year old girl. In Tattu Lodhi v. State of Madhya Pradesh, (2016) 9 SCC 675, where the accused was found guilty of committing the murder of a minor girl aged 7 years, the Court imposed the sentence of imprisonment for life with a direction not to release the accused from prison till he completed the period of 25 years of imprisonment.

In the matter on hand as well, we deem it proper to impose a sentence of life imprisonment with a minimum of 25 years' imprisonment (without remission). The imprisonment of about four years as already undergone by the accused/appellant shall be set off. We have arrived at this conclusion after giving due consideration to the age of the accused/appellant, which is currently around 38 to 40 years." Accordingly, the following order is made:

"The judgment and order of the High Court affirming the conviction of the accused/appellant for the offences punishable under Sections 376(A), 302 and 201(II) of the IPC and under Section 5(i)(m) read with Section 6 of the POCSO Act stands confirmed. However, the sentence is modified. The accused/appellant is hereby directed to undergo a sentence of 25 years' imprisonment (without remission). The sentence already undergone shall be set off. The appeals are disposed of accordingly."

113. In the case of Shri Bhagwan vs. State of Rajasthan (2001) 6 SCC 296, Indian Supreme Court held as under:

"Therefore, in the interest of justice, we commute the death sentence imposed upon the appellant and direct that the appellant shall undergo the sentence of imprisonment for life. We further direct that the appellant shall not be released from the prison unless she had served out at least 20 years of imprisonment including the period already undergone by the appellant."

114. In Prakash Dhawal Khairnar (Patil) vs. State of Maharashtra With State of Maharashtra vs. Sandeep @ Babloo Prakash Khairnar (Patil) (2002) 2 SCC 35, Supreme Court of India has observed,

"In this case also, considering the facts and circumstances, we set aside the death

sentence and direct that for murders committed by him, he shall served out at least 20 years of imprisonment including the period already undergone by him."

115. In Ram Anup Singh and Ors. vs. State of Bihar (2002) 6 SCC 686, a three-Judge Bench of the Supreme Court of India held as follows:

"Therefore, on a careful consideration of all the relevant circumstances we are of the view that the sentence of death is not warranted in this case. We, therefore, set aside the death sentence awarded by the Trial Court and confirmed by the High Court to appellants Lallan Singh and Babban Singh. We instead sentence them to suffer rigorous imprisonment for life with the condition that they shall not be released before completing an actual term of 20 years including the period already undergone by them."

116. In Nazir Khan and Ors. vs. State of Delhi (2003) 8 SCC 461, Supreme Court of India concluded, "Considering the gravity of the offence and the dastardly nature of the acts and consequences which have flown out and, would have flown in respect, of the life sentence, incarceration for the period of 20 years would be appropriate. The accused appellants would not be entitled to any remission from the, aforesaid period of 20 years."

117. In Haru Ghosh vs. State of West Bengal (2009) 15 SCC 551, Indian Supreme Court held as under:

"That leaves us with a question as to what sentence should be passed. Ordinarily, it would be the imprisonment for life. However, that would be no punishment to the appellant/accused, as he is already under the shadow of sentence of imprisonment for life, though he has been bailed out by the High Court. Under the circumstance, in our opinion, it will be better to take the course taken by this Court in the case of Swamy Shraddananda (cited supra), where the Court referred to the hiatus between the death sentence on one part and the life imprisonment, which actually might come to 14 years' imprisonment. In that case, the Court observed that the convict must not be released from the prison for rest of his life or for the actual term, as specified in the order, as the case may be.

We do not propose to send the appellant/accused for the rest of his life; however, we observe that the life imprisonment in case of the appellant/accused shall not be less than 35 years of actual jail sentence, meaning thereby, the appellant/accused would have to remain in jail for minimum 35 years."

118. In Ramraj @ Nanhoo @ Bihnu vs. State of Chhattisgarh (2010) 1 SCC 573, it was held, "In the present case, the facts are such that the petitioner is fortunate to have escaped the death penalty. We do not think that this is a fit case where the petitioner should be released on completion of 14 years imprisonment. The petitioner's case for premature release may be taken up by the concerned authorities after he completes 20 years imprisonment, including remissions earned."

119. In "Neel Kumar @ Anil Kumar vs. The State of Haryana (2012) 5 SCC 766, it was held as follows:

"Thus, in the facts and circumstances of the case, we set aside the death sentence and award life imprisonment. The Appellant must serve a minimum of 30 years in jail without remissions, before consideration of his case for pre-mature release."

120. In Sandeep vs. State of UP (2012) 6 SCC 107, it was observed as follows:

> "Taking note of the above decision and also taking into account the facts and circumstances of the case on hand, while holding that the imposition of death sentence to the accused Sandeep was not warranted and while awarding life imprisonment we hold that accused Sandeep must serve a minimum of 30 years in jail without remissions before consideration of his case for premature release."

121. In the case of Gurvail Singh @ Gala and Anr. vs. State of Punjab (2013) 2 SCC 713, it was concluded:

> "Considering the totality of facts and circumstances of this case we hold that imposition of death sentence on the Appellants was not warranted but while awarding life imprisonment to the Appellants, we hold that they must serve a minimum of thirty years in jail without remission. The sentence awarded by the trial court and confirmed by the High Court is modified as above. Under such circumstance, we modify the sentence from death to life imprisonment. Applying the principle laid down by this Court in Sandeep (supra), we are of the view that the minimum sentence of thirty years would be an adequate punishment, so far as the facts of this case are concerned."
>
> "It is clear that since more than a decade, in many cases, whenever death sentence has been commuted to life imprisonment where the offence alleged is serious in nature, while awarding life imprisonment, this Court reiterated minimum years of imprisonment of 20 years or 25 years or 30 years or 35 years, mentioning thereby, if the appropriate Government wants to give remission, the same has to be considered only after the expiry of the said period."

122. Imprisonment for life occupies an important place in our penological history which is one of the most severe punishments available for sentencing. Earlier transportation for life, which involved sending of a convict in exile, had been authorised as one form of punishment for certain serious crimes by the East India Company's Government under the "General Regulations" long before the said punishment was enacted in the Penal Code in 1860. Lord Cornwalls sent the first batch of Indian convicts into punishment to Bencoolen in S.W. Sumatra in 1787.

123. The very fact that transportation to the Andamans started soon after the rebellion of 1857. Prisoners transported from the Indian territories of the Company and later British India accounted for over twenty-eight percent of prisoners transported from British colonies. Transportation, it stated, was a "weapon of tremendous power", as "crossing the black water" invoked a sense of "indescribable horror". It was decided in 1811 that no more prisoners would be transported from Bengal. Prisoners convicted of serious crimes would be sentenced to life imprisonment and would be held in the then newly constructed Alipore jail. This policy was however abandoned by 1813 as the jail was over-crowded. Transportation re-started and got a further impetus with the British acquisition of Mauritius. From 1815 Indian prisoners were transported there. In 1817 more offences in India were made punishable by transportation. By 1826, the Bombay Presidency too began transporting prisoners to Mauritius. In 1837, draft of the Indian Penal Code as well as the Committee's report in 1838, though not immediately implemented, expressed a strong preference for transportation over life imprisonment. It was the years after the 1857 rebellion that saw a large number of Indian prisoners being transported to the Andamans. In 1921, the Indian Jails recommended that deportation to the Andamans should cease except in regard to such prisoners as the Governor General in Council may, by special or general order, direct. The furore over maltreatment of prisoners continued and the British government announced that year that the penal

settlement in the Andamans would be gradually abolished. While the number of prisoners in the Andamans reduced by nearly half, over the next decade, resistance to prisoner repatriation came from an unexpected quarter.

124. Since the passage of the Government of India Act in 1919, prisons had become a subject for the provinces. Resultantly, while the British Government in India resolved to largely end transportation, it was legally powerless to compel provincial governments to take the convicts back. Even a decade after the announcement to close the penal settlement, in 1932 the Secretary of State for India noted that the Andaman Cellular Jail would remain open. It scarcely helped that by the time Kishori Lal v. King Emperor was heard by the Privy Council in 1944, the Andaman Islands were under Japanese occupation. The case was of a prisoner involved in the nationalist movement who sought release since he had served over fourteen years (with remissions) of imprisonment. Although he was sentenced to transportation, he remained un-transported and was confined at the Lahore Jail and subject to discipline as if he were a prisoner sentenced to rigorous imprisonment. The Privy Council ruled that "A sentence of transportation no longer necessarily involves prisoners being sent overseas or even beyond the provinces in which they were convicted." It acknowledged that "at the present day transportation is in truth but a name given in India to a sentence for life". A prisoner sentenced to transportation was to be held in a prison in India and would be subject to such penal discipline as if the prisoners were sentenced to rigorous imprisonment. With this, the Privy Council accorded its seal of approval to the practice of treating un-transported prisoners as those sentenced to life imprisonment and subject to rigorous labour. In India from 1956 transportation no longer remained a punishment even on the statute books. It was perhaps the first formal acknowledgement of the punishment of "imprisonment for life", the IPC was amended to substitute it for all references to transportation. Life imprisonment, however, appears to have a much longer history. (Relied on: Life Imprisonment in India: A Short History of a Long Sentence- by Nishant Gokhale)

125. The issue to be considered is as to whether the imprisonment for life means till the end of convict's life with or without any deduction and remission. How long is a life sentence likely to be.

126. Life imprisonment is the most severe penalty in 149 countries. Few countries have the death penalty as their most severe punishment for crimes. Life imprisonment has become a contentions contemporary international sentencing issue. Although the sanction of life imprisonment has different meanings in different countries, in the majority cases those sentenced to life imprisonment become eligible for release after a certain period. 67 States retain life imprisonment as a punishment for offences committed. In some countries when a person is sentenced to life imprisonment, it means that such a person will spend the rest of his or her life in prison. Sometimes, Life imprisonment is called "penal servitude for life". Although in certain countries degrees of legislated determinacy are attached to life sentences, in general such sentences are, by their very nature, indeterminate.

127. In Africa the meaning of life imprisonment in nine African countries are as follows;

1. Kenya---life
2. Tanzania---life
3. Zimbabwe---life (In June 2016 it was held by the Constitutional Court that life imprisonment without the possibility of parole is unconstitutional)
4. Ghana---life
5. South Africa---Prisoner will be imprisoned for the rest of his life but still the law

affords a prisoner the opportunity to be released on parole after serving 25 years or he reaches the age of 65years.
6. Uganda---20 years
7. Malawi---life
8. Botswana---life or another period may be sentenced any shorter time.
9. Mouritius---life

128. In Mexico- life imprisonment is an indeterminate sentence. Its term may range from 20 years up to a maximum of 40 years.

129. In the USA- life imprisonment generally continues till the prisoner dies. Sometimes life terms are given in sentences are disproportionate to the prisoner is expected to live, for example, a 300 years sentence for multiple murders. In actuality, a life sentence does not always mean "imprisonment for life". Once a period of 10 years or more is over, the convict can be set out on parole.

130. In Canada- Life imprisonment is an indeterminate length with parole. Ineligibility period is of 25 years.

131. In Malaysia-Imprisonment for life means that it is until death whereas life imprisonment convicts have to serve minimum of 30 years.

132. In Myanmar- Life imprisonment means the entire life in prison which is guaranteed under the Code of Criminal Procedure. The minimum duration of life imprisonment is of 14 years.

133. United Kingdom- In the UK, "imprisonment for life" means a prison sentence of indeterminate length. In many cases, the Home Secretary sets the "tariff", i.e. the length of the terms, for life imprisonment convicts. He has to undergo sentence about 15 years before he can be paroled out. In England- the life sentence does not mean incarceration of the convict for the rest of his life. The total period for which the lifer may remain in prison can either be determined by the sentencing Court or the Home Office (reference may be made to sections 269 and 277 of the Criminal Justice Act 2003). If a convict sentenced to life imprisonment is to be released after a certain period then he is under a licence (issued in term of section 238 of the Criminal Justice Act, 2003). The 2003 Act removed the general power of the Secretary of State to review a life sentence and order a release.

134. Germany- Prior to 1977, all life sentence in Germany were imposed without the possibility of parole. In 1977 the German Constitutional Court found that mandatory sentences of life imprisonment without possibility of parole in all cases are unconstitutional. In 1981, parole was allowed for life imprisonment.

135. New Zealand- Life imprisonment has been the most severe criminal sentence in New Zealand since the death penalty was abolished in 1989. Offenders sentenced to life imprisonment must serve a minimum of 10 years imprisonment before they are eligible for parole.

136. France- In France, convict of life imprisonment is required to serve a safety period of 18 to 22 years before he becomes eligible for parole.

137. UAE-life imprisonment equals 25 years

138. China- Convicts of life imprisonment can be eligible for parole after 13 years of the original sentence having been actually served.

139. Turkey- Convicts of life imprisonment can be paroled after serving at least 36 years.

140. Australia- In the most extreme cases, the sentencing Judge may refuse to fix a non-parole period which means that the prisoner will spend the rest of their life in prison.

141. International Criminal Court- People sentenced to life imprisonment will not be considered for conditional release until they have served 25 years.

142. Some countries, such as Brazil, Colombia, Norway, Portugal and Spain, have recently replaced life or indeterminate sentences with fixed-term sentences. In general, however, life sentences are being retained. In some countries, judicial systems establish a minimum period that a life-sentence prisoner must serve before being considered for release. For example, the Canadian Criminal Code provides for a minimum penalty of 10 years of imprisonment for second-degree murder and a minimum of 25 years of imprisonment for first –degree murder before parole can be considered. In Sri Lanka, a life sentence prisoner may be eligible for parole after having served 6 years. In Japan and Republic of Korea the eligibility for parole after having served for 10 years, Denmark and Finland 12 years. Austria, Belgium, Switzerland 15 years etc.

143. Pakistan Supreme Court comprising Justice Sarder Raza, Justice Khalilur Rehman Ramday, Justice Faquir Muhammad Khoker, Justice M. Javed Buttar and Justice Syed Tassaduq Hussain Jilani invited legal opinion of the Attorney General and Advocates-general of all the four provinces for assisting the Court in reaching a conclusion. Pakistan Supreme Court observed that the provisions of Section 57 of the Penal Code which reckon 25 years imprisonment as imprisonment for life, only stipulate the calculation of the punishment term which is necessary because certain offences are a fraction of the term of imprisonment prescribed for other offences. Another question passed by the Supreme Court of Pakistan relates to remission which the Government gives to convicts from time to time and which leaves a great impact on the period of sentence in the prison.

144. In Abdul Malik V. The State reported in 2006 PLD SC-365 it was observed that, "Crime and punishment have vexed Prophets, reformers, Judges and criminologists ever since the advent of organized human living. At the jurisprudential plane, the issues raised have varied in time and space and the theories of punishment i.e. retribution, deterrence, prevention and reformation or rehabilitation are various facets of the age old human odyssey to devise ways and means to deter, to punish, to reform the deviant behaviour and to balm the aggrieved. As the basic human elements remain the same, the struggle continues."

145. It was further observed,

> "It is true that the term 'life imprisonment' has not been specifically defined in Pakistan Penal Code; Section 57 of the Code provides that for the purpose of calculating fractions of the term of punishment, 'life' shall mean imprisonment for 25 years."
>
> "Rule 140 of the Pakistan Prisons Rule which bears the heading, 'Release of lifers and

long term prisoners' defines 'life imprisonment' in following terms:- Rule 140- (1) Imprisonment for life will mean twenty five years rigorous imprisonment and every life prisoner shall undergo a minimum of fifteen years substantive imprisonment.

The case of all prisoners sentenced to imprisonment for life shall be referred to Government, through the Inspector General, after they have served fifteen years substantive imprisonment for consideration with reference to section 401 of the Code of Criminal Procedure."

The cases of all prisoners sentenced to emulative periods of imprisonment aggregating twenty five years or more shall also be submitted to Government, through the Inspector General, when they have served fifteen years substantive sentence for orders of the Government.

Although transportation for life means or sentence for the remaining span of the natural life of the convict, yet it has been accepted as being of twenty years' duration in view of the provisions contained in section 52 of the Pakistan Penal Code."

146. Likewise, in Dilawar Hussain V State case (2013 SCMR 1582) while referring to section 57 of the Code, Pakistan Supreme Court held that the term 'life imprisonment' means 25 years imprisonment. Referring to rule 140 of the Pakistan Prisons Rules, 1978, which provides that 'imprisonment for life will mean 25 years rigorous imprisonment and every prisoner shall undergo a minimum of 15 years of substantive imprisonment'. In Pakistan, the concept of remission or commutation of sentence under section 401 Cr.PC read with Prison rules, then he will have to wait till the completion of twenty five.

147. Section 45 of Penal Code- The word " life" denotes the life of a human being, unless the contrary appears from the context. The Physiological definition of life is a system capable of performing functions such as eating, metabolizing, excreting, breathing, moving growing, reproducing and responding to external stimuli. According to Black's Law Dictionary life means that state of animals, humans and plants or of an organized being. The words "unless the contrary appears from the context" used in the definition of "life" to mean unless a different intention appears from the Penal Code. That is, unless a different intention appears in the Penal Code life shall be deemed to be of a human's life. That definition of life is flexible. The legislature was not unmindful to define the word life in the Penal Code. Keeping in the mind some other provisions like section 57 the legislature purposely defined 'life' and made the definition of the same flexible. Section 57 of the Penal Code is a deeming provision and such provision for the purpose of calculating the fraction of imprisonment for life reckoned the 'life' imprisonment for a period of 30 years. Under section 57 of the Penal Code life imprisonment does not mean imprisonment for 30 years for all purposes but calculation of fractions. In other purposes where calculation is needed, how such calculation will be made. For example section 65 of the Penal Code provides that the term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. Section 511 provides that whoever attempts to commit the offence punishable with imprisonment for life shall be punished with imprisonment for a term which may extend to one-half of the imprisonment for life. In respect of the offences punishable under Sections 116, 119 and 120 of the Penal Code identical provisions have been provided.

148. When an offender commits an evil voluntarily, it is justified to give him the same in return. It is to be presumed that once the offender has committed an evil, he has paved way for infliction of punishment on him hence. From ancient time human civilization has been

maintaining the order in society by developing rules and regulations which are ideally followed by the people. Punishing the wrongdoer or treating him appropriately is one of the vital functions of the criminal justice administration. The main purpose of the sentence broadly stated is that the accused must realize that he has committed an act which is not only harmful to the society of which he forms an integral part but is harmful to his own future both as an individual and as a member of the society.

149. There is no guidance to the Judge in regard to selecting the most appropriate sentence of the cases. The absence of sentencing guidelines is resulting in wide discretion which ultimately leads to uncertainly in awarding sentences. A statutory guideline is required for the sentencing policy. Similarly, a properly crafted, legal framework is needed to meet the challenging task of appropriate sentencing. The judiciary has enunciated certain principles such as deterrence, proportionality, and rehabilitation which are needed to be taken account while sentencing. The proportionality principle includes factors such as mitigating and aggravating circumstances. The imposition of these principles depends on the fact and circumstances of each case. The guiding considerations would be that the punishment must be proportionate. The unguided sentencing discretion led to an unwarranted and huge disparity in sentences awarded by the courts of law. The procedure prescribed by law, which deprives a person of life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided. While deciding on quantum of sentence as accused getting away with lesser punishment would have adverse impact on society and justice system. Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test.

150. The legislature defines the offence with sufficient clarity and prescribes the outer limit of punishment and a wide discretion in fixing the degree of punishment within that ceiling is allowed to the Judge. On balancing the aggravating and mitigating circumstances as disclosed in each case, the Judge has to judiciously decide what would be the appropriate sentence. In judging an adequate sentence, the nature of the offence, the circumstances of its commission, the age and character of the offender, the injury to the individuals or to the society, whether the offender is a habitual, casual or a professional offender, affect of punishment on the offender, delay in the trial and the mental agony suffered by the offender during the prolonged trial, an eye to correction and reformation of the offender are some amongst many factors that have to be taken into consideration by the Courts. In addition to those factors, the consequences of the crime on the victim while fixing the quantum of punishment because one of the objects of the punishments is doing justice to the victim. A rational and consistent sentencing polices requires the removal of several deficiencies in the present system. An excessive sentence defects its own objective and tends to undermine the respect for law.

151. On the other hand, an unconscionably lenient sentence would lead to a miscarriage of justice and undermine the people's confidence in the efficacy of the administration of criminal justice. Sentencing process should be stern where it should be, and tempered with mercy where it warrants to be, otherwise departure from just desert principle results into injustice (State of Punjab V. Rakesh Kumer, AIR 2009 SC 891). In Criminology sentencing is largely thought to have four purposes: retributive, rehabilitation, deterrence and incapacitation. Justice Krishna Iyer observed that sentencing is a means to an end, a psycho-physical panacea to cure the culprit of socially dangerous behaviour and hence the penal

strategy should strike a balance between sentimental softness towards criminal, masquerading as progressive sociology and terror-cum-torment- oriented sadistic handling of criminal, which is the sublimated expression of judicial severity, although ostensibly imposed as deterrent to save society from further crimes. (Krishna Iyer J. perspectives in criminology, law and social change.). One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. Lord Denning appearing before the Royal Commission on "Capital Punishment" expressed that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority citizen for them. It is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else --.

152. The present criminal law system of the country contains various lacunae that need to be filled up so as to make the criminal justice system more stringent. Many penal Statutes prescribe the maximum punishment for offences, leaving the discretion to the courts to determine the quantum of sentence that can be imposed upon the offender. Certain provisions in the Penal Code relating to awarding punishment for imprisonment for life is required to be noticed. For example: (a) Offences punishable only with imprisonment for life, like being a thug (sec. 311), (b) extortion by threat of accusation of unnatural offence. (sec. 388) etc. Similarly, certain guidelines and policies need to be introduced by the legislature for bringing fairness and consistency while awarding sentences in criminal cases. The age- old colonial punishment system is not suitable to manage the crimes and to diminish its allied bad effects on society by imposing proper punishment to the persons responsible for the offence committed with no delay.

153. Supreme Court of India in Dananjoy Chatterjee @ Dhanu V State of West Bengal reported in (1994) 2 SCC-220 observed that "Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentences for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminals and in the ultimate making justice suffer by weakening the system's credibility."

154. In Swamy Shraddananda V. State of Karnataka reported in (2008) 13 SCC 767 it was observed,

> "The inability of the Criminal Justice System to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand, there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand, there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the Criminal Justice System. Thus the overall larger picture gets asymmetric and lop-sided and presents a poor reflection of the system of criminal administration of justice."

155. The reasonable determination period of imprisonment with regard to offences where life imprisonment is provided is a necessity and call for appropriate amendment for prescribing determinate punishment keeping in view the gravity of the offence. This Court feels that it is the primary obligation of the Legislature to carry out necessary amendments in

the cases where imprisonment for life is provided to make aware the convict/prisoner how much period he has to undergo in prison. Otherwise, the approach of reformative, rehabilitative and corrective system will be only a futile exercise. Otherwise also, to keep a prisoner behind bars is a financial burden on the State exchequer and for that reason, it is imperative to fix some determinate punishment by making amendments.

156. In Gopal Vinayak Godse v. State of Maharashtra (supra) it was held that sentence for imprisonment for life ordinarily means imprisonment for the whole of the remaining period of the convicted person's natural life. A convict undergoing such sentence may earn remissions of his part of the sentence under the Prison Rules but such remissions in the absence of an order of a Government remitting the entire balance of his sentence under this section does not entitle the convict to be released automatically before the full life term is served. It was observed that though under the relevant rules a sentence for imprisonment for life is equated with the definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose. 111. In Union of India Vs. V. Sriharan Murugan & others (supra), it was observed that life imprisonment means the end of one's life, subject to any remission granted by the appropriate Government under section 432 of the Code of Criminal Procedure which, in turn, is subject to the procedural checks mentioned in the said provision and further substantive check in section 433 A of the Code. The sentence of life imprisonment means imprisonment for the rest of life or the remainder of life of the convict. Such convict can always apply for obtaining remission either under Articles 72 of 161 of the Constitution of India or under Section 432 Cr.P.C. and the authority would be obliged to consider the same reasonably. In Maru Ram V. Union of India, (supra), a Constitutional Bench of the Supreme Court observed that the inevitable conclusion is that since in section 433-A of the Code of Criminal Procedure, which deals only with life sentences, remissions lead nowhere and cannot entitle a prisoner to release.

157. Further , in Laxman Naskar V. State of W.B and another, reported in (2000) 7 SCC 626, after referring to its decision in the case of Gopal Vinayak Godse (Supra), the Supreme Court of India reiterated that sentence for imprisonment for life, ordinarily, means imprisonment for the whole of the remaining period of the convicted person's natural life; that a convict undergoing such sentence may earn remissions of his part of the sentence under the Prison Rules, but such remissions, in the absence of an order of an appropriate Government, remitting the entire balance of his sentence under section 433 of the Code of Criminal Procedure does not entitle the convict to be released automatically before the full life term is served.

158. In Union of India Vs. V. Sriharan @ Murugan, (supra) one of the questions, which arose for consideration before the Constitution Bench of Supreme Court, was: Is it legally permissible for a Court, as held in Swami Shraddananda (supra), to award, instead of the death penalty, imprisonment for life and making the sentence of imprisonment beyond application of remission. Having referred to the cases of Godse (supra), Maru Ram (supra), and Ratan Singh (supra), the Constitution Bench of the Supreme Court, in Sriharan (supra), held that in exceptional cases, death penalty, when altered to life imprisonment, would only mean rest of one's life span. In Laxman Nashkar V. State of W.B. reported in (2000) 7 SCC 626 the Supreme Court of India reiterated that sentence for imprisonment for life, ordinarily means imprisonment for the whole of the remaining period of the convict's natural life; that a convict undergoing such sentence may earn remissions of his part of sentence under the

Prisons Rules, but such remissions, in the absence of an appropriate Government, remitting the entire balance of his sentence does not entitle the convict to be released automatically before the life term is served. Therefore, where the life imprisonment, in the light of the decisions in Godse (supra), Maru Ram (supra), and Ratan Singh (supra), means a person's life span in incarceration the Court cannot be said to have committed any wrong in directing while awarding sentence of imprisonment for life, that the convicted person shall remain incarcerated for the rest of his life.

159. The position at law is that unless the life imprisonment is commuted or remitted by the Government under the relevant provisions of law, a prisoner sentenced to life imprisonment is bound by law to serve the life term in prison. However, we feel it relevant here to state a passage from Maru Ram (supra) where Krishna Iyer J., to appreciate the despair in custody, thought it appropriate to reproduce the filter expression, from the poem, namely, "The Ballad of Reading Gaol" by Oscar Wilde. The poet said:

"I know not whether Laws be right,
Or whether Laws be wrong,
All that we know who lie in gaol
Is that the wall is strong;
And that each day is like a year,
A year whose days are long."
It was further quoted in that judgment:
"Something was dead in each of us,
And what was dead was Hope.
* * *

The vilest deeds like poison weeds
Bloom well in prison air:
It is only what is good in Man"

160. Indian Supreme Court consistently held that imprisonment for life means imprisonment for the whole remaining period of the convict's natural life. That is, the "last word" on the lifers' early release is entrusted to the political power. Indian Legislature recently enacted some penal provisions which have been incorporated in the Indian Penal Code. For Example, Sections 376A, 376D, 376E. Contents of which are as follows:

Section-376A. **Punishment for causing death or resulting in persistent vegetative state of victim**.-Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

Section 376-D. Gang rape.- Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine;
Provided that such fine shall be just and reasonable to meet the medical expenses and

rehabilitation of the victim;
Provided further that any fine imposed under this section shall be paid to the victim.

Section 376-E. Punishment for repeat offenders.- Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section1 376AB or section 376D or section 376DA or section 376DB and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.

161. In those provisions after the words "imprisonment for life" the words "which shall mean imprisonment for the remainder of the person's natural life" have been incorporated. Inspite consistent views of Indian Supreme Court that "imprisonment for life" means imprisonment for the whole of the remaining period of the convict's natural life, the Indian Legislature incorporated the words "which shall mean imprisonment for the remainder of that person's natural life" in the legislation which is a new category of punishment and the same was enacted not being satisfied with the interpretation of the definition life imprisonment given by the Supreme Court of India. If according to section 45 of the Penal Code life does mean life then what was the necessity to bring the aforesaid penal provision. That is, conclusion arrived at by the Supreme Court of India is not final and absolute. There is still a lot of confusion on the meaning of life sentence.

162. Can it be said that life imprisonment is a death sentence and the same amounts to putting a life convict in a waiting room until his death? Life without parole is no different from a death sentence that ends with the lethal injection. In such circumstances question arose whether or not life imprisonment is a lesser punishment than the death?

163. In Sriharan's case, (2016) 7SCC 1 Indian Supreme Court taking into consideration of the cases of Godse, AIR 1961 SC 600 and Maru Ram (1981) 1SCC 107, which were consistently followed in the subsequent decisions in Sambha J; Drishan J; (1974) 1SCC 196; Ratan Singh (1976) 3SCC; Ranjit Singh (1984) 1SCC 31; Ashok Kumer, (1991) 3SCC 498 and Subash Chander, (2001) 4SCC 458, has observed that imprisonment for life in terms section 53 read with section 45 of the Penal Code only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission etc. In Vikash Yadav V State of U.P. reported in (2006)9SCC 541 it was questioned the propriety of the sentence as the High Court has imposed a fixed term sentence, i.e., 25 years for the offence under section 302 IPC and 5 years for the offence under section 201 IPC with the stipulation that both the sentences would run consecutively and it was observed by the Supreme Court of India that the imposition of fix term sentence on the appellants by the High Court can not be found fault with simple modification in the sentence i.e. the sentence under sections 201/34 IPC shall run concurrently. In Dalbir Singh V. State of Panjab, (1979) 3 SCC 745 following Rajendra Prashad V State of U.P, V. R. Krishna Iyer and D.A. Desai JJ observed that life imprisonment "strictly means imprisonment for the whole of the man's life but in practice amounts to incarceration for a period between 10 years and 14 years" which may at the option of he convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large.

164. But Indian Supreme Court has started putting judicial breaks over the exercise of remission powers by the executive by prescribing the length of life imprisonment, for

example to 15/20/25/30/35 years before which no remission shall be granted. This approach is in line with age old sentencing without parole concept appeared in American and English sentencing procedure where Judges retain the authority. The indeterminacy of life imprisonment and the potential loss of liberty until the offender dies, lend it to criticism that it is a grossly disproportionate sentence.

165. In Union of India V. Dharam Paul (MANU/SC/0627/2019), respondent Dharam Paul was earlier convicted under sections 376 and 452 of the Penal Code and sentenced to R.I. for 10 years. In that case, he got bail, thereafter, he killed 5 family members of the prosecutrix. Then he was tried and sentenced to death under section 302, 34 of the Penal Code. High Court and Supreme Court of India upheld the death sentence. He filed a mercy petition before the Governor which was rejected. He then filed a mercy petition before the President of India which was rejected after 13 years 5 months and date of execution of the sentence was fixed. Meanwhile, he got an order of acquittal in the case of section 376, 457 of the Penal Code. In that juncture, he filed a writ petition on the grounds of delay in deciding his mercy petition by the President. The High Court Division allowed his writ petition and commuted the sentence of death to imprisonment for life. Thus, Union of India preferred an appeal. The Supreme Court of India in that appeal directed to release the respondent Dharam Paul after completion of 35 years of actual imprisonment including the period already undergone by him.

166. In the case of Shachin Kumar Singhara, (MANU/SC/0352/2019) the appellant Shachin was convicted for the offence punishable under sections 363, 376(A), 302 and 201(2) of the Penal Code and section 5(1)(m) read with section 6 of the Protection of Children from Sexual Offences Act 2012 and he was sentenced to death. The High Court of Madhya Prodesh at Jabalpur confirmed the sentence of death in appeal preferred by Sachin. The Supreme Court of India observed that the crime, in question, may not fall under the category of cases where the death sentence is necessary to be imposed. However, keeping in mind the aggravating circumstances of the crime it was held that the sentence of life imprisonment simpliciter would be grossly inadequate. Accordingly, Supreme Court ordered to impose a sentence of life imprisonment with a minimum period of 25 years imprisonment without remission. It was further ordered that the sentence already undergone shall be set off.

167. In the case of Nanda Kishore Vs. State of Madhya Pradesh (MANU/SC/0046/2019) the appellant was convicted for offences under sections 302,363, 366, and 376(2)(i) of the Penal Code and sentenced to death which was confirmed by the Madhya Pradesh High Court. The charge against the appellant was the commission of rape and murder of a girl aged about 8 years. The Supreme Court of India allowed the appeal in part and modified the sentence to that of life imprisonment with an actual period of 25 years without any benefit of remission.

168. In the case of Viran Gyanlal Rajput Vs. State of Maharastra (ICL 2018 SC 1179), the appellant was convicted for the offences punishable under sections 302 and 201 of the Penal Code and under sections 10 and 4 of the Protection of Children from Sexual Offences Act, 2012 for kidnapping, rape and murder of a 13 years old girl and causing disappearance of evidence. He was sentenced to death for the offence under section 302 of the IPC; R.I. for 10 years and a fine of rupees 200, in default, to suffer rigorous imprisonment for one year under section 366 of the IPC R.I. for 7 years and the fine of rupee 200, in default, to suffer rigorous imprisonment for one year under section 10 of the Protection of Children from Sexual Offences Act and R.I. for 7 years and the fine of rupees 200, in default, to suffer rigorous imprisonment for one year under section 201 of the IPC. Overturning the appellant's conviction under section 10 of the Act, lacking a specific charge for the same, the High Court maintained the other order of conviction and sentence. Supreme Court of India disposing

of the appeal observed that, "a sentence of life imprisonment simpliciter would not be proportionate to the gravity of the offence committed, and would not meet the need to respond to crime against women and children in the most stringent manner possible. Moreover, though we have noticed above that the possibility of reform of the accused is not completely precluded, we nevertheless share the conscious of the trial Court and the High Court regarding lack of remorse on behalf of the appellant and the possibility of reoffending. Finally, it commuted the sentence of death awarded to the appellant to life imprisonment, out of which the appellant shall mandatorily serve out a minimum of 20 years without claiming remission.

169. In the case of Amar Singh Yadav Vs. State of U.P. appellant was convicted for the offence under sections 302, 301 and 436 of the IPC, the appellant was sentenced to suffer imprisonment for life on the count of section 307, R.I. for 7 years on count of section 436 and also sentenced to death and to pay fine of rupee 10,000/- on count of section 302 of the IPC. Supreme Court of India disposed of the appeal holding that the imposition of death sentence to the accused Amar Singh Yadab was not warranted. Accordingly, it commuted the sentence to life imprisonment with an observation that he must serve a minimum period of 30 years in jail without remission before consideration of his case for premature release.

170. In the case of Shri Bhagwan V. State of Rajasthan, (2001)6 SCC 296 Indian Supreme Court commuting the sentence of death directed that the appellant shall not be released from the prison unless she had served out at least 20 years of imprisonment including the period already undergone by the appellant.

171. In Prakash Dhawal Khairnar (Patil) V. State of Maharashtra, [(2002) 2SCC 35] Indian Supreme Court setting aside sentence of death directed that the appellant to serve out at least 20 years imprisonment including the period already undergone by him.

172. In Nazir Khan and others V. State of Delhi, (2003) 8 SCC 461 Indian Supreme Court held that considering the gravity of the offence and the dastardly nature of the acts and consequences which have flown out and, would have flown in respect, of the life sentence, incarceration for the period of 20 years would be appropriate. The accused appellants would not be entitled to any remission.

173. In the case of Haru Ghosh V. State of West Bengal, (2009) 15SCC it was concluded, "we do not propose to send the Appellant/accused for the rest of his life; however we observe that the life imprisonment in the case of the Appellant/accused shall not be less than 35 years of actual jail sentence, meaning thereby, the Appellant/accused would have to remain in jail for minimum 35 years.

174. In India whenever death sentence has been commuted to life imprisonment where the offence alleged is serious in nature, while awarding life imprisonment, Supreme Court reiterated minimum years of imprisonment of 20 years or 25 years or 30 years or 35 years. But there is no indefeasible right of such Prisoner to be unconditionally released on the expiry of such particular term including remissions and that is only for the purpose of warring out the remissions. The Courts have been even more unclear on where to draw the line.

175. There can be no sentence worse than that which consumes the full span of a man's life. Unlike death penalty cases, life sentences receive no special consideration on appeal in the Appellate Division under article 103 of the Constitution which limits the possibility

they will be reduced or reversed. Spending entire life in jail, growing sick and old, and dying there, is a horrible experience. It is "the extended death penalty" known officially as life imprisonment with reduction or remission. It is a "secret death penalty" as Pope Francis wrote in his recent encyclical "Freatelli Tutti". He has suggested that all prisoners deserve the "right to hope" and said, "if you close hope in a cell, there is no future for society."

176. Whether a convict of imprisonment for life is entitled to get the benefit of section 35A of the Criminal Procedure and if he is so entitled how the same would be given and what would be length or duration of the period life imprisonment to be served by a life convict, that is, how the same would be calculated is relevant to decide.

177. In the original Code of Criminal Procedure, provision of section 35A was not provided. Section 35A was first incorporated in the Code of Criminal Procedure by the Code of Criminal Procedure (Amendment) Act, 1991 (Act No.16 of 1991) on 5th May, 1991. Contents of which run as follows:

> Section 35A: Term of imprisonment in cases where convicts are in custody- where a person is in custody at the time of his conviction and the offence for which he is convicted is not punishable with death or imprisonment for life, the court may, in passing the sentence of imprisonment, take into consideration the continuous period of his custody immediately preceding his conviction.

178. That is, under Act No.16 of 1991 it was the discretion of the Court to take into consideration of the continuous period of custody of a convict while passing the sentence in connection with the same case. The said provision was not applicable in respect of the offence for which he is convicted if not punishable with death or imprisonment for life.

179. Thereafter, the Legislature enacted a new provision incorporated in Section 35A in the Code of Criminal Procedure deleting the earlier provision by the Code of Criminal Procedure (Amendment) Act, 2003 (XIX of 2003) which runs as follows:

> "35A. (1) Except in the case of an offence punishable only with death, when any court finds an accused guilty of an offence and, upon conviction, sentences such accused to any term of imprisonment, simple or rigorous, it shall deduct from the sentence of imprisonment, the total period the accused may have been in custody in the meantime, in connection with that offence.
>
> (2) If the total period of custody prior to conviction referred to in sub-section (1) is longer than the period of imprisonment to which the accused is sentenced, the accused shall be deemed to have served out the sentence of imprisonment and shall be released at once, if in custody unless required to be detained in connection with any other offence; and if the accused is also sentenced to pay any fine in addition to such sentence, the fine shall stand remitted.

180. Upon analyzing the provision of section 35A (1) it appears that:

> (1) An accused who is guilty of an offence, not punishable only with death, is entitled to get the benefit of deduction from the sentence awarded.
>
> (2) It is a statutory mandate to deduct from the sentence of imprisonment.
>
> (3) Intention of the legislature is clear from such newly enacted provisions that in order to give benefit of the accused persons when the Court finds them guilty of offence except for the offence punishable with death, the provision has been incorporated."

181. In the judgment under review it was stated,

> "Section 35A of the Code of Criminal Procedure is not applicable in case of an offence punishable with death or imprisonment for life. An accused person cannot claim the deduction of the period in custody prior to the conviction as of right. It is a discretionary power of the Court. It cannot be applicable in respect of an offence which is punishable with death. Though the word 'only' is used in section 35A, the legislature without considering section 401 of the Code of Criminal Procedure and section 53 of the Penal Code has inserted the word 'only' but the use of word 'only' will not make any difference since under the scheme of the prevailing laws any remission/reduction of the sentence has been reversed to the government only." (underlined by us)

182. In the Code of Criminal Procedure (Amendment) Act, 2003 "except in the case of an offence punishable only with death" were substituted and the "words" "or imprisonment for life" were deleted. Similarly, deleting the word "may" the word "shall" was substituted and also provided that, 'it (Court) shall deduct from the sentence of imprisonment'. Question is, in view of the amendment, whether the observation under review is legally sustainable or not. (underlined by us)

183. The use of the word 'shall' raises a presumption that the particular provision is imperative. Hidayetullah J in Sinik Motors V. State of Rajasthan (AIR 1961 SC 1480) observed that 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the context or intention otherwise demands. In the case of State of U.P.V. Babu Ram (AIR 1961 SC 751) it was further observed by the Supreme Court of India that when a statute uses the word 'shall' prima-facie it is mandatory but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. If different provisions are connected with the same word 'shall' and if with respect to some of them the intention of the legislature is clear that the word 'shall' in relation to them must be given an obligatory or a directory meaning, it may indicate that with respect to other provisions also, the same construction should be placed (Hari Vishnu Kasnath V. Ahmed Ishaque AIR 1945 SC 233). If the word 'shall' has been substituted for the word 'may' by an amendment, it will be a very strong indication that the use of 'shall' makes the provision imperative.

184. In Maxwell on the Interpretation of Statutes it has been stated that if the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted. Similarly, statutes dealing with jurisdiction and procedure are, if they relate to the infliction of penalties, strictly construed. Compliance with procedure provisions will be stringently exacted from those proceeding against the person liable to be penalized, and if there is any ambiguity or doubt it will, as usual, be resolved in his favour. Section 35A has been enacted and incorporated as a procedural law which prescribes the procedures and methods for enforcing rights and duties and for obtaining redress.

185. The criminal law in its wider sense consists of both the "substantive criminal law" and procedural criminal law: The substantive Criminal law defines offences and prescribes punishment for the same whereas the procedural criminal law facilitates to administer the substantive law and to protect in society against criminals and lawbreakers. In absence of procedural law, the substantive criminal law would be of not much importance because

without the enforcement mechanism, the threat of punishment held out to the law breakers by the substantive criminal law would remain formality and empty practice. The Code of Criminal Procedure is complimentary to the Penal Code and failure of the Procedure in criminal laws would seriously affect the substantive criminal law. The substantive criminal law by its very nature cannot be self-operative. In absence of procedural law, the substantive criminal law could be almost worthless. By incorporating Section 35A in the Code of Criminal Procedure by the Code of Criminal Procedure (Amendment) Act, 2003 the legislature has provided the provision of deduction of imprisonment in cases where convicts may have been in custody except in the case of an offence punishable only with death. The Legislature did not use the word "only" unconsciously. The word 'only' has been used in Section 35A to restrict the exception in case of an offence punishable with death. That is, in case of an offence punishable with death alone will not get the benefit of Section 35A. That is, the category of offence is one which is punishable with death. In case of other clauses of offences not punishable with death, the provision of deduction of imprisonment in cases where convicts may have been in custody.

186. Thus, the convicts who are convicted and sentenced of the offences not punishable only with death are entitled to get the benefit of section 35A of the Code of Criminal Procedure in respect of the period of their imprisonment which was spent during investigation or inquiry or trial in a particular case. To deny the benefit of section 35A of the Code of Criminal Procedure the convict sentenced to life imprisonment would be to withdraw the mandatory application of a benevolent statutory provision.

187. Mr. Ariff specifically points out that the provisions of section 397 of the Code of Criminal Procedure lend support to above contemplation that life sentence has a terminus and ascertainable in terms of years. In view of Section 397 of the Code of Criminal Procedure after serving sentence awarded in one case the sentence of another case, if awarded shall start to run. Unless the first imprisonment is terminable at a certain point of time in terms of fixed years the second conviction and sentence can not run.

188. Section 45 of the Penal Code defining the meaning of 'life' has weighed heavily in determining that life sentence extends to natural life of the convict. Section 45 of the Penal Code in defining life is flexible. If we consider the words "unless the contrary appears from the context" together, the said flexibility would be apparent. In other words, indirectly it has been said that different intention of the legislature appears in the Penal Code which is opposed to the general meaning of 'life'. That is, the definition of "life" provided in section 45 of the Penal Code that, 'the life of a human being' is not conclusive, final and absolute definition in view of the next wordings, those are, 'unless the contrary appears from the contest.'

189. Section 65 of the Penal Code provides the term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. Section 65 provides the limit to imprisonment for non-payment of fine when imprisonment and fine awardable. For example, an offence punishable under Section 302 of the Penal Code provides the punishment with death or imprisonment for life, and shall also be liable to fine. If an accused is convicted under section 302 of the Penal Code and sentenced to imprisonment for life and to pay fine of taka 50,000/-, in default, of payment of fine amount, he is to suffer rigorous imprisonment for a further period which may be one-fourth of the whole period or any lesser period than that as

specified by the Court. If the accused fails to pay the fine amount how he will serve out the sentence against the defaulted amount when the duration of imprisonment for life means till the convict's last breathing in jail.

190. In a leading German case on life imprisonment (45 B Verf GE 187, Decision, 21 June 1977) the German Federal Constitutional Court had recognized that it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with some day regain that freedom. It was that conclusion which led the Constitutional Court to find that, the prison authorities had the duty to strive towards a life sentenced prisoner's rehabilitation and that rehabilitation was constitutionally required in any community that established human dignity as its centerpiece.

191. In Vinter and others V. United Kingdom (Application No.66069 of 2009-9th July, 2013) the Grand Chamber of the European Court of Human Rights ruled that all offenders sentenced to life imprisonment had a right to both a prospect of release and a review of their sentence. Failure to provide for these twin rights meant that the applicants had been deprived of their right under Article 3 of the European Convention on Human Rights (ECHR) to be free from inhuman or degrading treatment or punishment. In that judgment it was observed that all the prisoners need to be able to retain some hope for a better future in which they can again become full members of society. That judgment recognizes, implicitly, that hope is an important and constitutive aspect of the human person.

192. Retributive justice combines features of both corrective and distributive justice. The corrective dimension consists in seeking equality between offender and victim by subjecting the offender to punishment and communicating to the victim a concern for his or her suffering. As Justice Laurie Ackermann of the South African Constitutional Court observed in the case of S.Vs. Dodo (CCT/1/01), "To attempt to justify any period of penal incarceration, Let alone imprisonment for life..... without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of dignity. Human beings are not commodities to which price can be attached; they are creatures with inherent and indefinite worth, they ought to be treated as ends in themselves, never merely as means to an end." Committee of Ministers of the Council of Europe in 2003 made detailed recommendations on the treatment of such prisoners to avoid the destructive effects of imprisonment, and to increase and improve the possibilities for the prisoners to be successfully resulted in society and to lead a law abiding life following their release. The 2003 recommendation on conditional release (Parole) provides that Parole should be considered for all prisoners. European Prison Rules emphasized that the regime for all sentenced prisoners should be designed to enable them to lead a responsible and crime-free life. Prof. Jessica Henry has written extensively on the need to incorporate de facto life sentences into the boarder conversation about the life sentences overall. She notices that there is difficulty in setting a term of years to define virtual life since the age of the individual at the time of prison admission is a critical component of the calculation.

193. It is to be remembered that whether a convict receives much pain as was inflicted by him on his victim. A convict, till his natural death, dies every day before his death punishment should be a means to a certain end, not an end in itself. UK Supreme Court concluded in Osborn V. The Parole Board (2013 UK SC 61) that human dignity requires a procedure that respects the persons whose rights are significantly affected by the decisions. It was observed that human dignity required that prisoners serving indeterminate sentences be

given a hearing before the Parole Board when possible release was being considered and when the Parole Board was asked to advise on their possible transfer to open conditions. Justice should not only be done, but should manifestly and undoubtedly be seem to be done.

194. The principles of statutory interpretation dictate that a statute must be construed as a whole. The words which are capable of only one meaning must be given that meaning. The ordinary words must be given ordinary meanings. If the provisions of sections 45, 53, 55, 57 and 65 of the Penal Code, sections 35A, 397, 401 and 402 of the Code of Criminal Procedure and some other provisions of Penal Code and Criminal Procedure Code, the Prisons Act and Rules framed thereunder are construed as per rules of interpretation it may be observed that the assertion "imprisonment for life" means imprisonment for whole of the remaining period of convict's natural life is not final conclusion.

195. Administrative instructions regarding the various remissions are to be given to the prisoners from time to time in accordance with the Prisons Act and Rules framed thereunder. The provisions contained in the Prisons Act are only procedural in nature. The Preamble to the Act itself states that the Act is meant to consolidate the law relating to prisoners confined by order of a Court. Rules provide for a procedure to enable the Government to remit the sentence under section 401 of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remission earned.

196. The situation has been changed or created because of enactment of new provision incorporated in section 35A of the Code of Criminal Procedure deleting the earlier provision providing that except in the case of an offence punishable **only** (emphasis supplied) with death, when any court finds an accused guilty of an offence and, upon conviction, sentences such accused to **any term of imprisonment** (emphasis supplied) it shall deduct from the sentences of imprisonment, the total period the accused may have been in custody in the meantime, in connection with that offence.

197. In view of the deletion of the words, "imprisonment for life" from the legislation enacted earlier in the Code of Criminal Procedure (Amendment) Act, 1991 and by enacting the Code of Criminal Procedure (Amendment) Act, 2003 the legislature, who envisaged and prescribed punishment of "imprisonment for life" and used the word "shall deduct," thereby, made the provision of section 35A of the Code of Criminal Procedure mandatory and expressed its intention to give some benefit to the convicts of life imprisonment, the life convicts are entitled to get statutory deduction if they are so entitled. The purpose is clear that the convicted person is given the right to rekon the period of his sentence of imprisonment he was in custody as an under trial prisoner. In our decision under review we failed to look the reality and practical effect of the mandatory statutory provision of deduction of sentences of life imprisonment.

198. It is relevant here to mention that in order to give such benefits Supreme Court of Bangladesh, High Court Division issued Circular No.12/17 dated 29.05.2017 accordingly. Contents of the said circular run as follows:-

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বিষয়ঃ **The Code of Criminal Procedure, 1898** এর **35A** ধারার বিধান অনুসরণ প্রসঙ্গে।

The Code of Criminal Procedure, 1898 এর 35A ধারা অনুযায়ী শাস্তি কেবলমাত্র মৃত্যুদন্ড এরুপ অপরাধ ব্যতীত অন্যান্য অপরাধের ক্ষেত্রে সশ্রম বা বিনাশ্রম যে কোনো প্রকারের কারাদন্ড প্রদানক্রমে প্রচারিত রায় বা আদেশে আসামীর মামলা বিচারাধীন থাকা অবস্থায় আসামী কর্তৃক কারা হেফাজতে থাকা/অবস্থানরত সময়কাল তার মোট দন্ডের সময়কাল হতে বিয়োগ (deduct) হবে। যদি একই অপরাধের জন্য মামলা বিচারাধীন থাকা অবস্থায় আসামীর কারা হেফাজতে থাকা/অবস্থানরত সময় মোট দন্ডের সময়কালের অধিক হয়, তবে আসামী তার দন্ড ভোগ সম্পন্ন করেছে বলে গণ্য হবে এবং অন্য কোনো অপরাধের কারণে কারাগারে আটক রাখার প্রয়োজন না হলে অবিলম্বে তাকে মুক্তি প্রদান করতে হবে। এরুপ ক্ষেত্রে আসামীকে যদি কারাদন্ডের অতিরিক্ত অর্থদন্ড প্রদান করা হয় তাহলে আসামীর উক্ত অর্থদন্ড মওকুফ হয়েছে মর্মে গণ্য হবে।

২। কিন্তু লক্ষ্য করা যাচ্ছে যে, অনেক ক্ষেত্রেই আদালত ও ট্রাইব্যুনালের রায়ে কারাদন্ডপ্রাপ্ত আসামীর মোট কারাদন্ডের সময়কাল হতে মামলা বিচারাধীন থাকা অবস্থায় আসামীর কারা হেফাজতে থাকা/অবস্থানরত সময়কাল বিয়োগের বিষয়ে কোনো প্রকার নির্দেশনা প্রদান করা হচ্ছে না বা হলেও সাজা পরোয়ানায় (Conviction Warrant) তা উল্লেখ করা হচ্ছে না। ফলে কারা কর্তৃপক্ষ আসামীর দন্ডের মোট মেয়াদ হতে মামলা বিচারাধীন থাকা অবস্থায় আসামীর কারা হেফাজতে অবস্থানকালীন সময়কাল বিয়োগ করা হতে বা উক্ত সময়কাল কারাদন্ডের মোট মেয়াদ হতে অধিক হলে আসামীকে তাৎক্ষণিকভাবে মুক্তি প্রদান করতে (যদি না অন্য অপরাধে তাকে কারাগারে আটক রাখা আবশ্যক হয়) কিংবা ক্ষেত্রমতে, কারাদন্ডের অতিরিক্ত অর্থদন্ড মওকুফ গণ্য করা হতে বিরত থাকছে, যা আইনগত বিধি বিধানের লংঘন।

৩। এমতাবস্থায়, ফৌজদারী মামলায় আদালত ও ট্রাইব্যুনালসমূহ-কে আসামীকে দোষী সাব্যস্তক্রমে কারাদন্ড প্রদান করতঃ প্রদত্ত রায় বা আদেশে এবং সাজা পরায়ানায় কারা কর্তৃপক্ষের প্রতি The Code of Criminal Procedure, 1898 এর 35A ধারার বিধান মতে সশ্রম বা বিনাশ্রম যে কোনো প্রকারের কারাদন্ডপ্রাপ্ত আসামীর মোট কারাদন্ডের সময়কাল হতে মামলা বিচারাধীন থাকা অবস্থায় আসামীর কারা হেফাজতে থাকা/অবস্থানরত সময়কাল বাদ দেওয়ার এবং উক্ত সময়কাল কারাদন্ডের মোট মেয়াদ হতে অধিক হলে আসামীকে তাৎক্ষণিকভাবে মুক্তি প্রদান (যদি না অন্য অপরাধে তাকে কারাগারে আটক রাখা অবশ্যক হয়) ও কারাদন্ডের অতিরিক্ত অর্থদন্ড মওকুফ গণ্য করার আদেশ সুস্পষ্টভাবে রায়ে ও সাজা পরোয়ানায় উল্লেখ করার নির্দেশ প্রদান করা গেল।

৪। সর্বোপরি The Code of Criminal Procedure, 1898 এর 35A ধারার বিধান মতে আদালত ও ট্রাইব্যুনালসমূহের রায় বা সাজা পরোয়ানায় (Conviction Warrant) কোনো কারাদন্ড প্রাপ্ত আসামীর মামলা বিচারাধীন থাকা অবস্থায় কারা হেফাজতে থাকা/অবস্থানরত সময় বিয়োগের (deduct) বিষয়/নির্দেশনা উল্লেখ না থাকলেও কারা কর্তৃপক্ষ কর্তৃক উক্ত আইনের বিধান মতে আসামীর মোট কারাদন্ড হতে মামলা বিচারাধীন থাকা অবস্থায় আসামী কর্তৃক কারা হেফাজতে থাকা/অবস্থানরত সময় বাদ দিতে এবং উক্ত সময়কাল কারাদন্ডের মোট মেয়াদ হতে অধিক হলে আসামীকে তাৎক্ষণিকভাবে মুক্তি প্রদান (যদি না অন্য অপরাধে তাকে কারাগারে আটক রাখা আবশ্যক হয়) ও কারাদন্ডের অতিরিক্ত অর্থদন্ড মওকুফ গণ্য করতে আইনত কোনো বাধা নেই।

৫। উল্লেখ্য যে, যদি একজন আসামী একই সময়ে একাধিক বিচারাধীন মামলায় আটক হয়ে কারা হেফাজতে অবস্থান করে, সেক্ষেত্রে প্রত্যেক মামলায় আসামী কবে প্রথম গ্রেফতার হয়ে কারা হেফাজতে অবস্থান করা শুরু করেছে এবং/অথবা জামিনের শর্ত ভঙের জন্য গ্রেফতার হয়ে সময়ে সময়ে কারাগারে অবস্থান করেছে তার মোট সময়কাল প্রত্যেক মামলার মোট কারাদন্ডের মেয়াদ হতে বিয়োগ (deduct) করতে হবে। কেননা, একজন আসামী প্রতিটি আলাদা মামলায় যে কারাদন্ড প্রাপ্ত হয়, তার প্রত্যেকটি ক্ষেত্রে 35A ধারায় প্রদত্ত সুবিধা ভোগ করতে অধিকারী। আরা উল্লেখ্য যে, 63 DLR(AD)18 মামলার 41 নম্বর প্যারা ও 63 DLR(2008)363 মামলার রায়ের আলোকে The Code of Criminal Procedure, 1898 এর 35A ধারার বিধান ভূতাপেক্ষভাবে প্রয়োগযোগ্য বিধায় ফৌজদারী কার্যবিধিতে 35A ধারা সংযুক্তির পূর্বে যে সব মামলা দায়ের হয়ে চলমান আছে সে সব মামলার প্রত্যেক আসামী এ ধারায় প্রদত্ত সুবিধা ভোগের অধিকারী হবেন।

(আবু সৈয়দ দিলজার হোসেন)
রেজিষ্ট্রার, হাইকোর্ট বিভাগ।"

199. In Bangladesh, life sentence has become a complex patchwork of judicial and executive orders. A young person sentenced to imprisonment for life could theoretically, serve many more years in custody than an older person. Conversely, an older person has a significantly greater chance of serving the balance of his life in jail. Many prisoners serving life sentences will likely die in prison. Society should find a human way of handling life sentence. If complete bar to get release of all life convicts is provided it would fail to satisfy the principle of truth in sentencing. The imprisonment until death has some negative effects within the prison system such as ageing of the prison population and the creation "super-inmate". Generally, most of the prisoners come from poor and vulnerable communities. Critics suggest that to impose whole life tariffs denies the prisoner's human rights because it offers no possibility of release and thus no hope for the future. International human rights law allows the imposition of life sentences "only in the most serious crimes" and prohibits the use of life imprisonment without parole. Life imprisonment, without the possibility of release, leads to indefinite detention is prison, and is known to cause physical, emotional and psychological distress. Prisoners could suffer from ill-health, social isolation, loss of personal responsibility, identity crises, and may even be driven to suicide. The prison is a terrible place to cope with a serious ailment. In the dark and dank dungeons of our prisons, life is a killer, mentally and physically. Our prisons are so chock-a-block with inmates that there are not enough spaces for them to sleep. The enormous increase in prison populations has led to severe prison overcrowding. The incarceration rates continued to climb throughout the last few decades. In some jail, prisoners have reported sleeping in shifts because there are not enough room in cells for them all to lie down at the same time. Overcrowding increases the stress put on the inmates. Adam Gopnic in "The caging of America why do we lock up so many people" has said, "----- no one who has been inside a prison, if only for a day, can ever forget the feeling. Time stops. A note of attenuated panic, of watchful paranoia, anxiety and boredom and fear mixed into a kind of developing fog, covering the guards as well as the guarded-----." The International Covenant on Economic, Social and Cultural Rights (ICESR) states that prisoners have right to the highest attainable standard of physical and mental health. In India the Krishna Iyer Committee recommended induction of more women in the police force in view of their special role in tackling women and child offenders.

200. It is undoubtedly true that society has a right to lead a peaceful and fearless life, without-roaming criminals creating havoc in the lives of ordinary peace-loving people. Equally strong is the foundation of a reformative theory which propounds that a civilized society cannot be achieved only through punitive attitudes and vindictiveness. The object and purpose of determining quantum of sentence has to be 'socio- centric' following the relevant law. A civil society has a 'fundamental' and 'human' right to live free from any kind of psycho fear, threat, danger or insecurity at the hands of anti-social elements. The society legitimately expects the Courts to apply doctrine of proportionality and impose suitable and deterrent punishment that commensurates with the gravity of offence. The measure of punishment in a given case must depend upon the atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against criminals. Undue sympathy to impose inadequate punishment would do more harm to the justice system that undermines the public confidence in the efficacy of the law. 147. Simultaneously it is to be borne in mind of all that criminal justice would look hollow if

justice is not done to the victim of the occurrence. A victim of occurrence cannot be "a forgotten man" in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of murder. An honour which is lost or life which is suffered out cannot be recompensed but then compensation will at least provide some solace. Bangladesh regards itself as progressive in many aspects of criminal justice system. "Allah commands justice, righteousness, and spending on ones relatives, and prohibits licentiousness, wrongdoing, and injustice----" (The Holly Qur'an 16:90) "Take not life, which Allah has made sacred, except by way of justice and law. Thus does He command you, so that you may learned wisdom, " (The Holly Qur'an 6:151). Life and death are acts of the Divine and the divine's authority has been delegated to the human Courts of law to be only exercised with utmost caution.

201. If we read Sections 45, 53, 55 and 57 of the Penal Code with Sections 35A and 397 of the Code of Criminal Procedure together and consider the interpretations discussions above it may be observed that life imprisonment may be deemed equivalent to imprisonment for 30 years. The Rules framed under the Prisons Act enable a prisoner to earn remissions-ordinary, special or statutory and the said remissions will be given credit towards his term of imprisonment.

202. However, if the Court, considering the facts and circumstances of the case and gravity of the offence, seriousness of the crime and general effect upon public and tranquillity, is of the view that the convict should suffer imprisonment for life till his natural death, the convict shall not be entitled to get the benefit of section 35A of the Code of Criminal Procedure. In the most serious cases, a whole life order can be imposed, meaning life does mean life in those cases. In those cases leniency to the offenders would amount to injustice to the society. In those cases, the prisoner will not be eligible for release at any time. The circumstances which are required to be considered for taking such decision are: (1)surroundings of the crimes itself; (2) background of the accused; (3) conduct of the accused; (4) his future dangerousness; (5) motive; (6) manner and (7)magnitude of crime. This seems to be a common penal strategy to cope with dangerous offenders in criminal justice system.

203. Bentham, Auston Hart, Kelsen and some other jurists said that law making is the task of legislature, not of judiciary. In England, this principle is strictly followed. In Magor and St Mellons Rural District Council V. Newport Corporations [(1951) 2 All E Q 839] the House of Lords overruled the decision of Lord Denning in the Court of Appeals, holding it to be "a naked usurpation of legislative powers". There is separation of powers in the Constitution between three organs of the state, and one organ should not ordinarily encroach into the domain of another, otherwise, there will be chaos. Of all the organ of the state, it is only judiciary which can define the limits of all three. This great power must therefore be exercised by the judiciary, with the utmost humility and self restraint.

204. Judicial activism is not an unguided missile, and must not become judicial adventurism. Courts decision should have a jurisprudential base. A judge makes a decision in accordance with law and customs of the land. He can not introduce new law but make constructive interpretation and work out the implications of legal considerations. In the exercise of the judicial power, the Court should within the legally imposed restrictions act by adopting the best interpretations. Only the legislature is legally empowered to enact law fixing a definite period of life imprisonment resolving dichotomy and put an end to the ambiguity.

205. However, with the development and fast changing society, the law cannot remain static and the law has to develop its own principles. In view of discussions made above, it can be said that imprisonment for life may be deemed equivalent to imprisonment for 30 years.

206. In order to avoid any controversy it is relevant here to mention that punishment awarded by the International Crimes Tribunal under the International Crimes (Tribunals) Act,1973 (Act XIX of 1973) is to be regulated/controlled/guided following the provisions provided under article 47(3), 47A (1) and (2) of the Constitution and as per provisions of International Crimes (Tribunals) Act, 1973 and Rules framed thereunder. A convict under the said Act is not entitled to get benefit of Section 35A of the Code of Criminal Procedure.

207. In view of the facts and circumstances, the discussion made above the review petition is disposed of with the following observations and directions:

1. Imprisonment for life prima-facie means imprisonment for the whole of the remaining period of convicts natural life.
2. Imprisonment for life be deemed equivalent to imprisonment for 30 years if sections 45 and 53 are read along with sections 55 and 57 of the Penal Code and section 35A of the Code of Criminal Procedure.
3. However, in the case of sentence awarded to the convict for the imprisonment for life till his natural death by the Court, Tribunal or the International Crimes Tribunal under the International Crimes (Tribunal) Act, 1973 (Act XIX of 1973), the convict will not be entitled to get the benefit of section 35A of the Code of Criminal Procedure.

208. Considering the facts and circumstances, the sentence awarded to the review petitioner is modified to the extent that he is sentenced to suffer imprisonment for life and to pay fine of taka 5000/-, in default, to suffer rigorous imprisonment for 2(two) months more.

209. We express our gratitude to the learned ***amici curiae*** for their gracious assistance. (It is to be mentioned here that during the course of the hearing of this matter, Mr. Mahbubey Alam, the then Attorney General died on 27.09.2020 of COVID-19. He gave much labour in this case and assisted the Court. Thereafter, the matter was reheard upon reconstituting the bench with newly elevated Judge Obaidul Hasan, J. Then Mr. A.M. Aminuddin, newly

appointed Attorney General appeared for the State who adopted the submissions made by late legend Mahbubey Alam.)

Mirza Hussain Haider, J: I have gone through the judgment delivered by my brother, Muhammad Imman Ali, J. and my brother Hasan Foez Siddique, J. I agree with the reasoning and findings given by Hasan Foez Siddique, J.

Abu Bakar Siddiquee, J: I have gone through the judgment delivered by my brother, Muhammad Imman Ali, J. and my brother Hasan Foez Siddique, J. I agree with the reasoning and findings given by Hasan Foez Siddique, J.

Md. Nuruzzaman, J : I have gone through the judgment delivered by my brother, Muhammad Imman Ali, J. and my brother Hasan Foez Siddique, J. I agree with the reasoning and findings given by Hasan Foez Siddique, J.

Obaidul Hassan, J : I have gone through the judgment delivered by my brother, Muhammad Imman Ali, J. and my brother Hasan Foez Siddique, J. I agree with the reasoning and findings given by Hasan Foez Siddique, J.

Courts Order

210. The review petition is disposed of with the following observations and directions by majority decision:

1. Imprisonment for life prima-facie means imprisonment for the whole of the remaining period of convicts natural life.
2. Imprisonment for life be deemed equivalent to imprisonment for 30 years if sections 45 and 53 are read along with sections 55 and 57 of the Penal Code and section 35A of the Code of Criminal Procedure.
3. However, in the case of sentence awarded to the convict for the imprisonment for life till his natural death by the Court, Tribunal or the International Crimes Tribunal under the International Crimes (Tribunal) Act, 1973 (Act XIX of 1973), the convict will not be entitled to get the benefit of section 35A of the Code of Criminal Procedure.

211. Considering the facts and circumstances, the sentence awarded to the review petitioner is modified to the extent that he is sentenced to suffer imprisonment for life and to pay fine of taka 5000/-, in default, to suffer rigorous imprisonment for 2(two) months more.

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APPELLATE DIVISION

PRESENT:
Mr. Justice Syed Mahmud Hossain
-Chief Justice
Mr. Justice Hasan Foez Siddique
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

JAIL APPEAL NO.13 of 2014.
(From the judgment and order dated 09.10.2012 passed by the High Court Division in Criminal Appeal No.4239 of 2007 with Jail Appeal No.436 of 2007 and Death Reference No.35 of 2007).

Md. Abdul Haque.	:	.....Appellant
Vs.		
The State.	:	.....Respondent
For the Appellant.	:	Mr. Helaluddin Mollah, learned Advocate.
For the Respondent.	:	Mr. Biswajit Debnath, Deputy Attorney General.
Dates of Hearing.	:	The 16th and 22nd September,2020.
Date of Judgment.	:	The 29th September,2020.

Editor's Note:

The Appellant was convicted under section- 11 (KA) of the Nari-O –Shishu Nirjatan Daman Ain, 2000 and sentenced to death for killing his wife for dowry. The High Court Division confirmed the death sentence. The convict preferred Jail appeal before the Appellate Division. The Appellate Division dismissed the Jail Appeal and affirmed the judgment of the High Court Division. The Appellate Division also determined the competence of a child witness discussing the relevant laws and held that preliminary examination of a child witness is not at all necessary.

Key-words:

Dowry, Wife-killing case, Child witness, alibi, competency, unnatural death.

When presence of the witness at the place of occurrence is not challenged, his/her presence is deemed to be admitted:
What is remarkable to mention here is that presence of Laboni at the place of occurrence at the relevant time has not been challenged by the defence in her cross-examination. Therefore, it is deemed to have been admitted by the defence that Laboni a child aged about 7½ years was present at the time of occurrence. ...(Para 28)

Evidence Act 1872, Section 118
Competence of a witness:
All persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answer to question by tender years, extreme old age, disease and the like. ... (Para 30)

Evidence Act 1872, Section 118
Competence of a child witness:
A child as young as 5/6 years can depose evidence if she understands the questions and answers in a relevant and rational manner. The age is of no consequence, it is the mental faculties and understanding that matter in such cases. Their evidence, however, has to be scrutinised and caution has to be exercised in each individual case. The Court has to satisfy itself that the evidence of a child is reliable and untainted. Any sign of tutoring will render the evidence questionable if the Court is satisfied, it may convict a person without looking for corroboration of the child's evidence. As regards credibility of child witness, it is now established that all witnesses who testify in Court must be competent or able to testify at trial. In general, a witness is presumed to be competent. This presumption applies to child witnesses also. ... (Para 34)

Evidence Act 1872, Section 118
Trial judge may resort to any examination of child witness which will tend to disclose his capacity and intelligence:
The competency depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding. ... (Para 35)

Evidence Act 1872, Section 118
Preliminary examination of a child witness is not necessary:
Testing of intelligence of a witness of a tender age is not a condition precedent to the reception of his evidence. Therefore, preliminary examination of a child witness is not at all necessary. ... (Para 39)

Evidence Act 1872, Section 118
Evidence of a 12 years old witness is admissible even if the Tribunal does not test her intelligence when she answers rationally and withstands onslaught of cross-examination:
Having gone through the evidence of P.W.9, we find that at the time of deposing before the Court, Laboni was about 12 years old and as such, the Tribunal probably did not feel the necessity of testing her intelligence. Having gone through the evidence, we are of the view that P.W.9, Laboni could understand the question put to her and she answered the rational reply to the questions. Over and above, she withstood the onslaught of cross-examination before the Tribunal. ... (Para 40)

Evidence Act 1872, Section 106 and Nari-O-Shishu Nirjatan Daman Ain 2000, Section 11(Ka) Plea of alibi in a wife killing case:
In a wife killing case, it is always presumed that the husband was with the deceased wife at the time of occurrence unless any plea of alibi is set up by the defence. In that case,

the burden of proving such plea rests on the husband in order to absolve him of any criminal liability. ... (Para 43)

Evidence Act 1872, Section 106
The burden to prove the plea of alibi is heavy on the accused and the plea of alibi cannot be proved by preponderance of probabilities:
It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. Thus, the burden to prove the plea of alibi is heavy on the accused and the plea of alibi cannot be proved by preponderance of probabilities.
...(Paras 44 & 45)

Evidence Act 1872, Section 108
When long abscondence is to be treated culpable in nature:
Soon after the occurrence, the appellant-husband absconded and he surrendered before the Tribunal on 28.08.2002, that is, about 6 months after the occurrence. This long abscondence of the appellant-husband without any explanation whatsoever appears to be culpable in nature under section 8 of the Evidence Act. ... (Para 46)

Nari-O-Shishu Nirjatan Daman Ain 2000, Section 11(Ka) and Penal Code 1860, section 302:
When dowry demand has been proved and the murder was cold blooded, brutal and without provocation, death sentence should not be commuted:
The murder was cold blooded and brutal without any provocation. Therefore, the submissions of the learned Advocate for the appellant that imprisonment for life may be awarded to the appellant by converting his conviction from 11 (ka) of the Nari-O-Shishu Nirjatan Daman Ain to section 302 of the Penal Code do not hold good on the facts and in circumstances of the case in hand. Moreover, demand of Tk.10000/- as dowry has been proved by the satisfactory evidence as found by both the Courts below.
... (Para 51)

JUDGMENT

Syed Mahmud Hossain, CJ:

1. This jail appeal is directed against the judgment and order dated 09.10.2012 passed by the High Court Division. By the impugned judgment and order, the High Court Division

affirmed the death sentence passed by the learned Judge of the Nari-O-Shishu Nirjatan Daman Tribunal No.1, Rangpur against the appellant in Death Reference Case No.35 of 2007 and dismissed Criminal Appeal No.4239 of 2007 and Jail Appeal No.436 of 2007 preferred by the appellant before the High Court Division against conviction under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 and sentence of death awarded against him by the learned Judge of the Nari-O-Shishu Nirjatan Daman Tribunal No.1, Rangpur in Nari-O-Shishu Nirjatan Daman Case No.337 of 2002.

2. The appellant sent a petition from the jail, it was numbered as Jail Appeal No.13 of 2014.

3. The prosecution version of the case, in short, is that the daughter of the informant Abdul Hamiz Miah, namely, Beli was given in marriage to the appellant Md. Abdul Haque about 10/11 years back as per tenets of Islam. Anyway, at a subsequent stage, the appellant demanded a sum of Tk.10,000/- by way of dowry from the informant through his wife Beli. But the informant could not comply with the demand of dowry because of financial stringency. On 07.02.2002, the appellant assaulted the victim-wife for the above mentioned dowry amount of Tk.10,000/-. In order to resolve the dispute regarding the demand of dowry, a salish was held in the house of the appellant at village Vaktipur(Chowdhury Para), Police Station-Mithapukur, District-Rangpur. But the informant-party and the appellant could not come to any terms with reference to the demand of dowry. On the night following 08.02.2002 at about 11/12 o'clock, the appellant strangled the victim-wife Beli to death in his bed room for the failure to comply with the demand of dowry. The appellant gave out that she had committed suicide. Following the killing of the victim-wife by the accused-husband (Md. Abdul Haque), the informant Abdul Hamiz Miah lodged an ejahar with Mithapukur Police Station against the accused-husband and others.

4. The Investigating Officers of the case are Sub-Inspector Md. Shahriyar and Sub-Inspector Md. Rezaul Karim of Mithapukur Police Station, Rangpur. The Investigating Officer Md. Shahriyar conducted part of investigation. Subsequently, the Investigating Officer, that is to say, Sub-Inspector Md. Rezaul Karim took up investigation of the case and completed the rest of investigation. Having found a prima facie case, Sub-Inspector Md. Rezaul Karim submitted the charge-sheet No.167 dated 18.05.2002 against the accused-husband Md. Abdul Haque under Section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000; but the remaining accused were not sent up in the charge-sheet for dearth of pre-trial incriminating materials.

5. At the commencement of the trial of the case, the learned Tribunal Judge framed charge against the accused-husband Md. Abdul Haque under Section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 and it was read over and explained to him in the dock; but he pleaded not guilty thereto and claimed to be tried as per law.

6. The defence version of the case, as it appears from the trend of cross-examination of the prosecution witnesses and the statement made by the accused-husband at the time of his examination under Section 342 of the Code of Criminal Procedure, is that he is not responsible for the unnatural death of the victim-wife and she committed suicide having suffered from tuberculosis and he has been falsely implicated in the case out of oblique motives.

7. After hearing both the prosecution and the defence and on an appraisal of the evidence and materials on record and regard being had to the attending circumstances of the case, the Tribunal below came to the finding that the prosecution brought the charge home and accordingly, it convicted and sentenced the appellant-husband by the judgment and order dated 03.05.2007.

8. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence passed by the Tribunal, condemned-prisoner filed Criminal Appeal No.4239 of 2007 along with Jail Appeal No.436 of 2007 before the High Court Division. The Tribunal also made Death Reference No.35 of 2007 to the High Court Division under section 374 of Code of Criminal Procedure for confirmation of death sentence. Upon hearing, the High Court division dismissed Criminal Appeal and Jail Appeal and accepting the Death Reference confirmed the death sentence imposed upon the condemned-prisoner.

9. Being aggrieved at and dissatisfied with the impugned judgment and order of conviction and sentence passed by the High Court Division, condemned-prisoner, Md. Abdul Haque from Central Jail, Rangpur, filed Memo of Jail Petition No.02 of 2013 before this Division which was registered on 30.10.2013 as Jail Appeal No.13 of 2014.

10. Mr. Helaluddin Mollah, learned Advocate, appearing on behalf of the appellant, submits that at the time of alleged occurrence, the accused was not present in his house, that is, the plea of alibi and that his wife committed suicide and that this case of the appellant was not taken into account by the learned Tribunal Judge causing failure of justice. He further submits that the learned Judge of the Tribunal did not test the intelligence of P.W.9 Laboni although she was aged about 12 while deposing before the Court and at the time of occurrence she was about 7½ years old. He then submits that the appellant-husband is in condemned cell for more than 13 years and as such, his sentence of death may be commuted to imprisonment for life. He continues to submit that the prosecution has miserably failed to prove that the appellant-husband demanded Tk.10000/- as dowry by examining any disinterested witness and as such, conviction of the appellant under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 is not only illegal but also without jurisdiction.

11. Mr. Biswajit Debnath, learned Deputy Attorney General, appearing on behalf of the State-respondent, on the other hand, submits that the prosecution has been able to bring home the charge under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 by oral and circumstantial evidence and as such no interference is called for. He further submits that P.W.9 Laboni aged about 12 years deposed spontaneously before the Tribunal and that she also withstood the onslaught of cross-examination of the learned Advocate for the defence and her evidence both examination-in-chief and cross-examination shows that she had adequate intelligence and understanding of the question put to her and as such, there cannot be any ground for discarding her evidence on the ground that before examining her as a witness, the learned Tribunal Judge did not test her intelligence as a witness. He then submits that there is no scope for commuting the sentence of the appellant from hanging to imprisonment for life as section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 provides that for the offence charged under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 the only sentence is hanging. He lastly submits that the plea of *alibi* was not taken by the defence by examining any witness but during cross-examination of P.W.2, a question was put to him that the appellant-husband was not at his house or he was at village Belogram on the fateful night of occurrence and as such, this plea of the learned Advocate for the appellant, does not hold any water.

12. We have gone through the submissions of the learned Advocate for the appellant and the learned Deputy Attorney General for the State-respondent, perused the impugned judgment and order and the materials on record.

13. Admittedly, the victim Beli was given in marriage to the appellant Md. Abdul Haque about 10/11 years prior to the occurrence. The evidence on record transpires that the conjugal life between the appellant-husband and the victim-wife was not a happy one over the demand of dowry to the tune of Tk.10000/- by the accused-husband to the informant Abdul Hamiz Miah through the victim-wife. The marital incompatibility between them reached a new height when a 'salish' was held in the house of the accused-husband over the demand of dowry on 08.02.2002. The evidence on record reveals that the 'salish' ended in a complete failure. The rancorous relationship between the accused-husband and the victim-wife over the demand of dowry has been brought to our notice by the prosecution evidence.

14. P.W.1 Abdul Hamiz Miah, P.W.2, Md. Belal Hossain, P.W.3, Md. Anwarul Haque and others stated that on their arrival at the place of occurrence house, they did not find the accused-husband there. P.W.9 Laboni, the foster-daughter of the appellant-husband and the victim-wife stated in categorical and unequivocal terms that after killing of the victim-wife during night time the appellant-husband took to his heels on the following morning. Therefore, it appears that at the material time the appellant-husband and the victim-wife lived together at the place of occurrence house. Such being the case, a duty is cast upon the appellant-husband to explain about the unnatural death of the victim-wife as contemplated by section 106 of the Evidence Act,1872.

15. In the case of *Dipok Kumar Sarker Vs. The State (1998) 40 DLR (AD)139,* it has been held by this Division that the deceased was admittedly living with the appellant at the relevant time and thus he was obliged to give an explanation as to how his wife had met with her death although normally an accused is under no obligation to account for the death for which he is on trial. The consideration is bound to be different in a case like this.

16. In the case of *The State, represented by the Solicitor to the Government of the People's Republic of Bangladesh Vs. Md. Shafiqul Islam alias Rafique and another, (1991) 43 DLR (AD)92,* it has been held that in a wife killing case from its very nature, there could be no eye-witness of the occurrence, apart from the inmates of the house who may refuse to tell the truth and the neighbours may not also come forward to depose and the prosecution is, therefore, necessarily to rely on circumstantial evidence. In the said case, it has also been held that where it is proved that the wife died of assault in the house of her husband, there would be strong suspicion against the husband that at his hands the wife died and to make the husband liable, the minimum fact that must be brought on record, either by direct or circumstantial evidence, is that he was in the house at the relevant time.

17. In the case of *TRIMUKH MAROTI KIRKAN Vs. STATE OF MAHARASHTRA (2006)10 SCC 681*, it has been held that where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence took place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.

18. In the case of *Nika Ram* V. *State of Himachal Pradesh, (1972) 2 SCC 80,* it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "Khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

19. In the case of *Ganeshlal* v. *State of Maharashtra, (1992) 3 SCC 106* the appellant was prosecuted for the murder of his wife which took place inside his house. It was held that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 of CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife.

20. In the case of *State of U.P.* v. *Dr. Ravindra Prakash Mittal* (1992) 3 SCC 300 the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly the Supreme Court of India reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC.

21. In the case of *State of Tamil Nadu* Vs. *Rejendran* (1999) 8 SCC 679, the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.

22. P.W.6, Dr. Md. Abdul Jalil deposed that he held an autopsy of the dead body of the victim-wife Beli Begum and found the following injuries on her person:

"Ligature found horizontal around the neck at the label of thyroid cartilage abrasion and ecchymoses found around the edge of the ligature mark.

On dissection: The sub-cutaneous tissue under the ligature mark was ecchymosed, neck muscles, laryngeal cartilage, tracheal rings and carotid arteries bruised and abraded. Extravasation of blood found corresponding to the wound."

23. He opined that the death of victim-wife was due to shock and asphyxia following ligature strangulation which was ante-mortem and homicidal in nature. In cross-examination, P.W.6 denies the defence suggestion that it is a case of suicide or that the autopsy-report is flawed.

24. The defence case is that at the material time, the victim-wife committed suicide because of her continuous sufferings from tuberculosis. The defence version has been belied by the medical evidence on record as stated above. The injuries found by P.W.6, Dr. Md.

Abdul Jalil during autopsy and the opinion given by him as to the cause of death of the victim-wife has been corroborated by the ocular evidence of P.W.9 Laboni. Therefore, the finding of the learned Judges of the High Court Division is that they had no doubt that the victim-wife was strangled to death by the accused-husband at the place of occurrence house at the relevant time. Under the circumstances, the defence version of the case appears to be a blatant falsehood. Accordingly, the explanation given on behalf of the appellant-husband about the unnatural death of the victim-wife falls to the ground.

25. P.W.1, Abdul Hamiz Miah and P.W.2, Belal Hossain and others have been able to prove the motive of killing of the victim-wife by the appellant-husband. According to their evidence, the 'salish' in respect of demand of dowry ended in fiasco on 08.02.2002. Soon after, the 'salish' the victim-wife was done to death at the place of occurrence on the night following 08.02.2002 at about 11/12 O'clock. Therefore, the prosecution witnesses have been able to bring home the charge against the appellant-husband under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000.

26. The lone eye-witness, P.W.9, Laboni deposed that on the night following on 08.02.2002 she and her mother fell asleep and at that stage, the appellant-husband throttled her mother and she (P.W.9)woke up from sleep and raised a hue and cry and that her father pressed her mouth and hung her mother by means of a 'saree' from the ceiling of the room and the father stayed indoors during night time. She also deposed that on the following morning, she called out her elder paternal aunt and told her that her father had killed her mother and fled away.

27. In cross-examination, P.W.9, Laboni denied the defence suggestion that she did not see her father throttling her mother and that she did not witness any occurrence or that she is a tutored witness. In cross-examination, she admits that she has been residing in the house of the informant Abdul Hamiz Miah.

28. What is remarkable to mention here is that presence of Laboni at the place of occurrence at the relevant time has not been challenged by the defence in her cross-examination. Therefore, it is deemed to have been admitted by the defence that Laboni a child aged about 7½ years was present at the time of occurrence. Over and above, the evidence on record transpires that she successfully withstood the cross-examination though she was about 12 years at the time of her deposition before the Tribunal.

29. In this connection, the defence has raised about competency of child witness Laboni, who deposed before the Court. It is necessary to quote section 118 of the Evidence Act,1872:

> "118. Who may testify-All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.
>
> Explanation-A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

30. Having considered section 118 of the Evidence Act, we find that all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answer to question by tender years, extreme old age, disease and the like.

31. At this juncture, we are tempted to advert to the case of *SURYANARAYANA v. STATE OF KARNATAKA (2001) 9 SCC 129.* In the said case at paragraph-5, it has been stated as under:

> "5. Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the Court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the Court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the Courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the Courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not."

32. It was further held in the case that the Evidence Act,1872 does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease-whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in the case of *Wheeler Vs. United States, (1895)159 U.S.53: 40 L. Ed 244,* that the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one should think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous.

33. In the case of *DATTU RAMRAO SAKHARE AND OHTERS Vs. STATE OF MAHARASHTRA, (1997) 5 SCC 341,* it has been held that a child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.

34. As regards competency of a child to depose in a case, it is now well settled by the reported cases cited above that a child as young as 5/6 years can depose evidence if she understands the questions and answers in a relevant and rational manner. The age is of no consequence, it is the mental faculties and understanding that matter in such cases. Their evidence, however, has to be scrutinised and caution has to be exercised in each individual case. The Court has to satisfy itself that the evidence of a child is reliable and untainted. Any sign of tutoring will render the evidence questionable if the Court is satisfied, it may convict a person without looking for corroboration of the child's evidence. As regards credibility of child witness, it is now established that all witnesses who testify in Court must be competent or able to testify at trial. In general, a witness is presumed to be competent. This presumption applies to child witnesses also.

35. The competency depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding.

36. The defence has taken the plea that the competency of P.W.9 Laboni as a witness has not been tested by the learned Trial Judge and as such the evidence of P.W.9 Laboni should be left out of consideration.

37. In the case of *the State Vs. Badiuzzaman and another ((1973) 25 DLR (HCD) 41,* it has been held that testing of intelligence of a witness of tender age is not a condition precedent to the reception of his evidence. Preliminary examination of the child witness before receiving his evidence is not imperative. A person who can understand questions and can give rational answers to them is a competent witness to testify in Court.

38. Almost similar views have also been taken in the cases of *Abdul Gani and others Vs. The State (1959)11 DLR (Dhaka)338 and The State Vs. Abdur Rashid (1972)24 DLR (HCD)18.*

39. In view of the principle laid down in the cases referred to above and the provisions of section 118 of the Evidence Act,1872, there is no room for doubt that testing of intelligence of a witness of a tender age is not a condition precedent to the reception of his evidence. Therefore, preliminary examination of a child witness is not at all necessary.

40. Having gone through the evidence of P.W.9, we find that at the time of deposing before the Court, Laboni was about 12 years old and as such, the Tribunal probably did not feel the necessity of testing her intelligence. Having gone through the evidence, we are of the view that P.W.9, Laboni could understand the question put to her and she answered the rational reply to the questions. Over and above, she withstood the onslaught of cross-examination before the Tribunal.

41. The defence took the plea that appellant-husband was not at his house on the fateful night of occurrence and as such, he should be absolved from the charge of murdering his wife. Such a plea is termed as *alibi.*

42. In this case, the appellant did not take the defence of *alibi* that he was not at his house on the fateful night of occurrence and the defence did not examine any witness in support of the plea of *alibi*. During cross-examination of P.W.2, suggestions were given to him that on the fateful night, the appellant-husband was not at his house and that the victim-wife committed suicide while she was suffering from stomach pain, which P.W.2 denied.

43. In a wife killing case, it is always presumed that the husband was with the deceased wife at the time of occurrence unless any plea of *alibi* is set up by the defence. In that case, the burden of proving such plea rests on the husband in order to absolve him of any criminal liability. In this connection, reliance may be placed on the case of *Abdus Salam Vs. The State, (1999)19 BLD(HCD)98* where it has been held that in the absence of plea of *alibi*, the evidence on record is found to be sufficient to hold that the appellant was at home during the fateful night with his deceased wife. Since the defence has failed to succeed in creating a reasonable belief by proving any circumstance that she could take her life by committing suicide, the appellant as the husband cannot absolve himself of the criminal liability for causing death to his deceased wife.

44. In the case of *Binay Kumar Singh Vs. State of Bihar (1997) 1 SCC 283* it has been held that the latin word *alibi* means “elsewhere” and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is

alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of *alibi*. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of *alibi*, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy.

45. Thus, the burden to prove the plea of *alibi* is heavy on the accused and the plea of alibi cannot be proved by preponderance of probabilities.

46. Soon after the occurrence, the appellant-husband absconded and he surrendered before the Tribunal on 28.08.2002, that is, about 6 months after the occurrence. This long abscondence of the appellant-husband without any explanation whatsoever appears to be culpable in nature under section 8 of the Evidence Act.

47. In the case of *DHANANJOY CHATTERJEE ALIAS DHANA VS. STATE OF W.B (1994)2 SCC 220,* the Supreme Court of India held that abscondence by itself is not a circumstance which may lead to the only conclusion consistent with the guilt of the accused because it is not unknown that innocent persons on being falsely implicated may abscond to save themselves but abscondence of an accused after the occurrence is certainly a circumstance which warrants consideration and careful scrutiny. The appellant absconded soon after the occurrence why did the appellant disappear? The appellant has offered no explanation. No challenge has been made to the testimony of the investigation officers either when they testify that they successfully searched for the appellant from 5th to 8th March,1990 at different places or conducted raid at his village to apprehend him.

48. In the case in hand, the High Court Division has taken the abscondence as one of the circumstances and did not come to the conclusion which might lead to the only conclusion consistent with the guilt of the accused.

49. Even if the testimony of lone prosecution, eyewitness Laboni is left out of consideration the incriminating circumstances as enumerated by the High Court Division are

good enough to find that appellant-husband guilty of killing of victim-wife. The incriminating circumstances enumerated by the High Court Division are quoted below:

(a) On the night following 08.02.2002, both the accused-husband and the victim-wife lived together at the place of occurrence house and her dead body was found there;

(b) The evidence on record does not show that the accused-husband took any step for the treatment of the alleged tuberculosis of the victim-wife at or about the material time;

(c) The accused-husband's culpable and unexplained abscondence after the occurrence for about 6(six) months is relevant under section 8 of the Evidence Act, which is indicative of his *'mens rea'* in the commission of the offence;

(d) There is no evidence or suggestion or circumstance to show that the other inmates, if any, of the house of the accused-husband assaulted her to death;

(e) The accused-husband did not bring the matter of the unnatural death of the victim-wife to the notice of the police;

(f) The evidence on record does not indicate that the accused-husband attended the funeral rites of the victim-wife;

(g) It is the opinion of the Medical Officer Dr. Md. Abdul Jalil (P.W.6) that the death of the victim-wife was due to shock and asphyxia following ligature strangulation which was ante-mortem and homicidal in nature;

(h) The motive of killing of the victim-wife by the accused-husband has been firmly established; and

(i) The defence version of the case has been found to be a blatant falsehood.

50. The evidence of P.W.9, Laboni coupled with the medical evidence of P.W.6, Dr. Md. Abdul Jalil and the incriminating circumstantial evidence appearing against the appellant lead to the irresistible conclusion that the appellant-husband is the assailant of the victim-wife.

51. Section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 provides for capital punishment only. Therefore, the High Court Division took the view that it could not take any lenient view in respect of awarding punishment to the condemned-appellant. Moreover, in the present case, the savage nature of crime has shocked our judicial conscience. The murder was cold blooded and brutal without any provocation. Therefore, the submissions of the learned Advocate for the appellant that imprisonment for life may be awarded to the appellant by converting his conviction from 11 (ka) of the Nari-O-Shishu Nirjatan Daman Ain to section 302 of the Penal Code do not hold good on the facts and in circumstances of the case in hand. Moreover, demand of Tk.10000/- as dowry has been proved by the satisfactory evidence as found by both the Courts below.

52. In the light of the findings made before, we do not find any substance in the jail appeal. Accordingly, this jail appeal is dismissed.

15 SCOB [2021] AD 71

আপীল বিভাগ

উপস্থিতঃ
বিচারপতি জনাব মোহাম্মদ ইমান আলী
বিচারপতি জনাব আবু বকর সিদ্দিকী

ক্রিমিনাল পিটিশন ফর লীভ টু আপীল নং-১২৭১/২০১৭
[২০০৫ সালের ১২১২ নম্বর ক্রিমিনাল রিভিশন মামলায় হাইকোর্ট বিভাগ কর্তৃক ০২/০৩/২০১৭ খ্রিঃ তারিখে প্রদত্ত রায় ও আদেশ হতে উদ্ভুত]

নুর মোহাম্মদ	:	..... আবেদনকারী
-বনাম-		
সরকার এবং অন্যান্য	:	..... প্রতিবাদী পক্ষগণ
আবেদনকারীর পক্ষে	:	জনাব জয়নুল আবেদিন এ্যাডভোকেট-অন-রেকর্ড
প্রতিবাদীগণের পক্ষে	:	কেউ উপস্থিত হননি।
শুনানি ও রায়ের তারিখ	:	২৮/০১/২০২১ খ্রিঃ

সম্পাদকের নোট

এই ক্রিমিনাল পিটিশন ফর লীভ টু আপীল মামলার সার সংক্ষেপ এই যে, এজাহার দায়ের করার পর তদন্তকারী কর্মকর্তা আসামীগণের বিরুদ্ধে দন্ডবিধির ১৪৭/১৪৮/১৪৯/৩২৩/৩২৪/৩২৫/৩২৬/৩০৭/৩৫৪/৩৪ ধারায় অভিযোগপত্র দাখিল করে। বিচারকালে আসামীদের বিরুদ্ধে দন্ডবিধির ৩২৩/৩২৪/৩২৫/ ৩২৬/৩০৭ /৩৪/১৪৭ ধারায় অভিযোগ গঠন করা হয়। বিচার শেষে আসামী নুর মোহাম্মদকে দন্ডবিধি ৩২৫ ধারার অপরাধের জন্য এক বছরের সশ্রম কারাদন্ড এবং ৩২৩ ধারার অপরাধের জন্য ২,০০০/- টাকা জরিমানা, অনাদায়ে আরো তিন মাসের সশ্রম কারাদন্ড এবং অন্যান্য আসামীদের বিভিন্ন মেয়াদের সাজা ও জরিমানা প্রদান করা হয়। এই রায়ের বিরুদ্ধে আসামীগণ আপীল করলে তা খারিজ হয়। এরপর আসামীগণ হাইকোর্ট বিভাগে ক্রিমিনাল রিভিশন দায়ের করলে সেটাও শুনানী অন্তে খারিজ হয়। হাইকোর্ট বিভাগের উক্ত খারিজ আদেশে সংক্ষুব্ধ হয়ে আসামী-নুর মোহাম্মদ এই ক্রিমিনাল পিটিশন ফর লীভ টু আপীল দায়ের করেন। আপীল বিভাগ এই মামলার রায়ে উল্লেখ করেন যে তুচ্ছ ঘটনা হতে উদ্ভূত এই মামলায় আসামীকে ১(এক) বছরের জন্য জেলে না পাঠিয়ে প্রবেশনে রাখা সমীচিন ছিল। অতপর আপীল বিভাগ দরখাস্তকারী নুর মোহাম্মদ-এর দোষী সাব্যস্তের আদেশ এবং জরিমানা বহাল রেখে তিনি যত দিন কারাদন্ড ভোগ করেছেন ততদিনই তার দন্ড হিসেবে গণ্য করার আদেশ প্রদান করেন।

গুরুত্বপূর্ণ শব্দাবলীঃ
প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০, ধারা:৫; প্রবেশন

প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স ১৯৬০, ধারা ৫ঃ
যখনই বিজ্ঞ বিচারক ৩২৫ ধারার অপরাধে আসামীকে দোষী সাব্যস্ত করলেন তখনই উনার উচিত ছিল "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" -এর ৫ ধারা বিবেচনা করা। মামলার বিষয়বস্তু থেকে প্রতীয়মান হয় যে, এই ঘটনা ঘটেছিল দুই প্রতিবেশীর মধ্যে তুচ্ছ একটা ঘটনার জের ধরে। এইসব ক্ষেত্রে আসামীকে ১(এক) বছরের জন্য জেলে না পাঠিয়ে প্রবেশনে রাখা সমীচিন ছিল। এমনকি, যেহেতু দন্ডবিধি ৩২৩ এবং ৩২৫ ধারা আপোষযোগ্য আপরাধ (Compoundable offence) এবং যেহেতু দুই পক্ষ হচ্ছে পরস্পর আত্মীয়/প্রতিবেশী কাজেই মামলাটি আপোষ মীমাংসা করা যুক্তিযুক্ত ছিল।

... (প্যারা **১৬**)

কোনো বিশেষ আইনের অধীনে দায়রা আদালত হিসেবে ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল এবং ১ম শ্রেণীর ম্যাজিস্ট্রেটের ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল-এই আইনের বিধান প্রয়োগ করতে পারবেঃ
দায়রা আদালত হিসেবে ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল এবং ১ম শ্রেণীর ম্যাজিস্ট্রেটের ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল-এই আইনের বিধান প্রয়োগ করতে পারবে। সুতরাং বিশেষ ক্ষমতা আইন, ১৯৭৪ (Special Powers Act, 1974)-এর ধারা ২৯, সন্ত্রাস বিরোধী আইন, ১৯৯২ (Anti-Terrorism Act, 1992)-এর ধারা ১৫(১), সন্ত্রাস বিরোধী আইন, ২০০৯ (Anti-Terrorism Act, 2009)-এর ধারা ২৭(৩), নারী ও শিশু নির্যাতন (বিশেষ বিধান) আইন, ১৯৯৫-এর ধারা ২৩(১), জন নিরাপত্তা (বিশেষ বিধান) আইন, ২০০০-এর ধারা ২১(১), নারী ও শিশু নির্যাতন দমন আইন, ২০০০-এর ধারা ২৫(১), ক্রিমিনাল ল এ্যামেন্ডমেন্ট এ্যাক্ট, ১৯৫৮-এর ধারা ৬(১)(ক) এবং ফরেন এক্সচেঞ্জ রেগুলেশন এ্যাক্ট, ১৯৪৭-এর ধারা ২৩ক(৩)-এ উল্লেখিত বিধান অনুসারে ক্ষেত্রমতে ট্রাইব্যুনাল অথবা আদালতসমূহ দায়রা আদালত বলে গণ্য হবে। দ্রুত বিচার আইন, ২০০২-এর ধারা ১২(২) অনুসারে ১ম শ্রেণীর ম্যাজিস্ট্রেট আদালত বলে গণ্য হবে এবং ফরেন এক্সচেঞ্জ রেগুলেশন এ্যাক্ট, ১৯৪৭-এর ধারা ২৩ক(৩) অনুসারে ক্ষেত্রবিশেষ ট্রাইব্যুনাল ১ম শ্রেণীর ম্যাজিস্ট্রেট আদালত অথবা দায়রা আদালত বলে গণ্য হবে। উপরোক্ত আলোচনার প্রেক্ষিতে দেখা যাচ্ছে যে, কোন কোন বিশেষ আইনে অপরাধের ক্ষেত্রেও "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" প্রয়োগ করা যাবে।
... (প্যারা ২০ এবং ২১)

রায়

বিচারপতি মোহাম্মদ ইমান আলী ঃ

১. এই ক্রিমিনাল পিটিশন ফর লীভ টু আপীল দায়েরে ২৫৯ দিনের বিলম্ব মার্জনা করা হলো।

২. ফৌজদারী আবেদনটি বিগত ০২/০৩/২০১৭ খ্রিঃ তারিখে হাইকোর্ট বিভাগের একক বেঞ্চ কর্তৃক প্রদত্ত ১২১২/২০০৫ নং ক্রিমিনাল রিভিশন মামলার রায় ও আদেশের বিরুদ্ধে আনয়ন করা হয়েছে।

৩. এই ক্রিমিনাল পিটিশন ফর লীভ টু আপীল সংক্রান্ত মামলার সার সংক্ষেপ এই যে, ১৪/০৭/১৯৮৬ খ্রিঃ তারিখ বিকালে এজাহারকারীর ১০/১২ বছরের নাতী আব্দুল বাকীর সাথে আসামী-আবেদনকারী নুর মোহাম্মদ-এর ভাই মতিনের ঝগড়া হয় এবং ঐদিন সন্ধ্যায় এ বিষয়ে সালিশ হয়। সালিশে আসামী মতিনকে দোষী সাব্যস্ত করা হয়। ফলশ্রুতিতে আসামীরা ক্ষুব্ধ হয় এবং এজাহারকারী পক্ষকে হুমকি প্রদান করে। পর দিন অর্থাৎ ১৫/০৭/১৯৮৬ খ্রিঃ তারিখ আনুমানিক সকাল ৬.০০-৬.৩০ টায় এজাহারকারীর ছেলে আঃ জব্বার গরু এবং লাঙ্গল জোয়াল নিয়ে হাল চাষ করার জন্য আসামীদের বাড়ীর পশ্চিম পাশে আসলে আসামী নুর মোহাম্মদ লোহার চ্যাপ্টা ফালা নিয়ে আঃ জব্বারকে আক্রমণ করে এবং ফালার চ্যাপ্টা অংশ দিয়ে তার মাথায় পর পর আঘাত করে মাথা ফাটিয়ে রক্তাক্ত জখম করে এবং বাম হাতের কব্জি ভেঙ্গে ফেলে। আঃ জব্বার এর ডাক চিৎকারে এজাহারকারীর ছেলে ছাত্তার, জলিল, সাহাজ উদ্দিন, এজাহারকারীর স্ত্রী আরজান এবং স্ত্রীর বোন হাফিজা খাতুন ঘটনাস্থলে পৌঁছলে আসামী ইলিম উদ্দিন, এজাহারকারীর ছেলে ছাত্তারের মাথায় লোহার রড দিয়ে আঘাত করে রক্তাক্ত জখম করে এবং ডান হাতের আঙ্গুলের উপর আঘাত করে রক্তাক্ত জখম করে। ৩নং আসামী ছলুমদ্দিন তাল কাঠের রোল দিয়ে জলিলের মাথায় আঘাত করে রক্তাক্ত জখম করে এবং ডান হাতের উপরের অংশে রক্তাক্ত জখম করে। ৪ নং আসামী মতিন ছেন দা দিয়ে আরজান বিবির ডান হাতের কনুই এর উপর কোপ মেরে রক্তাক্ত কাটা জখম করে। ৫ নং আসামী করিম এজাহারকারীর স্ত্রীর বোন হাফিজা খাতুনের ডান কাঁধে ও ডান হাতের আঙ্গুলে এবং ডান হাতের কনুই এর উপরে চ্যাপ্টা ফালা দিয়ে পিটিয়ে মারাত্মক রক্তাক্ত জখম করে, অন্যান্য আসামীরাও লাঠি দিয়ে আহতদের এবং এজাহারকারীর বড় ছেলে সাহাজ উদ্দিনকে এলোপাথাড়ী পিটিয়ে নিলাফুলা জখম করে। আহতদের ডাক চিৎকারে অন্যান্য আরো অনেক লোকজন আসায় আসামীরা ঘটনাস্থল ত্যাগ করে। আহতদের মুমূর্ষু অবস্থায় খাট এবং গরুর গাড়ীতে বহন করে মহাসড়কে এনে বেবী টেক্সিযোগে জয়দেবপুর হাসপাতালে প্রেরণ করে ভর্তি করা হয়। আঃ জব্বারের শারীরিক অবস্থার অবনতি হলে জয়দেবপুর হাসপাতালের ডাক্তার তাকে ঢাকা মেডিকেল কলেজ হাসপাতালে প্রেরণ করেন। এজাহারকারী ডাক্তারী সনদ তাড়াতাড়ি সংগ্রহ করতে পারেনি এবং ডাক্তারী সনদ ছাড়াই থানায় এজাহার দায়ের করে।

৪. আসামীগণের বিরুদ্ধে এজাহার দায়ের করার পর তদন্তকারী কর্মকর্তা তদন্ত শেষে আসামীগণের বিরুদ্ধে দন্ডবিধির ১৪৭/১৪৮/১৪৯/৩২৩/৩২৪/৩২৫/৩২৬/৩০৭/৩৫৪/৩৪ ধারায় অভিযোগপত্র দাখিল করেন, যার নম্বর-১০৭ তারিখঃ ৩১/০৮/১৯৮৬। মামলাটি বিচারের জন্য বিজ্ঞ অতিরিক্ত জেলা ম্যাজিস্ট্রেট, গাজীপুর এর আদালতে স্থানান্তর করা হয় এবং বিজ্ঞ বিচারক আসামীদের বিরুদ্ধে দন্ডবিধির ৩২৩/৩২৪/৩২৫/৩২৬/৩০৭/৩৪/১৪৭ ধারায় অভিযোগ গঠন করেন এবং উক্ত অভিযোগ আসামীদের পাঠ করে শোনান এবং আসামীরা নিজেদের সম্পূর্ণ নির্দোষ দাবী করে বিচার প্রার্থনা করেন। বিচারকালীন

রাষ্ট্রপক্ষ অভিযোগপত্রে উল্লেখিত ১৫ (পনের) জন স্বাক্ষীর মধ্যে ৯ (নয়) জন সাক্ষীকে আদালতে উপস্থাপন করেন। আসামীপক্ষে কোন সাক্ষী উপস্থাপন করা হয়নি।

৫. একই ঘটনায় আসামীপক্ষীয় ইলিম উদ্দিন থানায় এজাহার দায়ের করে উল্লেখ করেন যে, প্রতিপক্ষের গরু ইলিম উদ্দিনের ধানক্ষেত নষ্ট করলে আবেদনকারী-নুর মোহাম্মদ গরু ধরতে যায় এবং কথা কাটাকাটির এক পর্যায়ে প্রতিপক্ষগণ নুর মোহাম্মদকে ভীষণভাবে মারপিট শুরু করলে ইলিম উদ্দিন, তার স্ত্রী এবং উভয় পক্ষের সহোদর ভাই ছলুমদ্দিন ও উভয় পক্ষের ভাতিজা হাকি বাধা দিলে এজাহারকারীগণ তাদেরও ভীষণভাবে মারপিট করে জখম করে। আহতরা হাসপাতালে ভর্তি হন। ইলিমদ্দিন কিছু সুস্থ হয়ে বিলম্বে থানায় এজাহার দায়ের করে। এজাহারটি জয়দেবপুর থানার মামলা নং-১৭(৭)৮৬ এবং দঃবিঃ ৩২৩/৩২৫ ধারা হিসেবে লিপিবদ্ধ করা হয়। উক্ত মামলাটি তদন্ত শেষে তদন্তকারী কর্মকর্তা অভিযোগপত্র দাখিল করেন।

৬. উভয়পক্ষের বক্তব্য ও দালিলিক সাক্ষ্য প্রমাণের ভিত্তিতে বিজ্ঞ অতিরিক্ত জেলা ম্যাজিস্ট্রেট, গাজীপুর, বিগত ৩১/০১/১৯৯৪ খ্রিঃ তারিখে আসামী নুর মোহাম্মদকে দন্ডবিধি ৩২৫ ধারার অপরাধের জন্য এক বছরের সশ্রম কারাদন্ড এবং ৩২৩ ধারার অপরাধের জন্য ২,০০০/- টাকা জরিমানা, অনাদায়ে আরো তিন মাসের সশ্রম কারাদন্ড এবং অন্যান্য আসামীদের দন্ডবিধি ৩২৩ ধারার অপরাধের জন্য যথাক্রমে ২,০০০/- হাজার টাকা ও ৫০০/- টাকা করে জরিমানা প্রদান করেন।

৭. উক্ত আদেশের দ্বারা সংক্ষুব্ধ হয়ে আসামীগণ বিজ্ঞ অতিরিক্ত দায়রা জজ, ১ম আদালত, গাজীপুর বরাবর ফৌজদারী আপীল নং ১৬/১৯৯৪ দায়ের করেন যা বিগত ০৭/০৭/২০০৫ খ্রিঃ তারিখে খারিজ হয় এবং বিচারিক আদালতের রায় ও আদেশ বহাল থাকে, যার বিরুদ্ধে আসামীগণ হাইকোর্ট বিভাগে ১২১২/২০০৫ নং ক্রিমিনাল রিভিশন দায়ের করেন। হাইকোর্ট বিভাগ রুল ইস্যু করেন এবং পরবর্তিতে উভয়পক্ষের বক্তব্য শুনানীঅন্তে ক্রিমিনাল রিভিশনটি খারিজ হয়।

৮. হাইকোর্ট বিভাগের উক্ত খারিজ আদেশে সংক্ষুব্ধ হয়ে আসামী-নুর মোহাম্মদ এই ক্রিমিনাল পিটিশন ফর লীভ টু আপীল দায়ের করেন।

৯. এই আবেদনটি আদালত কর্তৃক তথ্য-প্রযুক্তি ব্যবহার আইন, ২০২০ এর বিধান অনুসারে ভার্চুয়াল পদ্ধতিতে শুনানী হয়।

১০. জনাব জয়নুল আবেদীন, বিজ্ঞ এ্যাডভোকেট-অন-রেকর্ড, আবেদনকারীর পক্ষে বলেন যে, অধঃস্তন আদালত সাক্ষ্য-প্রমাণ যথাযথভাবে পর্যালোচনা করতে ব্যর্থ হয়েছে এবং পরবর্তীতে এ বিষয়টি হাইকোর্ট বিভাগও আমলে নেয়নি। ফলে বিরোধীয় রায় ও আদেশ বাতিলযোগ্য। তিনি আরও বলেন, বিজ্ঞ বিচারিক আদালত অভিযোগপত্রের সাক্ষীদের মধ্যে ৬ জনের সাক্ষ্য গ্রহণ করেননি এবং এ বিষয়ে কোনরূপ ব্যাখ্যা প্রদান না করেই অভিযুক্ত-আবেদনকারীকে দোষী সাব্যস্ত করে সাজা প্রদান করেছেন। সুতরাং, উক্ত সাক্ষীদের সাক্ষ্য গ্রহণ না করায় এই সাজা রদ-রহিতযোগ্য। তিনি আরো বলেন যে, রাষ্ট্রপক্ষের সাক্ষীরা পরস্পর আত্মীয়, যা যথেষ্ট সন্দেহের অবকাশ ঘটায় এবং বিরোধীয় ঘটনাটি একটি পারিবারিক কলহের জের ধরে সংঘটিত হয় যার কারণে সালিশ হয় এবং সালিশ পরবর্তীতে আরো মারাত্মক বিরাগের বশবর্তী হওয়ার কারণে উল্লেখিত মারপিট তথা বিরোধের ঘটনা ঘটে। সকল সাক্ষী ছিল পক্ষপাত দুষ্ট এবং তারা উদ্দেশ্যপ্রণোদিত হয়ে সাক্ষ্য প্রদান করে। হাইকোর্ট বিভাগের উচিত ছিল সাজাপ্রাপ্ত আবেদনকারীকে মুক্তি দেয়া কারণ রাষ্ট্রপক্ষ সন্দেহাতীতভাবে মামলা প্রমাণ করতে ব্যর্থ হয়েছে। তিনি আরও দাবী করেন প্রতিবেশী এবং নিরপেক্ষ ও স্বাধীন সাক্ষীদের বাদ দেয়ায় রাষ্ট্রপক্ষের মামলা সম্পর্কে যথেষ্ট সন্দেহের অবকাশ থেকে যায় এবং অপরাধের কোন আলামতও এই মামলায় বিচারিক আদালতে উপস্থাপন করা হয়নি। তাই স্বাক্ষীদের ব্যাপারে এই সব বিষয় আলোচনা ব্যতীত হাইকোর্ট বিভাগ যে আদেশ দিয়েছেন তা বাতিলযোগ্য।

১১. প্রতিবাদী পক্ষগণ কেউ উপস্থিত হননি।

১২. সাজাপ্রাপ্ত আবেদনকারীর পক্ষে বিজ্ঞ কৌসুলীর বক্তব্য শুনলাম ও হাইকোর্ট বিভাগ কর্তৃক প্রদত্ত তর্কিত রায় ও আদেশ এবং অন্যান্য কাগজপত্র পর্যালোচনা করলাম।

১৩. বাংলাদেশের শতকরা ৬২ ভাগ এর অধিক লোক গ্রামাঞ্চলে বাস করে। যেখানে মানুষের মধ্যে সৌহার্দ্যপূর্ণ সম্পর্ক শহরের তুলনায় বেশি এবং তাদের মধ্যে ছোট-খাটো ঝগড়া-বিবাদও বেশি হয়। এই মামলার ঘটনা শুরু হয়েছিল খুব তুচ্ছ বিষয় নিয়ে। ১৪/০৭/১৯৮৬ খ্রিঃ তারিখ সন্ধ্যায় আসামী আব্দুল মতিনের সাথে বাদী আহমদ আলীর ১০/১২ বছরের নাতি আব্দুল বাকির কথা কাটাকাটি হয়। ঐদিনই সন্ধ্যায় এই ব্যাপারে সালিশ হয় এবং আঃ মতিনকে সালিশে দোষী সাব্যস্ত করা হয়। ফলে আসামীপক্ষ প্রতিশোধ নেওয়ার হুমকি দেয় এবং পরের দিন ১৫/০৭/১৯৮৬ খ্রিঃ তারিখ সকাল ৬.০০-৬.৩০ টায় আসামী আঃ মতিন-এর ভাই আসামী নুর মোহাম্মদ বাদীর ছেলে আব্দুল জব্বারকে আক্রমণ করে এবং একটি ফালার চ্যাপ্টা অংশ দিয়ে মাথায় আঘাত করে একাধিক রক্তাক্ত জখম করে এবং তার বাম হাতের কব্জি ভেঙ্গে দেয়। মোট ৬ (ছয়) জন আসামী বাদী পক্ষের ৪(চার) জনের শরীরে বিভিন্ন আকারের জখম করে। এর মধ্যে আব্দুল জব্বার সবচেয়ে গুরুতরভাবে আহত হয়। বাদীপক্ষের ৭(সাত) নম্বর সাক্ষী ডাঃ নুরুল ইসলাম তার সাক্ষ্যে আহত আব্দুল জব্বারের মাথায় ভোতা অস্ত্রের সৃষ্ট ৪(চার) টি থেতলানো এবং বাম হাতের কব্জিতে কয়েকটি হাড় ভাঙ্গা জখমের বিবরণ দেন। তিনি হাত ভাঙ্গা পরীক্ষার জন্য এক্স-রে এবং চিকিৎসার জন্য আহত আব্দুল জব্বার-কে ঢাকার পঙ্গু হাসপাতালে যাওয়ার পরামর্শ দেন। এখানে লক্ষ্যণীয় যে, নুর মোহাম্মদ তার হাতে থাকা ফালার চ্যাপ্টা অংশ দিয়ে মাথায় আঘাত করে এবং এতেই অনুমান করা যায় যে আহতকে হত্যার উদ্দেশ্যে আঘাত করেনি। তাকে হত্যা করার উদ্দেশ্য থাকলে ফালা দিয়ে আঘাত করতো। এটাও লক্ষ্যণীয় যে মাথার কোন হাড় ভাঙ্গেনি। বিচারিক আদালতের রায়ে এটাও লক্ষ্য করা যায় যে, আসামী মতিন ছ্যান দা এর উল্টা পিঠ দিয়ে আরজান বিবিকে আঘাত করে। সুতরাং স্পষ্টই দেখা যায় যে, আক্রমণকারী পক্ষ কর্তৃক আসামীর বাদীপক্ষের কোন ব্যক্তিকে হত্যার কোন উদ্দেশ্য ছিলনা।

১৪. বিচার শেষে বিচারিক আদালত লক্ষ্য করেন যে, মামলাটিতে কোন নিরপেক্ষ স্বাক্ষী উপস্থাপন করা হয়নি এবং এজাহারকারী ও আসামীরা ভাই ভাই ও তাদের ছেলে-সন্তান, স্ত্রী এবং পরস্পর নিকট প্রতিবেশী এবং প্রত্যেকের বাড়ীর পাশ দিয়ে যৌথভাবে তৈরী করা হালট দিয়ে তারা সকলে যাতায়াত করে। তাদের মধ্যে কোন পূর্ব শত্রুতা ছিলনা। শুধুমাত্র এজাহারকারীর ১০/১২ বছরের একটি নাতির সংগে আগের দিন ঝগড়ার কথা বলা হয়েছে। ঐ ঝগড়ার বিষয়ে সালিশ হয় এবং সেই সালিশ আসামীরা না মেনে ঐ ঘটনা ঘটায় বলে এজাহারকারী পক্ষ দাবী করেছে। বিজ্ঞ বিচারক এটাও লক্ষ্য করেছেন যে, আসামীপক্ষ দাবী করেছেন এজাহারকারী পক্ষের গরু তাদের ধানের চারা খেলে আসামী পক্ষ এতে বাধা দিলে এজাহারকারীরা আসামীদেরকে মারপিট করে আহত করে। বিচার শেষে বিজ্ঞ বিচারক বর্তমান দরখাস্তকারী নুর মোহাম্মদকে দন্ডবিধি ৩২৫ ধারার অপরাধের জন্য এক বছরের সশ্রম কারাদন্ড এবং ৩২৩ ধারার অপরাধের জন্য ২,০০০/- টাকা জরিমানা অনাদায়ে আরো তিন মাসের সশ্রম কারাদন্ডে দন্ডিত করেন এবং অন্যান্য আসামীদেরকে দন্ডবিধি ৩২৩ ধারার অপরাধের জন্য যথাক্রমে ২,০০০/- হাজার টাকা ও ৫০০/- টাকা জরিমানা করেন।

১৫. যদিও আসামীদের বিরুদ্ধে দন্ডবিধির ৩২৩, ৩২৪, ৩২৫, ৩২৬, ৩০৭, ৩৪ এবং ১৪৭ ধারায় অভিযোগ গঠন করা হয় কিন্তু অবশেষে বর্তমান দরখাস্তকারীর বিরুদ্ধে ৩২৫ ধারার অপরাধ প্রমাণ হয়েছে বলে সাব্যস্ত হয় এবং এক বছর এর সশ্রম কারাদন্ডে দন্ডিত করা হয়। পরবর্তীতে আপীল আদালত সাজা ও দন্ড বহাল রাখেন।

১৬. আমরা দুঃখের সাথে লক্ষ্য করছি, বিচারিক আদালতের বিজ্ঞ বিচারক ও আপীল আদালতের বিজ্ঞ বিচারক সম্পূর্ণরূপে ভুলে গেছেন যে, আমাদের দেশে "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" (Probation of Offenders Ordinance,1960) নামে একটি আইন আছে এবং বর্তমান মামলার প্রেক্ষাপটে সেই আইনের ৫ ধারা প্রয়োগযোগ্য। যখনই বিজ্ঞ বিচারক ৩২৫ ধারার অপরাধে আসামীকে দোষী সাব্যস্ত করলেন তখনই উনার উচিত ছিল "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" -এর ৫ ধারা বিবেচনা করা। মামলার বিষয়বস্তু থেকে প্রতীয়মান হয় যে, এই ঘটনা ঘটেছিল দুই প্রতিবেশীর মধ্যে তুচ্ছ একটা ঘটনার জের ধরে। এইসব ক্ষেত্রে আসামীকে ১(এক) বছরের জন্য জেলে না পাঠিয়ে প্রবেশনে রাখা সমীচিন ছিল। এমনকি, যেহেতু দন্ডবিধি ৩২৩ এবং ৩২৫ ধারা আপোষযোগ্য আপরাধ (Compoundable offence) এবং যেহেতু দুই পক্ষ হচ্ছে পরস্পর আত্মীয়/প্রতিবেশী কাজেই মামলাটি আপোষ মীমাংসা করা যুক্তিযুক্ত ছিল।

১৭. এই "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০"-এর বিধানাবলী বিচারিক আদালত, আপীল আদালত এবং হাইকোর্ট বিভাগ কর্তৃক প্রয়োগযোগ্য। অথচ পূর্বোক্ত আদালত সমূহের তিনটি রায় থেকে বোঝা যাচ্ছে না যে, বিজ্ঞ বিচারকগণ এই আইনের বিষয়ে আদৌ অবগত আছেন কিনা। যদি এই আইন প্রয়োগের বিষয়ে ধারণা থাকত তাহলে রায়ের মধ্যে বলা থাকতো কেন এই আইন প্রয়োগ করা সমীচিন নয় এবং যদি এই আইন সঠিকভাবে বিচারিক আদালতে প্রয়োগ করা হতো তাহলে এই ধরণের মামলা আপীল বিভাগ পর্যন্ত আসতো না। আমরা আরো দুঃখের সাথে বলতে চাচ্ছি যে এ ধরণের মামলার "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" প্রয়োগ না করা শুধু দুঃখজনকই নয় প্রচলিত আইনের পরিপন্থী।

১৮. উল্লেখ্য যে, "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" ধারা ৩(১)(ক) অনুসারে হাইকোর্ট বিভাগেরও এই আইনের বিধান প্রয়োগ করার এখতিয়ার আছে। নজিরস্বরূপ ***৫৮ ডিএলআর, ৩২২***-এ প্রকাশিত ***আঃ খালেক বনাম হাজেরা বেগম এবং আরেকজন*** মামলার রায় দেখা যেতে পারে।

১৯. এই "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" ধারা ৩(১)(ক)-এ বলা হয়েছে কোন কোন আদালত এই আইন প্রয়োগ করতে পারবে। যথাঃ

(ক) হাইকোর্ট বিভাগ;

(খ) দায়রা আদালত ;

(ঙ) ১ম শ্রেণীর ম্যাজিস্ট্রেট; এবং

(চ) বিশেষ ক্ষমতাপ্রাপ্ত অন্যান্য ম্যাজিস্ট্রেটগণ।

২০. দায়রা আদালত হিসেবে ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল এবং ১ম শ্রেণীর ম্যাজিস্ট্রেটের ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল-এই আইনের বিধান প্রয়োগ করতে পারবে। সুতরাং বিশেষ ক্ষমতা আইন, ১৯৭৪ (Special Powers Act, 1974)-এর ধারা ২৯, সন্ত্রাস বিরোধী আইন, ১৯৯২ (Anti-Terrorism Act, 1992)-এর ধারা ১৫(১), সন্ত্রাস বিরোধী আইন, ২০০৯ (Anti-Terrorism Act, 2009)-এর ধারা ২৭(৩), নারী ও শিশু নির্যাতন (বিশেষ বিধান) আইন, ১৯৯৫-এর ধারা ২৩(১), জন নিরাপত্তা (বিশেষ বিধান) আইন, ২০০০-এর ধারা ২১(১), নারী ও শিশু নির্যাতন দমন আইন, ২০০০-এর ধারা ২৫(১), ক্রিমিনাল ল এ্যামেন্ডমেন্ট এ্যাক্ট, ১৯৫৮-এর ধারা ৬(১)(ক) এবং ফরেন এক্সচেঞ্জ রেগুলেশন এ্যাক্ট, ১৯৪৭-এর ধারা ২৩ক(৩)-এ উল্লেখিত বিধান অনুসারে ক্ষেত্রমতে ট্রাইব্যুনাল অথবা আদালতসমূহ দায়রা আদালত বলে গণ্য হবে। দ্রুত বিচার আইন, ২০০২-এর ধারা ১২(২) অনুসারে ১ম শ্রেণীর ম্যাজিস্ট্রেট আদালত বলে গণ্য হবে এবং ফরেন এক্সচেঞ্জ রেগুলেশন এ্যাক্ট, ১৯৪৭-এর ধারা ২৩ক(৩) অনুসারে ক্ষেত্রবিশেষ ট্রাইব্যুনাল ১ম শ্রেণীর ম্যাজিস্ট্রেট আদালত অথবা দায়রা আদালত বলে গণ্য হবে।

২১. উপরোক্ত আলোচনার প্রেক্ষিতে দেখা যাচ্ছে যে, কোন কোন বিশেষ আইনে অপরাধের ক্ষেত্রেও "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" প্রয়োগ করা যাবে।

২২. এখানে লক্ষ্য করা যাচ্ছে যে, নিম্ন আদালতের ২(দুই) জন বিজ্ঞ বিচারক এবং হাইকোর্ট বিভাগের বিজ্ঞ বিচারক কেউই "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" অথবা আপোষ মীমাংসার ব্যাপারে চিন্তা করেননি এবং দন্ড ও সাজা বহাল রাখেন। ইতোমধ্যে দরখাস্তকারী নুর মোহাম্মদ ৩১(একত্রিশ) দিন কারাদন্ড ভোগ করেছেন।

২৩. উপরোক্ত আলোচনা ও পর্যবেক্ষণের প্রেক্ষিতে আমাদের অভিমত এই যে, দরখাস্তকারী নুর মোহাম্মদ-এর দোষী সাব্যস্তের আদেশ (conviction) এবং জরিমানা বহাল থাকবে তবে তিনি যতদিন কারাদন্ড ভোগ করেছেন ততদিনই তার দন্ড হিসেবে গণ্য হবে।

২৪. এমতাবস্থায়, ক্রিমিনাল পিটিশন ফর লীভ টু আপীলটি নিষ্পত্তি করা হলো এবং হাইকোর্ট বিভাগ প্রদত্ত রায় ও আদেশ সংশোধন করা হলো।

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APPELLATE DIVISION

PRESENT:
Mr. Justice Syed Mahmud Hossain
Chief Justice
Mr. Justice Hasan Foez Siddique
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

JAIL APPEAL NO.08 OF 2014.

(From the judgment and order dated 20.02.2012 and 22.02.2012 passed by the High Court Division in Death Reference No.30 of 2006 with Jail Appeal No.301 of 2006.)

Md. Humayun Kabir	...Appellant
Vs.	
The State	...Respondent

For the Appellant:	Mr. A.B.M. Baiyazid, Advocate.
For the Respondent:	Mr. Biswajit Debnath, Deputy Attorney General.

Date of hearing : 09.09.2020, 15.09.2020
Date of judgment : 22.09.2020

Editor's Note
In this case first information report was lodged against the appellant Humayun Kabir and his father Moulana Latifullah under Section 7/30 of Nari-O- Shishu Nirjatan Daman Ain, 2003, but the Investigating Officer, holding investigation, submitted charge sheet against the appellant Humayun Kabir under section 302/201 of the Penal Code and the learned Sessions Judge, Comilla, framed charge accordingly. On transfer Divisional Druto Bichar Tribunal, Chattogram tried the case and convicted the appellant under section 302 of the Penal Code and sentenced him to death. The High Court Division receiving the Death Reference accepted it upon hearing and dismissed the connected Jail Appeal and confirmed the order of conviction and sentence awarded by the Tribunal. Thereafter, the appellant preferred this Jail Appeal in the Appellate Division.
There was no eyewitness in the case and the Appellate Division disbelieving the confessional statement of the accused which is inconsistent with the prosecution case allowed the appeal and set aside the judgment and orders of the Courts below.

Key Words:
Confessional Statement; TI Parade; Motive; Section 27 of Evidence Act; last seen together; Extra Judicial Confession.

Absence of motive demands deeper forensic search of the evidence:

It is true that proof of motive is not necessary to sustain a conviction but when the prosecution puts forward a specific case as to motive for the crime, the evidence regarding the same has to be considered in order to judge the probabilities. Proof of motive satisfies the judicial mind about the likelihood of the authorship of the crime. In its absence, it demands deeper forensic search of the evidence. ... (Para 13)

Section 8 of the Evidence Act, 1872:
Motive is a relevant fact behind a crime:
The proof of motive helps the Court in coming to a correct conclusion when there is no eyewitness of the occurrence. ...It is true that the failure to establish the motive for the crime does not throw over-board the entire prosecution case but it casts a duty on the Court to scrutinize other evidence with greater care since motive moves a man to do a particular act and the same is relevant fact behind a crime. ...(Para 13)

Section 164 of Code of Criminal Procedure, 1898:
IF testimonies of prosecution witnesses and post-mortem report are inconsistent with the contents of the confessional statement it makes the confessional statement unreliable:
To prove the charge brought under Section 302 of the Penal Code primarily on the basis of the confessional statement it is duty of the Court to ascertain as to whether the confession was made voluntarily, and if so as to whether the same was true and trustworthy. Satisfaction of the Court is a *sine qua non* for the admissibility in evidence. True and complete disclosure of the offence is the soul of true confessional statement. In this case, the testimonies of P.Ws.1, 2, 3 and 4 and post-mortem report are inconsistent with the contents of the confessional statement of the appellant which has made the confessional statement unreliable. In view of the evidence quoted above and the contents of the confessional statement, it is difficult for us to hold that the statements made in confession by the appellant are true and those were consistent with the prosecution case. It would be extremely unsafe to base conviction of the appellant on the basis of such confessional statement accepting the same as true. ... (Para 20)

Competency of a child witness to testify:

A child may be allowed to testify, if the court is satisfied that the child is capable of understanding the question put to him and give rational answers to the Court. Before examining a child as a witness the Court should know his intellectual capacity by putting a few simple and ordinary question to him and should also record a brief proceeding of the inquiry. ... (Para 23)

Section 9 of the Evidence Act, 1872:
The idea of holding T.I. parade is to test the veracity of the witness on the question of his capability to identify an unknown person whom he has seen only once:

The idea of holding T.I. parade under Section 9 of the evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his testimony regarding the identification of an accused for the first time in Court. It is necessary when the witnesses admitted that the accused was not known the witnesses before happening of the incident seen by them. When the accused person is

not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial. ... (Para 25)

Section 27 of the Evidence Act, 1872:
Since statement under section 27 of the Evidence Act is alleged to be frequently misused by the police, the courts are required to be vigilant about its application:

Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be allowed to be given in evidence. Since statement under section 27 of the Evidence Act is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 the Evidence Act. ... (Para 27)

The evidentiary value of extra-judicial confession depends upon the veracity of the witnesses to whom it is made and the circumstances in which it is made:

It is the duty of the Court to look into the surrounding circumstances and to find whether the extra-judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. The evidentiary value of such statement depends upon the veracity of the witnesses to whom it is made and the circumstances in which it came to be made and actual word used by the accused. Such statement must pass the test of reproduction of exact words, the reason or motive of making such statement. ... (Para 30)

When accused is entitled to benefit of doubt:

Court's decision must rest not upon suspicion but upon legal grounds establish by legal testimony. Mere suspicion, however, strong, cannot take the place of proof. It is well settled principle that where on the evidence two possibilities are open, one which goes in favour of prosecution and the other benefits the accused, the accused is entitled to the benefit of doubt. ... (Para 32)

JUDGMENT

Hasan Foez Siddique, J:

1. This jail appeal is directed against the judgment and order dated 20.02.2012 and 22.02.2012 passed by the High Court Division in Death Reference No.30 of 2006 heard with Jail Appeal No.301 of 2006 upholding the judgment and order of conviction and sentence of death dated 05.04.2006 passed in Druta Bichar Tribunal Case No. 02 of 2006 by the Druta Bichar Tribunal, Chittagong.

2. The prosecution case, in short, was that, at about 10.15 a.m. on 30.06.2004 victim Jaheda Aktara Jyoti, daughter of P.W.1, aged about 8(eight) years, a student of class one of Sakera Government Primary School, left house for going to her school and, thereafter, she

was found missing. Mother, uncle informant Jasimuddin and other relatives of the missing victim started searching for her but did not find her whereabouts. Then Jashimuddin lodged a G.D. being entry No.1336 dated 30.06.2004 with Laksham Police Station. On the next day, when they were searching the victim, one Sakil(P.W.2), Rubel(P.W.3) and Ibrahim(P.W.4) of village Sakera informed them that on 30.06.2004 Sakil and Jyoti were sitting on a culvert situated at the western side of "Pondit Bari" of village Sakera. At that time, appellant Humayun Kabir went there and asked Sakil about the reason of his staying there and compelled him to leave the place. Sakil requested Jyoti to leave the place but appellant Humayon Kabir said that Jyoti is his niece so she should go with him. Getting such information, Jashimuddin rushed to the house of Humayun Kabir and requested his father to handover Jyoti but he scolded Jashimuddin. At 7.30 p.m. on 02.07.2004, Jashimuddin, lodged a first information report against the appellant Humayun Kabir and his father Moulana Latifullah under Section 7/30 of Nari-O- Shishu Nirjatan Daman Ain, 2003.

3. The Investigating Officer, holding investigation, submitted charge sheet against the appellant Humayun Kabir under Section 302/201 of the Penal Code on 29.09.2004. The learned Sessions Judge, Comilla, framed charge against the appellant under Section 302/201 of the Penal Code.

4. The prosecution examined 11(eleven) witnesses in support of its case and defence examined none. The defence case as it appeared from the trend of cross examination of the prosecution witnesses that the appellant has been falsely implicated in the case.

5. After examination of P.W.1, the case was transferred to the Court of Additional Sessions Judge, 1st Court, Comilla where the prosecution examined upto P.W.4. Thereafter, the case was again transferred to the Divisional Druto Bichar Tribunal, Chattogram by an administrative order communicated under memo No.106/2005 dated 31.08.2005 where the case was registered as Druto Bichar Tribunal Case No.02 of 2006. Before the Tribunal, the prosecution examined rest of the P.Ws. Mr. Nasiruddin, learned Advocate was appointed as defence Lawyer by the Court On 22.02.2006.

6. After completion of recording the evidence, examining the appellant under section 342 of the Code of Criminal Procedure and hearing the parties, the Tribunal convicted the appellant under section 302 of the Penal Code and sentenced him to death. Thereafter, the Tribunal sent the case record in the High Court Division for confirmation of sentence of death which was registered as Death Reference No. 30 of 2006. The appellant preferred Jail Appeal No.301 of 2006. The High Court Division heard the Death Reference and Jail Appeal together and upheld the judgment and order of conviction and sentence awarded by the Tribunal. Thus, the appellant has preferred this Jail Appeal in this Division.

7. Mr. A.B.M. Baiyazid, learned Advocate appearing for the appellant, submits that the confessional statement, recorded by P.W.10, was not voluntarily made by the appellant and the contents of the same were not true and the same was not recorded following the provisions of Sections 164 and 364 of the Code of Criminal Procedure, the Courts below committed error of law in relying upon the said confessional statement. He further submits that the P.Ws. 2, 3 and 4 though claimed that they had seen the victim in company of the appellant on 30.06.2004 at about 10.30 a.m. lastly on the culvert situated beside the house of Samsu Master but testimonies of those witnesses are not reliable and they contradicted each other as to the material particulars. He further submits that the Courts below relied upon the testimonies of P.Ws.5 and 11 that the appellant pointed out the dead body of the victim and

the same was recovered on the basis of his confession made before the Police but those testimonies were not admissible in evidence. He, lastly, submits that the prosecution failed to examine some material witnesses, so, the appellant is entitled to get benefit of Section 114(g) of the Evidence Act.

8. Mr. Biswajit Debnath, learned Deputy Attorney General appearing for the State, submits that the appellant made the confessional statement voluntarily and the contents of the same were true. He submits that in his confessional statement, the appellant admitted his guilt and stated that he, taking the victim, went to a jungle situated at the northern bank of the pond of village Ranichor and killed her in that Jungle. He next submits that the appellant and victim were last seen together on a culvert situated near the house of Shamsu Master. He adds that P.Ws.2, 3 and 4 stated that they had seen the victim in the company of the appellant before her disappearance. He further submits that the appellant made extra-judicial confession before the Investigating Officer about the place of killing and as per his pointing out, P.W.11, in presence of P.W.5, recovered the dead body of the victim, her books and khatas from the place of occurrence. He, lastly, submits that it is not necessary to examine all the chargesheeted witnesses to prove the case. The Court can convict an accused if testimony of a single witness is found to be reliable, the Courts below did not commit any error in convicting the appellant.

9. In this case there is no eye witness of killing the victim at the place of occurrence. The entire case of the prosecution revolves around the confessional statement of the appellant; motive; last seen together and discovery of the deadbody and some incriminating materials. In the case of Dogdu V. State of Maharastra reported in AIR 1977 SC 1759 it was observed that when in case involving capital punishment, prosecution demands conviction primarily on the basis of confession, the Court must apply the double tests: (I) Whether the confession is perfectly voluntary, and (II) if so, whether it is perfectly true.

10. The first submission of the learned Advocate for the appellant is in respect of the reliability and admissibility of the confessional statement. A confession is a statement made by an accused which must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence.

11. Let us examine and evaluate the confessional statement of the appellant first. For the purpose of finding out the incriminating fact or facts or truth of the charge framed it is necessary to examine the confession and compare the same with the rest of the prosecution evidence and probabilities of the case. From the confessional statement it appears that the appellant was arrested at about 5.30 a.m. on 04.07.2004 from his father-in-law's house at Jatrapur. He was taken to Laksham thana at 10.15 a.m. on 04.07.2004. At about 2.00 p.m. on 05.07.2004, he was sent to the Magistrate for recording of confessional statement. It appears from the paragraph No.6 of the confessional statement, which is the question and answer para, that when it was asked, "স্বীকারোক্তি কি কারো ভয়ে, চাপে বা লোভে পড়ে দিচ্ছেন?" He replied "না, নিজের ইচ্ছায় করছি, আমার বাপের দিকে চেয়ে।" It is evident that father of the appellant was arrested by the Police before the arrest of the appellant in connection with the occurrence. The words "আমার বাপের দিকে চেয়ে।" raise a question whether there was any promise or assurance behind making such confession. Those words used by the appellant before making confession are significant.

12. In his confessional statement, the appellant made following statements:

"আমি জ্যোতির বাবার কাছে টাকা পেতাম ১৬০০/- আমি তার কাছে ঐ টাকার জন্য গেলে জ্যোতির বাবা আমাকে খুব মারধর করে, এবং লোহার পাত দিয়ে পায়ে বারি মারে। আমি সায়েদাবাদ গিয়ে ডাক্তারের কাছে চিকিৎসা

করাই। এর ৩/৪ মাস পরে আমি অনুনয় করে তার কাছে আবার টাকা চাই তখন সে আমাকে ঘাড় ধাক্কা দিয়ে স্কীমের ধান ক্ষেতে ফেলে দেয়, এরপর আমি জ্যোতির মার কাছে টাকা চাইলে সে বলে জ্যোতির বাবা তাকে ও টাকা দেয় না সে কি করবে, জ্যোতির বাবা ঢাকায় আরেক বিয়ে করেছে। তখন আমি রাগ করে জ্যোতিকে স্কুল থেকে রানীচর গ্রামে পুস্করীনির উত্তর পাড়ে নিয়ে যাই এবং মুখ চেপে ধরে জ্যোতিকে মেরে ফেলি। জ্যোতির বই খাতা কাঁদার মধ্যে ফেলে আমি বাড়ী চলে যাই। বাড়ি এসে আমি আতাউর চেয়ারম্যানের (মতিন মওলানার) বাড়িতে দাওয়াত খেতে যাই। দাওয়াত খেয়ে দোকানে এসে শুনি এর আগের রাতে আমার পিতাকে পুলিশ গ্রেফতার করে নিয়ে আসছে। আমি পরের দিন সন্ধায় মোটর সাইকেলে গিয়ে লাকসাম থানায় পুলিশের কাছে আত্মসমর্পন করি।"

13. From the first four sentences of the confessional statement, it appears that the appellant has stated about the motive behind killing of the victim that earlier he met the father of the victim and requested him to pay taka 1600/- as was due but her father, instead of refunding the same, assaulted him severely. He assaulted the appellant by giving blow on his leg with an iron sheet. After receiving injury, the appellant took treatment from a doctor of Sayedabad. 3 /4 months later, he again met the P.W.1 and requested him to pay his money but he, giving a slap on the shoulder, pushed him in a paddy field. Thereafter, the appellant met the mother of the victim and demanded the said money. She replied that the victim's father had married another lady in Dhaka and does not send any money for her; she had nothing to do with the matter. It is true that proof of motive is not necessary to sustain a conviction but when the prosecution puts forward a specific case as to motive for the crime, the evidence regarding the same has to be considered in order to judge the probabilities. Proof of motive satisfies the judicial mind about the likelihood of the authorship of the crime. In its absence, it demands deeper forensic search of the evidence. The aforesaid portions of the statement are contrary to the evidence of P.W.1, that is, the father of the victim, who in his examination-in-chief has said, "আসামীকে আগে চিনতাম না। ধৃত হওয়ার পর চিনতে পারি।" In his cross examination, P.W. 1 specifically said, "ঘটনার আগে আসামীকে আমি দু একবার দেখে থাকতে পারি। তবে পরিচিত নয়।" In view of the categorical assertion of P.W.1, father of victim Jyoti, that the appellant was not previously known to him it is difficult to accept that the above quoted four sentences of confessional statement, that is, regarding the dues and demand of taka 1600; story of assault and pushing him in the paddy field giving blow are true. Mother of the victim was not examined so it is difficult to ascertain as to whether last of those four sentences, that is, the appellant met her and demanded those money from her was true or not. But in view of aforesaid assertion of P.W.1, that the appellant was unfamiliar to him, the statement as to the claim of demanding the dues from the victim's mother by the appellant lost its intrinsic acceptability. The proof of motive helps the Court in coming to a correct conclusion when there is no eye witness of the occurrence. Since P.W.1 claimed that the appellant was not previously known to him and, after his arrest, he came to know him for the first time, the motive of killing as stated by the appellant in confessional statement was not true. We do not find any other motive of killing the victim by the appellant in the testimonies of the prosecution witnesses. It is true that the failure to establish the motive for the crime does not throw over-board the entire prosecution case but it casts a duty on the Court to scrutinize other evidence with greater care since motive moves a man to do a particular act and the same is relevant fact behind a crime. Section 8 of the Evidence Act states motive, preparation and previous or subsequent conduct as relevant. The conduct of the accused before or after the crime is relevant. After the occurrence, the appellant did not abscond. Similarly, motive prompts a man to form an intention to do an act and the same is a moving power. There is hardly any action without a motive.

14. Next sentence of confessional statement of the appellant is তখন আমি রাগ করে জ্যোতিকে স্কুল থেকে রানীচর গ্রামে পুস্করীনির উত্তর পাড়ে নিয়ে যাই এবং মুখ চেপে ধরে জ্যোতিকে মেরে ফেলি। (underlined by us)

15. From the evidence of P.Ws.2, 3 and 4, it appears that on 30.06.2004, victim Jyoti did not at all reach her school. P.W.2 said that he went to the culvert first and found victim Jyoti sitting on the culvert. He asked Jyoti whether she went to her school or not who replied, "সে স্কুলে ঢোকার আগেই ঘন্টা পড়ে গেছে, সেজন্য ফিরে এসেছে।". P.W.3 in his testimony said, "যুথিকে স্কুলে না যাওয়ার কারণ জিজ্ঞেস করায় সে বলেছে ঘন্টা পড়ে যাওয়ায় স্কুলে যায়নি।" Sometimes thereafter, appellant Kabir went there. So the story of taking away the victim from the school as made by the appellant is contrary to the evidence of P.Ws.2 and 3.

16. In his confessional statements, the appellant stated, "তখন আমি রাগ করে জ্যোতিকে স্কুল থেকে রানীচর গ্রামে পুস্করীনির উত্তর পাড়ে নিয়ে যাই এবং মুখ চেপে ধরে জ্যোতিকে মেরে ফেলি।". The word "তখন" is significant here. Its previous sentence is, "এরপর আমি জ্যোতির মার কাছে টাকা চাইলে সে বলে জ্যোতির বাবা তাকে ও টাকা দেয় না সে কি করবে, জ্যোতির বাবা ঢাকায় আরেক বিয়ে করেছে। " Next sentence was started with the word, "তখন", that is, "then" or "thereafter" or "after that" he, capturing Jyoti from her school, had killed her at northern bank of a pond of village Ranirchar. We have already found that the father of victim said that the appellant was not previously known to him. So the story of demanding taka 1600/- from P.W.1; story of assault and, thereafter, the meeting with the mother of victim and demand of money from her and "তখন", captured the victim from her school and killed her cannot be considered as true story. There is nothing in the evidence and it is not the prosecution case that on that day appellant met the mother of the victim and (তখন) took away the victim from school.

17. From the Postmortem Report of the dead body of the victim (exhibit-4/2) it appears that the Doctor has observed, "It is to be noted that the body was highly decomposed at the time of post mortem examination and no soft tissue injury even if present could be detected, but antemortem of 3rd and 4th ribs of right side was found which is indicator that heavy blunt trauma to the chest were inflicted prior to her death". In his examination in chief P.W.8 Dr. Abdul Hye has said that antemortem fracture of 3rd and 4th ribs at the lower third of right side was present. That is, Doctor found that 3rd and 4th ribs of right side of the chest of victim Jyoti were fractured due to heavy blunt trauma which was caused prior to her death. In the Postmortem report, it was further stated in the column "অস্থিভঙ্গ" that "Antemortem of 3rd and 4th ribs at the lower third of right side present". In the Inquest Report (exhibit-2/1) it was stated "লাশ সনাক্ত না হওয়ার জন্য সে কোন কেমিক্যাল মৃত লাশের উপর প্রয়োগ করে এবং লাশ পচাইয়া ফেলে।" From the Police report, though not evidence, the Investigating Officer stated, – "জ্যোতির লাশ ৫ দিনের মধ্যে গলিয়া যাওয়ার ব্যাপারে জিজ্ঞাসা করিলে আসামী হুমায়ুন কবির সঠিক কোন জবাব দিতে পারেন নাই।" In view of the fractures of ribs No.3 and 4 and finding of the Doctor that those were caused due to heavy blunt trauma on the chest clearly indicated that victim was not killed by pressing her mouth. That is, statement of the appellant that he had killed the victim by pressing her mouth was inconsistent with post mortem report. Where the medical evidence on the side of prosecution and statement of the accused is more or less equally balanced, the benefit of doubt must go to the accused.

18. In his confessional statement, the appellant has further stated "জ্যোতির বই খাতা কাঁদার মধ্যে ফেলে আমি বাড়ি চলে যাই।" From the seizure list (exhibit-5) it appears that books and khatas were recovered under the water as well as beneath the ground. In the seizure list it was stated – "উক্ত আলামত আসামী হুমায়ুন কবিরের দেখানো মতে পানি মাটিতে পুতানো অবস্হা হইতে উদ্ধার করা হয়।" None of the witnesses said that there was any marks of mud on those books and khatas.

19. It further appears from the confessional statement that the appellant, thereafter, has said, "জ্যোতির বই খাতা কাঁদার মধ্যে ফেলে আমি বাড়ি চলে যাই। বাড়ী এসে আমি আতাউর চেয়ারম্যানের (মতিন

মওলানার) বাড়ীতে দাওয়াত খেতে যাই। দাওয়াত খেয়ে দোকানে এসে শুনি এর আগের রাতে আমার পিতাকে পুলিশ গ্রেফতার করে নিয়ে আসছে। আমি পরের দিন সন্ধায় মোটর সাইকেলে গিয়ে লাকসাম থানায় পুলিশের কাছে আত্মসমর্পন করি।" | This portion of confession is also contradictory to the statement recorded in the confessional statement itself. We have already found that in the confessional statement it was stated that the appellant was arrested at 5.30 a.m. on 04.07.2004, that is, four days after the occurrence but from above quoted sentence of the confessional statement it appears that the appellant has stated that on the date of occurrence, that is, on 30.06.2004 after commission of offence, he returned to his house and, on the same day, he went to the house of Ataur (মতিন মওলানা) to have his lunch. Thereafter, he went to a shop where he came to know that his father was arrested and taken to the police station. Thereafter, on the next day, (that is, on 01.07.2004) he, by motorcycle, went to local Police Station and surrendered. That is, according to the contents of the confessional statement, the appellant surrendered on 01.07.2004. P.W.5 Habibulla in his cross examination has said, "পুলিশ এই মামলার পর কবিরের পিতাকে ধরিলে তখন কবিরের ভাই পুলিশের কাছে কবিরকে ধরাইয়া দিয়াছে।" P.W.1, in his examination in chief, has said, "মোকদ্দমার পর কবিরের বাবা ও পরের দিন কবিরকে এরেষ্ট করে।" That is, according to him the police arrested the appellant on 03.07.2004. That is, date of surrender of the appellant as stated in confessional statement and date of arrest as claimed by the police and witnesses are different.

20. To prove the charge brought under Section 302 of the Penal Code primarily on the basis of the confessional statement it is duty of the Court to ascertain as to whether the confession was made voluntarily, and if so as to whether the same was true and trustworthy. Satisfaction of the Court is a ***sine qua non*** for the admissibility in evidence. True and complete disclosure of the offence is the soul of true confessional statement. In this case, the testimonies of P.Ws.1,2,3 and 4 and post-mortem report are inconsistent with the contents of the confessional statement of the appellant which has made the confessional statement unreliable. In view of the evidence quoted above and the contents of the confessional statement, it is difficult for us to hold that the statements made in confession by the appellant are true and those were consistent with the prosecution case. It would be extremely unsafe to base conviction of the appellant on the basis of such confessional statement accepting the same as true.

21. It is the prosecution case that in between 10.30 a.m. to 11.00 a.m. on 30.06.2004 , P.Ws. 2, 3 and 4 lastly saw the victim in the company of the accused on a culvert situated near the house of Shamsu Master of village Shakera. That was the place of taking away the victim towards the killing spot of village Ranir chor. We do not find evidence regarding the distance between the said culvert of village Shakera and killing spot of village Ranirchar which was very relevant to adjudicate case. It has been stated in the F.I.R. that after consultation with the P.Ws. 2 and 4, that is, Sakil and Md. Ibrahim, the informant came to know that the victim did not attend the class on that fateful day and she was sitting on a culvert situated near "Pandit bari" along with 5/6 other students and at that time, the appellant went there. The prosecution has failed to examine informant Jashimuddin to prove the contents on the F.I.R. From the F.I.R., it appears that the informant stated that after making G.D. entry No.1336 dated 30.06.2004, he met Sakil and Ibrahim but P.W.1, father of the victim, who was in Dhaka at the relevant time, in his examination in chief has stated, "কিন্তু প্রতিদিন যে সময় স্কুল থেকে বাড়ি ফিরে আসে সেদিন ঐ স্কুলে থেকে ফিরে না আসায় আমার বাবা, মা, ছোট ভাই জসিম উদ্দিন ও আমার স্ত্রী আত্মীয় স্বজনের বাড়ী সহ বিভিন্ন দিকে খোজ খবর নেয়। কিন্তু অনুসন্ধান না পেয়ে ভাই জসিম উদ্দিন থানায় গিয়ে ১৩৩৬ তাং ৩০-৬-২০০৪ জি,ডি, করেন। তার পরে ও অনুসন্ধান করা হয়। পরের দিন অনুসন্ধান কালে সাকেরা গ্রামের সাকিল, রুবেল ও ইব্রাহীমকে জিজ্ঞাসাবাদ জানায় যে বিগত ৩০-৬-০৪ তারিখে সাকিল সাকেরা গ্রামের পন্ডিত বাড়ির

পশ্চিমে অবস্থিত কালভার্টে সে ও জ্যোতি বসা ছিল।" From the above quoted testimony of P.W.1 it appears that on the next day, that is, on 01.07.2004 his father, mother, informant Jashimuddin and wife started searching the victim and Sakil, Rubel and Ibrahim disclosed the story that they had seen the victim in the company of the appellant on the culvert situated at the western side of "Pondit Bari" of village Sakera to them. P.W.2 Sakil, P.W.3 Rubel and P.W.4 Ibrahim, in their testimonies, did not state that, on next day, that is, on 01.07.2004 they had disclosed any such story to any of the aforesaid persons before lodging F.I.R. Moreover, the prosecution did not examine the father, mother, younger brother (the informant) and wife of P.W.1 to substantiate the aforesaid claim. That is, F.I.R. story of discloser of the fact, regarding the presence of appellant and victim on the culvert near "Pandit bari" to the informant party before the lodging F.I.R., by the P.Ws.2, 3 and 4 has not been proved.

22. P.W.2, a child of 12(twelve) years, in his examination-in-chief has stated that he found the victim Jyoti on the culvert and, sometimes thereafter, appellant Humayun Kabir went there but in his cross examination he has said "আমি কবির নামক লোকটিকে আগে চিনতাম না ও তার নাম জানতাম না একথা ঠিক। আমি কালভার্ট থেকে চলে যাবার সময় সেখানে ২ জন লোক ছিল।" P.W.3, who is not F.I.R. named witness in his examination in chief, stated that at about 10.30 a.m. on 30.04.2004, he was sitting on the culvert situated at the western side of the house of Shamsu Master and found Sakil, Jyoti and 2 /3 others. P.W. 2 Sakil did not say about the presence of P.W.3 there. P.W. 3, thereafter, has said one Humayun Kabir went there and set on the culvert. In his cross examination he said, "আমাদের বাড়ী থেকে যুথিদের বাড়ী এখান থেকে গেট যতদুর। (এ কোর্টরুম থেকে স্বাক্ষীর দেখানো গেটের দুরত্ব ২০০/২২০ গজ)". Thereafter, he said "আমি জ্যোতির বাবা মাকে চিনি না। আমি ১১.৩০ মিনিটে বাড়ীতে ফিরেছি। আমি চলে যাবার সময় কালভার্টে ৪ জন লোক ছিল। তারা সেখানে গল্পগুজব করছিল একথা ঠিক। (গল্পগুজব কালে বলে আদালতের জিজ্ঞাসায় জবাব দিতে পারে নাই)। (It is to be mentioned here that this witness is also aged about 12 years) ঐ দিন আমি ৪টা পর্যন্ত স্কুলে ক্লাস করি।" Once he said that he had returned home at 11-30 a.m. and, thereafter, said he had participated in his class upto 4 p.m. In his cross examination he further said, "ঐ লোকটাকে আমি আগে চিনতাম বা তার নাম জানতাম না।" The evidence of these witnesses are self contradictory, discrepant and inconsistent with each other on material points which should not be lightly passed over, as they seriously affect the value of their testimonies and those inconsistences go to the root of the matter. From the evidence of P.W.2 and 3 it is apparent that the appellant was not previously known to them. But mysteriously both the witnesses in their examination in chief disclosing the name of the appellant stated that the appellant Humayun Kabir went to the culvert.

23. It is relevant here to state that a child may be allowed to testify, if the court is satisfied that the child is capable of understanding the question put to him and give rational answers to the Court. Before examining a child as a witness the Court should know his intellectual capacity by putting a few simple and ordinary question to him and should also record a brief proceeding of the inquiry. From the above quoted evidence of P.W.3 it appears that his understanding and intellectual capacity is questionable.

24. P.W. 4 Md. Ibrahim, another witness of the claim of "last seen together" of the victim with the appellant, who, in his examination in chief, has said, " ঘটনার তারিখ মনে নেই। ১১/১২ মাস আগে বুধবারে সকাল ১১.০০ টায় আমি বাড়ী থেকে উত্তর দিকে যাবার পর সাকেরা গ্রামে নোয়াব আলী পন্ডিতের বাড়ীর পাশে কালভার্টে ডকে থাকা আসামী কবীর মিয়া ও জলিলের মেয়ে যুথিকে দেখি। তখন কবীর আমাকে দেখে বলে তার ভাগ্নি যুথি ঐদিন স্কুলে যায়নি।" In his cross examination he has said, "যুথির বাবা জলিলকে চিনি। কবিরকে আগে থেকে চিনতাম না ও নাম ও জানতাম না। পরে শুনেছি ছেলেটার নাম কবির।"

25. From close reading of the testimony of this witness, it appears to us that he was going towards north from his house and, on the way, he found the appellant and victim Jyoti on the culvert. While he was crossing the culvert appellant Humayun Kabir, who was not previously acquainted to him, voluntarily told him that his "bhagni" (sister's daughter) did not attend the class on that day. There was no earthly reason of saying so to an unknown man, particularly, when no such question in that regard was asked for by P.W.4. It was totally an unnatural statement and beyond natural human conduct. P.Ws. 2, 3 and 4 in their cross-examinations admitted that appellant Humayon Kabir was not previously known to them and they were not aware of his name even but in the F.I.R. it has been stated that these witnesses disclosed the name of the appellant to the informant and others. Discloser of the name and particulars of an unknown man can not be accepted as correct identification. In the case of Kanan V. State of Kerala reported in AIR 1979 SC 1127 it was observed by the supreme Court of India that where a witness identifies an accused who is not known to him, in the Court for the first time, his evidence is absolutely valuless unless there has been a previous T.I. parade to test his powers of observations. The idea of holding T.I. parade under Section 9 of the evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his testimony regarding the identification of an accused for the first time in Court. It is necessary when the witnesses admitted that the accused was not known the witnesses before happening of the incident seen by them. When the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial. In view of the discussion made above, we are of the view that the story of last seeing of the victim with the company of the appellant at about 10.30 a.m. to 11.00 a.m. on 30.06.2004 is highly doubtful. Their conduct does not inspire confidence.

26. In the Police report it was stated that, "তাকে নিয়ে যাবার সময় তার সাথে থাকা স্কুলের ছেলে মেয়েরা এবং পন্ডিত বাড়ীর লোকজন দেখে।" The prosecution did not examine those students of the school and any person of " পন্ডিতবাড়ী" though it was claimed that they saw the occurrence of taking away the victim. This was an unfortunate part of the prosecution case.

27. Next point is in respect of oral extra-judicial confession of the appellant before the Investigating Officer and recovery of the dead body of the victim from the place of occurrence. The evidence of the Investigating Officer in this regard is very relevant. As P.W.11, he has said, "আমি আসামীকে গ্রেফতার করিয়া তাহাকে জিজ্ঞাসাবাদ শেষে তাহার জবানবন্দী মতে মৃত জাহেদা আক্তার জ্যোতির লাশ উদ্ধার করিয়া ময়নাতদন্তের জনা মর্গে প্রেরণ করি।" Section 25 of the Evidence Act mandates that no confession made to a police officer shall be proved as against a person accused of an offence. Similarly Section 26 of the Evidence Act provides that confession by the accused person while in custody of police cannot be proved against him. However, to the

aforesaid rule of Sections 25 to 26 of the Evidence Act, there is an exception carved out by Section 27 of the Evidence Act. Section 27 is a proviso to Sections 25 and 26. Such statement is generally termed as disclosure statement leading to the discovery of facts which are presumably in the exclusive knowledge of the maker. Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be allowed to be given in evidence. Since statement under section 27 of the Evidence Act is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 the Evidence Act.

28. In the case of Himachal Pradesh Administration V. Om Prakash reported in (1972) 1 SCC 249 it was observed by the Supreme Court of India that section 27 of the Evidence Act which makes the information given by the accused while in custody leading to the discovery of a fact and the fact admissible, is liable to be abused and for that reason great caution has to be exercised in resisting any attempt to circumvent, by manipulation or ingenuity of the Investigating Officer. The protection afforded by sections 25 and 26 of the Evidence Act, while considering the evidence relating to the recovery the Court shall have to exercise that caution and care which is necessary to lend assurance that the information furnished and the fact discovered is credible.

29. Earlier, we have found that the date and time of arrest or surrender of the appellant to the Police as revealed in the evidence are contradictory and inconsistent. It was duty of the prosecution to disclose the exact date and time of arrest or surrender of the appellant to the Police for the reasons that the police was not authorized to keep the appellant in their custody for a period more than 24 hours without any order of the Court. Evidence as to total period of interrogation of the appellant is not definite and the same is highly debatable. According to the contents confessional statement of the appellant it was from 01.07.2004 to 05.07.2004, according to P.W.1, appellant was arrested on 03.07.2004, that is, he was in custody from 03.07.2004 to 05.07.2004 and according to Investigating Officer the appellant was in his custody since 5.30 am on 04.07.2004 and he was produced before the Magistrate at 2 PM on 05.07.2004, that is, he was in police custody for more than 24 hours. Another significant event appears from paragraph 2 of the confessional statement where it was stated , "I was arrested at (e) ভোর 5.30 p.m. on 04 .07.04 in $\frac{village}{town}$ of (যাত্রাপুর শ্বশুরবাড়ী) . I was taken (f) $city$

লাকসাম থানা -সকাল ১০-১৫ টা p.m on 4.07.04." That is, arresting the appellant from his father-in-law's house he was brought at Laksham Police Station at 10.15 a.m. or p.m. Inquest report shows that the same was prepared at 11-50 a.m. on the basis of the alleged statement made by the appellant before the Police. That is, within 95 minutes of bringing the appellant at

Laksham thana, dead body of the victim was recovered. We have seen from the F.I.R. that the Police Station is about 8 Kilometer far from the crime village. In his report, the Investigating Officer categorically stated," আসামী স্বীকারোক্তী মতে উপজেলা নির্বাহী অফিসার সহকারে আসামী কবিরকে সংগে নিয়ে রানী চৌ বড় পুকুর পারে গভীর জঙ্গলের ভিতরে পুকুরের উত্তর পাড় হইতে জাহেদা আক্তার যুথীর গলিত লাশ মামলার বাদীর সনাক্ত মতে উদ্ধার করিয়া লাশের সুরতহাল রিপোর্ট প্রস্তুত করিয়া ময়না তদন্তের জন্য মর্গে প্রেরণ করি।" That is, as per identification of the informant (not examined) deadbody was recovered. The appellant did not identify the deadbody or pointed out the deadbody at the place of recovery. After bringing the appellant at thana at about 10.15 a.m. on 04.07.2004, the Investigating Officer started interrogation and, thereafter, he made his alleged statement to the Police and, then, the Police informed the same to Upozilla Nirbahi Officer and, thereafter, they started moving towards the place of recovery together and on the way, they picked up P.W.5 Habibulla member from his village Badarpur and, then reached at village Ranir Chor and recovered the dead body as per informant's identification. Upon calculation of time, consumed for those incidents it appears that those were completed within 95 minutes which was not at all humanly possible and those facts indicated that all those events were not done and completed as stated date, time and manner.

30. Section 27 has frequently been misused by the Police and the Court should be vigilant about the circumvention of its provisions. Sometimes a devise is adopted by the Police to stage a scene and take the accused to the place where the things discovered. Here in this case P.W. 11 simply said, "জিজ্ঞাসাবাদ শেষে তাহার জবানবন্দি মতে" (which was made in the police station) dead body was recovered by the Police. It is the duty of the Court to look into the surrounding circumstances and to find whether the extra-judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. The evidentiary value of such statement depends upon the veracity of the witnesses to whom it is made and the circumstances in which it came to be made and actual word used by the accused . Such statement must pass the test of reproduction of exact words, the reason or motive of making such statement. It is not clear such " জবানবন্দি" was written by the Police or the same was oral "জবানবন্দি" before the Police. There is no evidence that the appellant himself narrated the name of the place of occurrence and pointed out the dead body. If the accused points out, or leads the Police to, a place from where some incriminating article is recovered there would be discovery within the meaning of section 27 and the relevant of the conduct of the accused. According to P.W.11 the appellant gave a "জবানবন্দি" but there is no reliable evidence that he himself pointed out the dead body and other incriminating materials at the place of recovery in the village Ranirchar. At the time of recovery, the U.N.O., Laksham, an important and most responsible chargesheeted witness was allegedly present but the prosecution withheld him without any explanation. From the inquest report, it appears that Jashimuddin (informant) of village- Konoksree, Sanjit Kumar Vhoumik of village Rani Chor, Md. Shafiqur Rahman and Md. Habibullah member village of Badarpur; Md. Abul Quasem village Uttor Bonoy and constable Nurul Alam were cited as witnesses. But the prosecution did not examine Jashimuddin, Shafiqur Rahman, Abul

Kashem and Constable Nurul Alam though it has been stated that in their presence dead body was recovered. Sanjit Kumar was tendered by the prosecution and defence did not cross examine him. Only witness P.W.5 Habibullah member of village Badorpur. Prosecution witnesses failed to reproduce the exacts words used by the appellant in his alleged extra-judicial confession before the police. The appellant while making his confessional statement before the Magistrate did not disclose that he had given any such information to the police though the deadbody was recovered on the same day. The alleged extra-judicial confession made before the Police and recovery of the deadbody and other incrementing materials are surrounded by suspicious circumstances.

31. In the case of K.K. Jadav Vs. State of Gujarat reported in A.I.R.1966 SC 821 it was observed by the Supreme Court of India that mere fact that the dead body was pointed out by the appellant or was discovered as a result of statement made by him would not necessarily lead to the conclusion of the offence of murder. In the case Bakshish Singh Vs. The State of Punjab reported AIR 1971 (SC)2016 it was further observed by the Supreme Court of India that only incriminating evidence against the appellant in his pointing out the place where the dead body of deceased had been thrown. This is not a conclusive circumstance though undoubtly it raises strong suspicion against the appellant. In a criminal case when the Court is called upon to convict a person having committed any offence it has to satisfy that possibility of innocence is ruled out.

32. Court's decision must rest not upon suspicion but upon legal grounds establish by legal testimony. Mere suspicion, however, strong, cannot take the place of proof. It is well settled principle that where on the evidence two possibilities are open, one which goes in favour of prosecution and the other benefits the accused, the accused is entitled to the benefit of doubt.

33. Considering the aforesaid facts and circumstances of the case, we are of the view that the prosecution has not been able to prove its case beyond all shadow of doubt against the appellant, so the appellant is entitled to get benefit of doubt. Accordingly, we find substance in the appeal.

34. Thus, the appeal is allowed.

35. The judgment and orders of the Courts below are hereby set aside. The appellant Humayun Kabir, son of Liakatulla, of village- Newrain, Police Station Laksham, District Comilla is acquitted on the charge. He may be released forthwith if not wanted in any other case.

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APPELLATE DIVISION

PRESENT:
Mr. Justice Muhammad Imman Ali
Mr. Justice Mirza Hussain Haider
Mr. Justice Abu Bakar Siddiquee

CRIMINAL PETITION FOR LEAVE TO APPEAL NO. 179 of 2020

(From the judgment and order dated 07.01.2020, passed by the High Court Division in Criminal Miscellaneous Case No. 3160 of 2020).

Md. Hafiz Ibrahim, former Member of Parliament.	:	.....Petitioner.
-Versus-		
The State represented by the Deputy Commissioner, Dhaka and another.	:	.....Respondents.

For the Petitioner.	:	Mr. Md. Ruhul Quddus, Advocate instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.
For Respondent No.2	:	Mr. Md. Khurshid Alam Khan, Advocate, instructed by Mr. Md. Zahirul Islam, Advocate-On-Record.
Respondent No.1	:	Not represented.
Date of Hearing.	:	The 5th October, 2020.

Editor's Note
On 16.08.2011, one Deputy Director of Anti-Corruption Commission, Dhaka, lodged First Information Report (FIR) with the Gulshan Police Station implicating the accused petitioner and his wife under section 13 of the Money Laundering Prevention Act, 2002 read with section 4(2)/7 of the Money Laundering Prevention Act, 2009. A prima facie case of commission of such offence under section 13 of the Money Laundering Protirodh Ain, 2002 read with section 4(2)/7 of the Money Laundering Protirodh Ain, 2009 found to have been committed by the accused persons and charge was framed against them accordingly. Accused challenged the criminal proceeding against him in the High Court Division under section 561A of CrPC which was summarily rejected. Thereafter, he preferred this leave to appeal before the Appellate Division.

The question raised in this petition is whether the investigation made and proceeding initiated against the accused petitioner under the provisions of Money Laundering Prevention Act of 2002 and Anti-Corruption Commission Ain 2002 which were amended and repealed subsequently on several occasions and the money laundering offence which is claimed to have been a schedule offence of the ACC Act being not ratified by the parliament the ACC can investigate, lodge and initiate the proceeding against the accused petitioner. With various explanation of laws, the Appellate Division held that the ACC has such authority and dismissed the criminal petition.

Key Words:
Effect of Amendment or Repeal of an Act, Money Laundering; section 13 of the Money Laundering Prevention Act, 2002; section 4(2)/7 of the Money Laundering Prevention Act, 2009.

Section 13 of the Money Laundering Prevention Act, 2002 read with section 4(2)/7 of the Money Laundering Prevention Act, 2009 and Anti-Corruption Commission Ain 2002:

It appears that whenever any Act was amended or repealed by any Ordinance the Legislature continued giving effect of the previous law as if the previous law has not been repealed. Thus, the offence committed by the accused petitioner between 19.12.2005 to 16.01.2008 being within the period of continuation of the aforesaid law which were amended/repealed subsequently by different Ordinances/Acts, it cannot be said that the ACC did not have any authority to initiate, investigate, lodge FIR and continue to proceed with the case under the amended law it is to be deemed to have been committed under the law which has got a new life by the saving clause. ... (Para 12)

JUDGMENT:

Mirza Hussain Haider, J:

1. This criminal petition for leave to appeal is directed against the judgment and order dated 07.01.2020, passed by the High Court Division in Criminal Miscellaneous Case No. 3160 of 2020, summarily rejecting the application, filed by the petitioner under section 561A of the Criminal Procedure Code wherein the proceeding of Special Case No. 04 of 2013 corresponding to ACC GR Case No. 88 of 2011 arising out of Gulshan Police Station Case No. 45 dated 16.08.2011 under sections 2(V)(A)(Av) and 13 of the Money Laundering Prevention Act, 2002, now pending in the third Court of learned Special Judge, Dhaka was challenged.

2. It is contended that on 16.08.2011, one Deputy Director (Special Inquiry and Investigation Cell-1), Anti-Corruption Commission, Dhaka, lodged First Information Report (FIR) with the Gulshan Police Station implicating the accused petitioner and his wife, Mrs. Mafruza Sultana, under section 13 of the Money Laundering Prevention Act, 2002 read with section 4(2)/7 of the Money Laundering Prevention Act, 2009, alleging, inter alia that, on investigation into the record kept with the Anti-Corruption Commission the informant found that the accused petitioner, an influential Member of Parliament elected from Bhola-2 Constituency in the 8th National Parliament Election and also a Member of the then two Standing Parliamentary Committees for the Ministry of Planning and Ministry of Information, along with his wife-Mafruza Sultana, opened a joint account No. 01-7-416270-7 on 19.12.2005 in Standard Chartered Bank, Battery Road Branch, Singapore; that the accused persons received through the aforesaid bank account some money transferred by one Mr. Julfikar Ali, a consultant of Siemens Bangladesh Limited and his wife Rahima Ali from their joint account for lobbying in helping Siemens to get a work tender illegally which was invited by Bangladesh Telecommunication Limited(BTCL); that a prima facie case of commission of such offence under section 13 of the Money Laundering Protirodh Ain, 2002 read with section 4(2)/7 of the Money Laundering Protirodh Ain, 2009 found to have been committed by the accused persons in collusion with the said Julfikar Ali and his wife Rahima Ali from 19.12.2005 to 16.01.2008. Hence, the case wherein the trial court on 03.011.2015

framed charge against the present petitioner and three others which included his wife under the provision as mentioned above.

3. Against the framing of charge on 03.11.2015 by the learned Special Judge, 3rd Court, Dhaka, in the aforesaid case the present accused petitioner filed Criminal Revision No. 334 of 2015 before the High Court Division which after hearing was rejected summarily by judgment and order dated 08.02.2016 on the ground that charge was framed pursuant to the judgment and order dated 12.04.2015 passed by the Appellate Division in Criminal Petition for Leave to Appeal No. 186 of 2014 disposing of the same. Against the said order dated 08.02.2016 passed by the High Court Division in the aforementioned criminal revision, the present petitioner preferred Criminal Petition for Leave to Appeal No. 802 of 2016 before this Division which was dismissed for default on 30.07.2017 and subsequently the application for restoration of the said criminal petition was rejected by judgment and order dated 17.06.2019 holding that there is no cogent reason for allowing the application.

4. Under such facts and circumstances, the accused petitioner filed Criminal Miscellaneous Case No. 3160 of 2020 under section 561A of the Criminal Procedure Code for quashing the proceeding of Special Case No. 04 of 2013 corresponding to ACC GR Case No. 88 of 2011 arising out of Gulshan Police Station Case No. 45 dated 16.08.2011 under sections 2(V)(A)(Av) and 13 of the Money Laundering Prevention Act, 2002, now pending in the third Court of Special Judge, Dhaka on the ground that under section 8(2) of the Money Laundering Prevention Act, 2002 no Court shall take cognizance of any offence punishable under the said Act except upon the complaint lodged in writing by or on behalf of Bangladesh Bank which is totally absent in the present case. The High Court Division rejected the said application summarily by judgment and order dated 07.01.2020 on the ground that since after framing of the charge one witness has already been examined there is no scope to interfere with the matter for quashment.

5. Being aggrieved by and dissatisfied with the same, the accused petitioner filed the instant Criminal Petition for Leave to Appeal No. 179 of 2020 before this Division for redress.

6. Mr. Ruhul Quddus, learned Advocate appearing on behalf of the accused petitioner submits that important question of law has been raised in this petition as to whether complaint lodged by ACC on its own motion in violation of section 8(2) of the Act of 2002 is a valid complaint under the original law of 2002 as there is no written complaint by or on behalf of Bangladesh Bank. He submits that Section 5(2) of the said Law of 2002 also debars any person or authority other than Bangladesh Bank or on its behalf to investigate with regard to the offence committed under the law of 2002. According to him, any offence punishable under the Money Laundering Prevention Act 2002 is to be tried by the Court of Sessions or Additional Sessions Judge as contemplated in section 6 of the said law which has non-obstante clause, and since did not authorize the Commission to investigate/inquire or lodging of FIR and proceed with the case other than by Bangladesh Bank. Thus, the initiation and proceeding of the case is illegal and without lawful authority as well as without jurisdiction. Under section 20(1) of the Anti Corruption Commission Act, 2004 it has been contemplated that offences specified in the schedule of the said Act shall be inquired into or investigated by the Commission only. Although by Ordinance No. VII of 2007 the offences under the Money Laundering Prevention Ain of 2002 has been included in the schedule of offences under the Anti Corruption Commission Act, 2004, but the same having not been ratified by in the first session of parliament, the Ordinance is not a valid law and as such, the proceeding of

the instant case is not sustainable in law. Similarly, by Ordinance No. VII of 2007 paragraph 'Kha Kha' has been inserted in the Anti Corruption Commission Act, 2004 whereby money laundering offences under the Money Laundering Prevention Ain of 2002 has been included in the schedule of the said Act of 2004 and by Ordinance No. VIII of 2007 the same has also been included in the schedule of the Criminal Law (Amendment) Act 1958. But those two ordinances also having not been ratified by the 9th Parliament in its session, the investigation, trial, lodging of FIR, initiation of case and proceeding of the same is palpably illegal, without lawful authority and without jurisdiction and hence the proceeding should be quashed.

7. Mr. Khurshid Alam Khan, learned Advocate appeared on behalf of respondent Commission by filing caveat submits that the points raised in this case on behalf of the accused petitioner has already been settled in the case of **Tarique Rahman Vs. Government of Bangladesh, reported in 63 DLR(AD)18 and those reported in 63 DLR(AD)162** and as such, the offence committed with necessary mens rea remains an offence for all time to come even if the provisions of law creating the said offence is repealed, without declaring the said law as ultra vires to the Constitution. Thus any offence committed during the subsistence of law but detected/revealed subsequently even if the said law is repealed/amended would still come under the mischief of the said repealed/amended law as if the said law has not been repealed. He submits that it has been detected that the account has been opened abroad on 19.12.2005 and the offence of money laundering and transferring the money from Bangladesh to Singapore having been done from 19.12.2005 to 16.1.2008 during the continuance of Anti-Corruption Commission Act, 2002 and subsequently under the amended Act of 2004 and inclusion of Money Laundering Prevention Act, 2002 in the Anti Corruption Commission Act by Ordinances No. VII of 2007 and also by Ordinance No. VIII of 2007 during the continuance of the Ain of 2002 subsequently amended by Act of 2004 and Ordinance No. VII of 2007 as well as Ordinance No. VIII of 2007 there is no illegality in the proceeding with the case. He next submits that out of four accused persons accused Julfikar Ali (Consultant of Siemens Bangladesh) made confessional statement under section 164 of the Criminal Procedure Code before the concerned Magistrate admitting the transaction made in order to get a contract for work order with regard to Teletalk Mobile Phone from BTTB(Now BTCL) and since it appears that total 1,75,000 has been transacted from the joint account of accused, Julfikar Ali and his wife Rahima Ali, to the foreign account of the accused petitioner and his wife for the purpose of getting a work order in favour of Siemens Bangladesh Limited regarding Teletalk Mobile Phone(BTCL) and after framing of charge the wife of the present accused petitioner namely, Mafruza Sultana having unsuccessfully moved the High Court Division in Criminal Revision No. 357 of 2013 and then unsuccessfully moved this Division in Criminal Petition for leave to Appeal No. 186 of 2014 and the present accused petitioner also having unsuccessfully moved the High Court Division earlier in Criminal Revision No. 334 of 2016 and in Criminal Petition for Leave to Appeal No. 802 of 2016 before this Division there is no illegality in proceeding with the case before the trial Court. Moreover at the instance of the accused petitioner after framing of charge till examination of P.W.1, the proceeding of the case was stayed on different pleas and thereby created obstruction in disposal of the case. Now the accused petitioner has come up with the prayer for quashment of the proceeding on different pretexts so that the trial of the case cannot be concluded rather be kept in abeyance which is completely dilatory tactics and as such this criminal petition should be dismissed with cost.

8. On hearing the learned Advocates appearing on behalf of their respective parties and on perusal of the materials on record it appears that the question raised in this petition is whether the investigation made and proceeding initiated against the accused petitioner under

the provisions of Money Laundering Prevention Act of 2002 and Anti-Corruption Commission Ain 2002 which were amended and repealed subsequently on several occasions and the money laundering offence which is claimed to have been a schedule offence of the ACC Act being not ratified by the parliament the ACC can investigate, lodge and initiate the proceeding against the accused petitioner. In the case of **Tarique Rahman Vs. Government of Bangladesh, reported in 63 DLR(AD)162 this Division while reviewing the decision reported in 63 DLR(AD)18 and dismissing the same (**wherein same submissions in respect of maintainability of the proceeding was made) this Division held:

> *"Inquiry, investigation, lodging of complaint and conduct of prosecution of cases and holding of trial in respect of those cases under the Ain of 2002 shall proceed under the provisions of ACC Act, 2004 and that in case of any conflict with the provisions of the Ain of 2002, the provision of the ACC Act, 2004 and the Criminal law Amendment Act 1958 shall prevail though the Ain of 2002 was repealed by the Ordinance of 2008 keeping similar provisions as of section 3(Ka) in section 9 of the Ordinance of 2008 and also in section 9 of the Ain of 2009."*

9. In the said decision it has further been held:

> "*If the actus reus of an offence is committed with necessary mens rea it remains an offence for all time to come, even if the provisions of law creating the said very offence is repealed, without declaring the said law as ultra vires the Constitution. There is no doubt that, after the repeal of the relevant provision of law, the subsequent actus reus even, if committed, ceases to be an offence. But if the offence committed during the period when the said provision of law was in force, any offence committed during the substance of the said law but, detected/revealed later on, even after it's repeal would still come under the mischief of the said repealed law as if the said law has not been repealed."*

10. Apart from this, it is to be noted that the Anti-Corruption Act, 1957 and the Anti-Corruption (Tribunal) Ordinance, 1960 were repealed by the Anti-Corruption Commission Act, 2004, but in spite of such repeal order inquiry, investigation into any allegation, application for sanction to file cases pending before the tribunal established by the Ordinance immediately before such repealing of such Act were given a new life under the saving clause, of the Act of 2004 for disposal of the same under the Act of 2004. Thus any case pending before the tribunal would be transferred to the Special Judge having local jurisdiction thereof. Similarly, Money Laundering Prevention Ain, 2002 being also repealed by the Money Laundering Prevention Ordinance, 2008 has got a new life under its saving clause. The saving clause, provides that 'in spite of repealing the Money Laundering Protirodh Ain, 2002, if any case filed under the said repealed law or proceeding of any case taken under the said repealed law is pending, then the same would be disposed of under the said repealed law as if the law had not been repealed'. Thereafter, the Money Laundering Protirodh Ain,

2009 was also enacted upon repealing the Ordinance of 2008 wherein all cases filed under the repealed law of 2008 which were pending before the tribunal were directed to be continued under the new Law of 2009 treating those cases to have been filed under the new Law of 2009. Subsequent thereto, Money Laundering Protirodh Ain, 2012 was enacted wherein similar saving clause has been incorporated with addition that "(৩) উক্তরূপ রহিত হওয়া সত্ত্বেও Foreign Exchange Regulation Act, 1947 (Act No. VII of 1947) এবং উক্ত আইন ও অধ্যাদেশের আওতাধীন কোন অপরাধ সংঘটিত হইলে বা তদন্তাধীন বা বিচারাধীন থাকিলে উক্ত অপরাধসমুহ এই আইনের বিধান অনুযায়ী এইরুপে নিস্পন্ন হইবে যেন উহা এই আইনের অধীন দায়েরকৃত বা গৃহীত হইয়াছে।"

11. It further appears that Money Laundering Protirodh Ain 2012 was amended further by Ordinance No. II of 2015 and then the same was further amended by Ordinance No. XXV of 2015 repealing the earlier Ordinance No. II of 2015 and it has been provided in the saving clause that in spite of repealing the said law, any act done or step taken under the said repealed law would be deemed to have been done and taken under the present Ordinance.

12. Thus, it appears that whenever any Act was amended or repealed by any Ordinance the Legislature continued giving effect of the previous law as if the previous law has not been repealed. Thus, the offence committed by the accused petitioner between 19.12.2005 to 16.01.2008 being within the period of continuation of the aforesaid law which were amended/repealed subsequently by different Ordinances/Acts, it cannot be said that the ACC did not have any authority to initiate, investigate, lodge FIR and continue to proceed with the case under the amended law it is to be deemed to have been committed under the law which has got a new life by the saving clause. Moreover, since it appears that from the date of framing of charge on 03.11.2015, the proceeding of the Case could not be concluded in last 5(five) years because of obstructions created by the accused petitioner by obtaining stay orders from higher court on different pleas, the submission made by the learned Advocate for the accused petitioner has no substance in the eye of law.

13. Hence the findings and decision arrived at by the High Court Division being based on proper appreciation of fact and law the same does not call for any interference by this Division.

14. Accordingly, this criminal petition for leave to appeal is dismissed.

15. The trial Court is directed to proceed with the trial and conclude the same within 06(six) months from the date of receipt of this judgment and order without any adjournment.

16. Communicate this judgment and order at once.

15 SCOB [2021] AD 95

APPELLATE DIVISION

PRESENT:
Mr. Justice Syed Mahmud Hossain
Chief Justice
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

CIVIL APPEAL NO. 210 OF 2010
(From the judgment and order dated 25.08.2009 passed by the High Court Division in Civil Revision No.4485 of 2004)

Md. Rabiul Islam and others …… Appellants

Vs.

Sultan Mahmud died leaving behind his heirs: … Respondents
(1) Md. Abu Hasnat (Bulbul)and others

For the Appellants	:Mr. A.S.M Khalequzzaman, Advocate, instructed by Mr. Md. Shamsul Alam, Advocate-on-Record
For the Respondent Nos.1-8	:Mr. Sasti Sarker, Advocate, instructed by Mrs. Madhu Malati Chowdhury Barua, Advocate-on-Record
For the Respondent Nos.9-14	:Not represented
Date of hearing	:The 12th January, 2021
Judgment on	:The 12th January, 2021

Editor`s Note

In this case of pre-emption the core question is whether a pre-emption application under section 24 of the Non-Agricultural Tenancy Act, 1949 can be converted to section 96 of the State Acquisition and Tenancy Act, 1950. On the rejection of the case by the trial court the pre-emptor-appellant-petitioner filed an appeal before the learned District Judge of Kushtia and that was transferred to the learned Additional District judge. In the appellate court the preemptor filed an application to convert his case as mentioned above. The learned Additional District Judge rejected the application. Against the rejection order preemptor preferred Civil Revision before the HCD and the HCD made the rule absolute. After that, the pre-emptee-opposite parties, being aggrieved, preferred Civil Petition for Leave to Appeal before Appellate Division and obtained leave giving rise to the instant appeal. In the result, the Appellate Division allowed the appeal.

Key Words

Pre-emption; Conversion of pre-emption petition; Section 24 of the Non-Agricultural Tenancy Act, 1949; Section 96 of the State Acquisition and Tenancy Act, 1950

Section 96 and 89 of the State Acquisition and Tenancy Act, 1950:
From a conjoint reading of the above provisions of law it is divulged that sub-section 3 of Section 96 of the Act requires that an application for pre-emption must be accompanied by deposit of the entire consideration money of the property transferred as stated in the notice under section 89 together with compensation @ 10% thereof. The statutory deposit being a condition precedent to the application being entertained, its non-compliance renders the application liable to be dismissed. Therefore, direction for depositing the rest statutory compensation deposit and consideration out of time would not cure the lacuna, thus, is also illegal and without jurisdiction. … (Para 14)

Conversion of Pre-emption application filed under section 96 of the State Acquisition and Tenancy Act, 1950 to section 24 of the Non-Agricultural Tenancy Act, 1949:
The pre-emption application filed under section 96 of the Act, 1950 may be converted to a pre-emption case under section 24 of the Act, 1949 because the deposit of compensation would not be a impediment in case of such conversion allowing the amendment. … (Para 15)

Conversion of application filed under section 24 of the Non-Agricultural Tenancy Act to section 96 of the State Acquisition and Tenancy Act, 1950:
It further be noted that the application filed under section 24 of the Act, 1949 may be converted to an application under section 96 of the Act, 1950 if such application for conversion is filed within 120 days, i.e. within period of limitation with rest of the deposit and concerned Court allowed the such application of conversation. The application for conversation cannot be allowed after the expiry of limitation as stipulated in the section 96 of the State Acquisition and Tenancy Act. … (Para 16)

JUDGMENT

Md. Nuruzzaman, J:

1. This Civil Appeal, by leave, has arisen out of the judgment and order dated 25.08.2009 passed by the High Court Division in Civil Revision No.4485 of 2004 making the Rule absolute arising out of order No.6 dated 04.08.2004 passed by the Additional District Judge, 1st Court, Kushtia in Miscellaneous Appeal No.32 of 2004 rejecting an application dated 20.07.2004 for amendment of original pre-emption petition in Pre-emption Miscellaneous Case No.31 of 2002 of the Court of Assistant Judge, Bheramara, Kushtia.

2. Facts, leading to filing this civil appeal, in short, was that the land covering an area of 5.78 acres appertaining to S.A. Plot Nos.9683 and 9684 of S.A. Khatian No.2155 of Mouza Bahirchar, Paschim, under P.S. Bheramara originally belonged to one Tasirannessa who died leaving her husband Delwar Hossain, 5 sons namely Mufazzal Haque, Abdul Majid, Sultan Mahmud, Aminul Islam, Mehedi Hasan and two daughters, namely Jobeda Khatun and Roushanara. Thereafter, Delwar Hossain died leaving behind his above mentioned 5 sons and two daughters.

3. At the time of R.S. operation the said land of S.A. Plot Nos.9683 and 9684 were recorded in R.S. Plot Nos.103 and 109 and 110. The respondent was the co-sharer of the disputed land and holding. The vendor-petitioner No.7 transferred the disputed land to the pre-emptees. There are undivided dwelling homestead and pathway in the disputed land.

Knowing about the story of transfer the respondent obtained the certified copy of the same on 29.12.2002 and filed the application under section 24 of the Non-agricultural Tenancy Act.

4. The pre-emptee-opposite party Nos.1-6 contested the case by filing written statement denying the material statements made in the pre-emption case contending, *inter-alia,* that the pre-emptor is not the co-sharer of the disputed holding. The disputed land was not situated within the Municipal area. Knowing it fully well the pre-emptor had deposited only 5% of compensation money and filed an application under section 24 of the Non-Agricultural Tenancy Act. So, the case was not maintainable in law.

5. The trial Court rejected the pre-emption case being Miscellaneous Case No.31 of 2002 by the judgment and order dated 18.04.2004.

6. Feeling aggrieved by the judgment and order dated 18.04.2004 passed by the trial Court, the pre-emptor preferred Miscellaneous Appeal No.32 of 2004 before the Court of learned District Judge, Kushtia and it was transferred to the Court of learned Additional District Judge, First Court, Kushtia. Subsequently, the pre-emptor filed an application for amendment of the application for pre-emption for conversion of the said pre-emption application under section 24 of the Non-Agricultural Tenancy Act, 1949 (in short, Act 1949) in that place to 'insert' Section 96 of the State Acquisition and Tenancy Act, 1950 (in short, Act 1950) before the learned Additional District Judge, First Court, Kushtia who after hearing the parties by his judgment and order dated 04.08.2004 rejected the said application.

7. Against the judgment and order dated 04.08.2004 passed by the learned Additional District Judge, First Court, Kushtia in Miscellaneous Appeal No.32 of 2004, the pre-emptor-appellant-petitioner preferred Civil Revision No.4485 of 2004 before the High Court Division and obtained Rule.

In due course, a Single Bench of the High Court Division, upon hearing the parties, made the Rule absolute by the impugned judgment and order dated 25.08.2009.

8. The pre-emptee-opposite parties as appellants herein feeling aggrieved by the impugned judgment and order dated 25.08.2009 of the High Court Division preferred Civil Petition for Leave to Appeal No.2346 of 2009 before this Division and obtained leave, which gave rise to the instant appeal.

9. Mr. A.S.M. Khalequzzaman, the learned Advocate appearing on behalf of the appellants submits that the Section 96(3)speaks "An application made under section (1) shall be dismissed unless the applicant or applicants, at the time of making it, deposit in the Court the amount of the consideration money or the value of the transferred holding or portion or share of the holding as stated in the notice under Section 89 or in the deed of transfer, as the case may be, together with compensation at the rate of ten per centum of such amount" here consequence is provided for non-compliance of the provision of the sub-section 96(3) and

this is mandatory and as such, the High Court Division committed an error of an important question of law occasioning failure of justice making the Rule absolute. He further submits that it is possible to convert the pre-emption petition under section 96 of the Act, 1950 to section 24 of the Act, 1949 but the High Court Division committed an error of an important question of law occasioning failure of justice making the Rule absolute and passed the impugned judgment and, as such, the impugned judgment and order of the High Court Division is liable to be set aside.

10. Contrariwise, Mr. Sasti Sarker, the learned Advocate appearing on behalf of the respondents submits that the pre-emptor filed an application for pre-emption under section 24 of the Act, 1949. The property under dispute is homestead land and the same is situated outside the municipality. That the lawyer on behalf of the pre-emptor filed an application under section 24 of the Act, 1949, which was a mistake on behalf of the learned Advocate for the pre-emptor. After so detection, the pre-emptor filed an application under section 96 of the Act, 1950. At this present case, the pre-emptor has filed an application for conversion at the appellate Court below. Facts remain that appeal is a continuation of the proceeding, in such view of the matter, the High Court Division rightly made the Rule absolute and also allowed the application for amendment petition and passed impugned judgment and order. He further submits that a pre-emption petition under section 24 of the Act, 1949 legally can be converted under section 96 of the Act, 1950 at any stage of the proceeding but the appellate Court below without considering the law point rejected the said application for amendment of the pre-emption petition and hence, the High Court Division rightly made the Rule absolute and allowed the application for pre-emption petition passed the impugned judgment and order and, as such, the instant appeal may kindly be dismissed.

11. We have considered the submissions of the learned Advocates of the respective parties. We have gone through the materials on records with impugned judgment and order of the High Court Division.

Having gone through the backdrops of the case in hand it reveals that in the appellate Court the pre-emptor as applicant filed an application for amendment of the application for pre-emption case to convert the pre-emption case under section 96 of the State Acquisition and Tenancy Act instead of section 24 of the Act, 1949 by inserting section 96 of the Act, 1950 in the place of section 24 of the Act, 1949. The Appellate Court after hearing both the sides rejected the application, however, in revision, the High Court Division allowed the application making the Rule absolute. Against the judgment and order of the High Court Division, the pre-emptee as petitioner filed Civil Petition for Leave to Appeal before this Division and obtained leave.

12. The leave was grated on the following grounds:

> I. For that the section 96(3) speaks "An application made under sub-section (1) shall be dismissed unless the applicant or applicants, at the time of making it, deposit in the Court the amount of the consideration money or the value of the

transferred holding or portion or share of the holding as stated in the notice under section 89 or in the deed of transfer, as the case may be, together with compensation at the rate of ten per centum of such amount" here consequence is provided for non compliance of the provision of the sub-section 96(3) and this is mandatory and, as such, the High Court Division committed an error of an important question of law occasioning failure of justice and the impugned judgment and order is liable to be set aside.

II. For that it is possible to convert the pre-emptor petition under section 96 of the State Acquisition and Tenancy Act to section 24 of the Non-Agricultural Tenancy Act and, as such, the impugned judgment and order of the High Court Division is liable to be set aside.

13. It would be pertinent to quote the relevant portion of section 96 of the Act, 1950, thus, runs as follows:

"96. Right of Pre-emption – (1) If a portion or share of a holding of a raiyat is sold to a person who is not a co-sharer tenant in the holding, one or more co-sharer tenants of the holding may, within two months of the service of the notice given under section 98, or, if no notice has been served under section 98, within two months of the date of the knowledge of the sale, apply to the Court for the said portion or share to be sold to himself or themselves:

Provided that no application under this section shall lie unless the applicant is –

(a) a co-sharer tenant in the holding by inheritance; and

(b) a person to whom sale of the holding or the portion or share thereof, as the case may be, can be made under section 90:

Provided further that no application under this section shall lie after expiry of three years from the date of registration of the sale deed.

(2) In an application under sub-section (1), all other co-sharer tenants by inheritance of the holding and the purchaser shall be made parties.

(3) An application under sub-section (1) shall be dismissed unless the applicant or applicants, at the time of making it, deposit in the Court-

(a) the amount of the consideration money of the sold holding or portion or share of the holding as stated in the notice under section 89 or in the deed of sale, as the case may be;

(b) compensation at the rate of twenty five per centum of the amount referred to in clause (a); and

(c) an amount calculated at the rate of eight per centum simple annual interest upon the amount referred to in clause (a) for the period from the date of the execution of the deed of sale to the date of filing of the application for pre-emption."

14. From a conjoint reading of the above provisions of law it is divulged that sub-section 3 of Section 96 of the Act requires that an application for pre-emption must be accompanied

by deposit of the entire consideration money of the property transferred as stated in the notice under section 89 together with compensation @ 10% thereof. The statutory deposit being a condition precedent to the application being entertained, its non-compliance renders the application liable to be dismissed. Therefore, direction for depositing the rest statutory compensation deposit and consideration out of time would not cure the lacuna, thus, is also illegal and without jurisdiction.

15. However, it is perhaps may be noted for the benefit of the judicial pronouncement that the pre-emption application filed under section 96 of the Act, 1950 may be converted to a pre-emption case under section 24 of the Act, 1949 because the deposit of compensation would not be a impediment in case of such conversion allowing the amendment.

16. It further be noted that the application filed under section 24 of the Act, 1949 may be converted to an application under section 96 of the Act, 1950 if such application for conversion is filed within 120 days, i.e. within period of limitation with rest of the deposit and concerned Court allowed the such application of conversation. The application for conversation cannot be allowed after the expiry of limitation as stipulated in the section 96 of the State Acquisition and Tenancy Act.

17. In the instant case the High Court Division in allowing the revisional application relied to the case of Abdus Sobhan Sheikh Vs. Kazi Moulana Jahedullah and others reported in 5 M.L.R.(HCD)140. We have gone through the principles enunciated in the case 5 M.L.R. (HCD) 140. The view taken by the learned Single Judge of the High Court Division in the 5 M.L.R. case seems to us not appropriate and squarely applicable in the instant case. In the reported case compensation was deposited in the trial Court after amendment by the order of the Court.

18. However, the case for conversion and amendment in hand the pre-emptor filed the application in the appellate Court for conversion of the said pre-emption application under section 24 of the Act, 1949 into an application under section 96 of the Act, 1950 and also prayed for depositing the rest of compensation amount which obviously in violation of statutory provisions as contemplated in section 96(3) of the State Acquisition of Tenancy Act, after the expiry of limitation of deposit of statutory compensation. If such deposit is allowed after expiry of limitation violating statutory provisions then the legal proposition as contemplated in the statute would be nugatory.

19. The learned Single Judge of the High Court Division while made the Rule absolute further took the views that filing of the pre-emption petition under section 24 of the Act, 1949 was a mistake of lawyer, appeal is the continuation of the proceeding, if the application for amendment is allowed such amendment would be treated as part of the original application as if the same was made in the application at the time of institution of the application for pre-emption, the above views are not disputed.

20. But the only legal question has not been answered by the High Court Division as to whether the statutory deposit of compensation would be allowed in violation the provisions as contemplated in the section 96 of the Act, 1950, the reply is negative, the State Acquisition and Tenancy Act is a special law wherein statutory provisions of deposition of compensation for the filing of pre-emption petition has been provided as condition precedent with consequence that provision would not be defeated for reasons as stated by the High Court Division.

21. Provisions of section 96 (3) provide that an application made under sub-section (1) of the section 96 of the Act, 1950 shall be dismissed unless the applicant or applicants, at the time of making it, deposit in the Court the amount of the consideration money or the value of the transferred holding or portion or share of the holding as stated in the notice under section 89 or in deed of transfer, as the case may be, together with compensation at the rate of ten percent centum of such amount, according to the above provisions, consequence, has been provided for non-compliance of the provision of law, in that view the provision is mandatory, the High Court Division missed the said provision of law at the time of deciding the revisional application, thus, committed an error of an important question of law.

22. This Division in the case of Akhtarun Nessa and another Vs. Habibullah and others reported in 31 DLR (AD)(1979)88 (para-28) has held:

> "Further question for consideration is as to whether the direction given by the High Court Division for depositing the balance consideration money out of time is warranted by the law? Sub-section (3) of section 96 of the Act requires that an application for pre-emption must be accompanied by deposit of the entire consideration money of the property transferred as stated in the notice under section 89 together with compensation @10% thereof. The statutory deposit being a condition precedent to the application being entertained, its non-compliance renders the application liable to be dismissed. The direction for depositing the balance consideration money out of time is also illegal and without jurisdiction."

23. We are, therefore, of the firmed view that the High Court Division committed error of law which calls for interference by this Division.

24. Accordingly, this appeal is allowed. However, without any order as to costs. The judgment of the High Court Division is set aside. The judgment of the lower appellate Court is affirmed.

15 SCOB [2021] AD 102

APPELLATE DIVISION

Present:
Mr. Justice Syed Mahmud Hossain, *Chief Justice*
Mr. Justice Hasan Foez Siddique
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

CIVIL PETITION FOR LEAVE TO APPEAL NO.2844 OF 2017
(From the judgment and order dated 12.04.2017 passed by the Administrative Appellate Tribunal, Dhaka in A.A.T. Appeal No.260 of 2012)

Md. Syedul Abrar, son of late Ahmed Hossain	**:**	……..…..Petitioner
Vs.		
Government of Bangladesh, represented by the Secretary Ministry of Primary and Mass Education, Bangladesh Secretariat, Dhaka and others	**:**	…..…Respondents

For the petitioner	**:**	Mr. Sheikh Mohammad Murshed, Advocate, instructed by Mr. Md. Taherul Islam, Advocate-on-Record.
For the respondents	**:**	Not represented.
Date of hearing and judgment	:	The 10th day of December, 2020.

Editor's Note:
The petitioner was a teacher at a government primary school. A departmental proceeding was drawn against him for misconduct. An inquiry against him was conducted ex parte and second show cause notice was served to him without annexing the inquiry report for which he could not take any defense. The authority ultimately dismissed the petitioner from service.
Being aggrieved, the petitioner filed a departmental appeal before the Appellate authority, but the same was not disposed within 2 months as per the provisions of the Administrative Tribunal Act. Therefore, he filed administrative tribunal case before the Administrative Tribunal, Chittagong. Administrative Tribunal set aside the impugned order of dismissal. On appeal the decision was reversed by the Administrative Appellate Tribunal. The petitioner then filed a leave to appeal before the Appellate Division of the Supreme Court. The impugned decision of the Administrative Appellate Tribunal was set aside by the Appellate Division on the ground, among others, that the petitioner was not given opportunity to cross-examine the witnesses or to produce evidence in his

favour according to Rule 10 of the Government Servants (Discipline and Appeal) Rules 1985.

Key Words:
Administrative Tribunal; Administrative Appellate Tribunal; Departmental Inquiry Report; Natural Justice; Disciplinary Proceeding.

Government Servants (Discipline and Appeal) Rules 1985, Rule 7(5)
Requirement of Providing Inquiry Report along with the second show cause notice:
From the evidence on record, it also appears that on 01.06.2005 the second show cause notice had been issued upon the petitioner. But along with the second show cause notice, no copy of inquiry report had been attached, which is the violation of Rule 7(5) of the Government Servants (Discipline and Appeal) Rules, 1985. Rule 7(5) of the Rules, 1985 provides that the authority would communicate the accused-applicant with the copy of inquiry report with their decision thereof. But this provision has been violated in the instant case. ...(Para 12)

Government Servants (Discipline and Appeal) Rules 1985, Rule 10:
In disciplinary matters the provisions of the Government Servants (Discipline and Appeal) Rules, 1985 and the principles of natural justice are required to be followed properly:
In the instant case, the authority i.e. the respondents-opposite parties failed to follow the procedures provided in the Rules, 1985 accordingly. The petitioner was not given any opportunity to be heard. The inquiry proceeding was held ex-parte, which was not in accordance with law. At the same time the petitioner was not given opportunity to cross-examine the witnesses or to produce evidence in his favour according to Rule 10 of the Rules, 1985. Besides the respondents claimed that the date of hearing fixed on 10.04.2005 and 04.05.2005 were informed to the petitioner, but from the materials on record, it appears that the respondents had not produced any copy of notice given to the petitioner fixing the date of hearing on 10.04.2005 and 04.05.2005 respectively. ... However, in consideration of the matters discussed above, we are of the view that the Administrative Appellate Tribunal committed a serious error of law in not considering the provisions of the Government Servants (Discipline and Appeal) Rules, 1985 in toto and the principles of natural justice properly. So, we are constraint to interfere.
...(Para 13, 14 & 16)

JUDGMENT

Obaidul Hassan, J.

1. This Civil Petition for Leave to Appeal is directed against the judgment and order dated 12.04.2017 passed by the Administrative Appellate Tribunal, Dhaka (hereinafter referred to as AAT) in A.A.T. Appeal No.260 of 2012 allowing the appeal.

2. Facts necessary for the disposal of the petition are that the petitioner as applicant filed the A.T. Case No.10 of 2006 in the Administrative Tribunal, Chittagong (hereinafter referred to as AT) stating, *inter alia,* that on 08.10.1987 the applicant joined in service as an Assistant Teacher of Government Primary School. He did his job very honestly, sincerely, with devotion and entire satisfaction of the authority. While the applicant was posted at Kadalpur

Government Primary School under Upazilla–Rawjan, District-Chittagram, a departmental proceeding was drawn against him for the charge of misconduct proposing penalty of dismissal from service under Government Servants (Discipline and Appeal) Rules, 1985 (shortly, the Rules, 1985) alleging, *inter alia*, that on 18.12.2004 the applicant brought false allegation to the Deputy Director, Primary Education, Chittagram against one Md. Nuruzzaman and Md. Nurul Absir. Another allegation was that the applicant was found unauthorized absent by the Assistant Director on 19.12.2004 when he went to visit the school, and the last allegation was that on 18.09.2004 the applicant made an allegation against Md. Jahangir, an Assistant Teacher that, one of his educational certificates is forged. The applicant submitted written statement on 31.01.2005 and denied the allegations made against him save and except the last one that one of the certificates regarding date of birth of Md. Jahangir, Assistant Teacher is forged one, but the authority without considering the written statement, appointed one Mr. Anwar Hossain as Inquiry Officer, who served a notice to the applicant to appear before him on 03.04.2005. The applicant on 31.03.2005 prayed for 15 days time for collecting evidence and shifting the place of inquiry stating the reason in the application. The Inquiry Officer without considering the application on due date inquired the matter ex-parte. Thereafter, the authority without considering the materials on record served the second show cause notice without annexing the inquiry report and, as such, the applicant could not take defence in the reply of the second show cause notice. The authority without considering the materials on record illegally dismissed the petitioner from service on 10.07.2005.

3. Being aggrieved by the aforesaid decision, the applicant on 14.09.2005 filed departmental appeal before Appellate Authority. But the same was not disposed of within 2 (two) months as provided in the amended provisions of the Administrative Tribunal Act, 1997 as such the applicant filed A.T. Case before the Administrative Tribunal, Chittagong.

4. The opposite party Nos.3-5 contested the case by submitting written statement denying the allegation made in the plaint contending, *inter alia*, that the departmental proceeding was initiated against the applicant under Section 3(b) of the Government Servants (Discipline and Appeal) Rules, 1985 for the allegations of misconduct. The applicant was given all opportunity for taking his defence in the proceeding, but he did not appear before the Inquiry Officer intentionally and, as such, the authority rightly dismissed the petitioner from service by the order dated 10.07.2005. So, the case is liable to be discharged.

5. The learned Member of the Tribunal after hearing the parties and considering all materials on record allowed the case of the applicant setting aside the impugned order of dismissal from service by the judgment and order dated 10.06.2012.

6. Being aggrieved by and dissatisfied with the said judgment and order, the opposite parties filed appeal before the Administrative Appellate Tribunal, Dhaka, which was heard by the said Tribunal, subsequently the appeal was allowed by the judgment and order dated 12.04.2017.

7. Being aggrieved by and dissatisfied with the aforesaid judgment and order dated 12.04.2017, the petitioner preferred this Civil Petition for Leave to Appeal before this Division.

8. Mr. Sheikh Mohammad Murshed, the learned advocate, appearing for the petitioner, has taken us through the judgment and order dated 12.04.2017 passed by the Administrative

Appellate Tribunal, Dhaka, the relevant provisions of the Government Servants (Discipline and Appeal) Rules, 1985 and the connected materials on record and submits that the member of the Tribunal found that getting the departmental inquiry report by the applicant is a mandatory requirement as per Rule 7(5) of the Government Servants (Discipline and Appeal) Rules, 1985 for his defence. The respondent authority did not supply the inquiry report with the second show cause notice to the applicant nor filed the said report before the Member of the Tribunal with the written statements, giving opportunity to the petitioner-applicant for defence. But the Administrative Appellate Tribunal committed an error in holding a wrong presumption that since the applicant did not mention about inquiry report in the reply of the second show cause notice, so it may be presumed that he got it. This presumption is without any evidence and relying the decision reported in ***18 BLC (AD) 226***, which is not at all applicable here. He also submits that the Appellate Tribunal erred in law in holding that, "তদন্তকারী কর্মকর্তা যৌক্তিকভাবে তার আবেদন অগ্রাহ্য করেন এবং বিধিসম্মতভাবে তার অনুপস্থিতিতে একতরফা তদন্ত পরিচালনা করেন।" He next submits that the applicant filed an application before the Inquiry Officer praying for adjournment of the inquiry on the ground of adducing evidence and for shifting the place of inquiry for want of security, which was rejected and ex-parte inquiry was done and thereby the petitioner was highly prejudiced as the petitioner was dismissed from the service on the basis of the said inquiry report. He further submits that in an offence of misconduct, the authority can impose penalties minor or major as per rule 4 of the Government Servants (Discipline and Appeal) Rules, 1985 considering the gravity of the offence. But in this case, the authority without considering the long 18 years unblemished service career of the petitioner as Primary School Teacher and without considering the gravity of allegation, imposed highest penalty and dismissed him from service which was not considered by the authority as well as Appellate Tribunal while confirmed the penalty of dismissal from the service. He next submits that the Administrative Appellate Tribunal failed to consider that the petitioner was not given chance to defend him as per Rules 7 and 10 of the Government Servants (Discipline and Appeal) Rules, 1985, because he was refused to take part in inquiry and thereby he could not give evidence and cross-examine the witnesses in the departmental inquiry. He finally submits that the Administrative Appellate Tribunal committed an error of law in considering the decision in the case of ***Bikash Ranjan Das Vs. the Chairman Labour Court*** reported in ***29 DLR (SC) 280*** and in the case of ***Trading Corporation of Bangladesh Vs. Kazi Abdul Hai*** reported in ***17 BLD (AD) 156*** considering the departmental inquiry report as domestic inquiry whereas our Apex Court as well as law gave wide jurisdiction to the Tribunal to see all materials on record for proper adjudication of the matter.

9. No one appears to represent the respondents.

10. We have examined the judgment and order dated 12.04.2017 passed by the Administrative Appellate Tribunal, Dhaka, the relevant provisions of the Government Servants (Discipline and Appeal) Rules, 1985 and the connected materials on record. From the materials on record it appears that on 08.10.1987 the petitioner joined in service as an Assistant Teacher of Government Primary School. While the applicant was posted at Kadalpur Government Primary School under Upazilla–Rawjan, District-Chittagram a departmental proceeding was drawn against him for the charge of misconduct proposing penalty of dismissal from service under Government Servants (Discipline and Appeal) Rules, 1985 alleging that on 18.12.2004 the applicant brought false allegation to the Deputy Director, Primary Education, Chittagram against Md. Nuruzzaman and Md. Nurul Absir. Another allegation is unauthorized absent of the applicant found by the Assistant Director on 19.12.2004 when he went to visit the school and the last allegation was that on 18.09.2004

the petitioner made allegation against Md. Jahangir, Assistant Teacher that one of his educational certificates is forged. The petitioner submitted written statement on 31.01.2005. The authority appointed one Mr. Anwar Hossain as Inquiry Officer, who served a notice to the petitioner-applicant to appear before him on 03.04.2005. The petitioner-applicant on 31.03.2005 prayed for 15 days time for collecting evidence and also prayed for shifting the place of inquiry stating the reason in the application. The Inquiry Officer rejected the said application and heard the matter ex-parte. Thereafter, the authority without considering the materials on record served the second show cause notice, but the petitioner-applicant could not take defence in the reply of the second show cause notice. Then, the authority dismissed the petitioner from service on 10.07.2005. The petitioner-applicant preferred appeal before the Administrative Tribunal, the same was allowed. Thereafter, government preferred appeal against the judgment and order of the Administrative Tribunal, Chattogram before the Administrative Appellant Tribunal (AAT) and the AAT allowed the appeal preferred by the opposite parties dismissing the petitioner-applicant from service.

11. Now the question before us is that whether the dismissal of the petitioner from the service was legal. The Administrative Appellate Tribunal while confirming the dismissal of the petitioner held that, in case of imposing minor punishment to hear the accused applicant is mandatory but in case of imposing major punishment it is not essential to hear the applicant. The observation of AAT is true in one context. Because Rule 8(a) of the Government Servants (Discipline and Appeal) Rules, 1985 provides that if the concerned authority is satisfied that the accused would be suspended or dismissed from the service for the reasons of conviction of criminal charge, then the provision of Rules 6 and 7 shall not apply to give the opportunity to the accused-applicant, but in rule 8(b) it has been mentioned that if the concerned authority thinks that the service of the notice upon the person against proceeding has been initiated is not practicable in that case the authority must record the reasons in writing. From the evidence on record of the instant case, it is found that the authority did not record any such reason for non serving of the notice upon the applicant. The petitioner has been dismissed without getting any opportunity of being heard, which is an absolute violation of the principle of natural justice.

12. From the evidence on record, it also appears that on 01.06.2005 the second show cause notice had been issued upon the petitioner. But along with the second show cause notice, no copy of inquiry report had been attached, which is the violation of Rule 7(5) of the Government Servants (Discipline and Appeal) Rules, 1985. Rule 7(5) of the Rules, 1985 provides that the authority would communicate the accused-applicant with the copy of inquiry report with their decision thereof. But this provision has been violated in the instant case and the instant case was heard ex-parte. It was held in the case of ***Government of Bangladesh, represented by the Secretary, Ministry of Post, Telegraph and Telecommunication & others vs. Mr. Abul Khair [9 MLR (AD) 221]*** that, ***"Government servants have to be dealt with in accordance with law and the principles of natural justice in disciplinary proceedings.***

When disciplinary proceedings are not conducted in accordance with the rules of procedure and principles of natural justice, the order of punishment passed therein not sustainable in law."

13. Thus in the instant case, the authority i.e. the respondents-opposite parties failed to follow the procedures provided in the Rules, 1985 accordingly. The petitioner was not given any opportunity to be heard. The inquiry proceeding was held ex-parte, which was not in accordance with law. At the same time the petitioner was not given opportunity to cross-

examine the witnesses or to produce evidence in his favour according to Rule 10 of the Rules, 1985.

14. Besides the respondents claimed that the date of hearing fixed on 10.04.2005 and 04.05.2005 were informed to the petitioner, but from the materials on record, it appears that the respondents had not produced any copy of notice given to the petitioner fixing the date of hearing on 10.04.2005 and 04.05.2005 respectively.

15. We have gone through the decisions in the case of ***Bikash Ranjan Das vs. the Chairman Labour Court*** reported in ***29 DLR (SC) 280*** and the case of ***Trading Corporation of Bangladesh vs. Kazi Abdul Hai*** reported in ***17 BLD (AD) 156*** as cited by the respondents. The facts of the above cases do not match with the facts of the present case. Each and every case is to be considered on the basis of the fact of the case itself. The decisions as cited by the respondents do not have any manner of application in this case.

16. However, in consideration of the matters discussed above, we are of the view that the Administrative Appellate Tribunal committed a serious error of law in not considering the provisions of the Government Servants (Discipline and Appeal) Rules, 1985 in toto and the principles of natural justice properly. So, we are constraint to interfere.

17. With the above findings, the petition is **disposed of.**

18. The judgment and order of the Administrative Appellate Tribunal is hereby set aside.

15 SCOB [2021] HCD 1

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 6653 of 2012

M. Asafuddowlah
…… Petitioner
-Versus-

Government of Bangladesh, represented by the Secretary, Ministry of Public Administration, Bangladesh Secretariat, Dhaka.
……Respondent

Mr. Aneek R. Haque with
Mr. Md. Monjur Nahid,
Ms. Mahjerin Musharaf and
Ms. Khaleda Chowdhury, Advocates
…. For the Petitioner

Mr. Mahbubey Alam, Attorney General with Ms. Israt Jahan, DAG with
Mr. Amit Das Gupta, DAG
Ms. Rokeya Akhter, AAG,
Ms. Abantee Nurul, AAG,
Ms. Annah Khanom, AAG and
Mr. A.K.M. Nur Nabi, AAG
.... For Respondent No. 1

Date of Hearing : 31.03.2019, 17.04.2019, 07.05.2019 & 28.07.2019
Date of Judgment : 08.01.2020

Present:
Mr. Justice Zubayer Rahman Chowdhury
And
Mr. Justice Sashanka Shekhar Sarkar

Editor's Note:
The petitioner, a retired bureaucrat of the country, filed this writ petition through a Public Interest Litigation (PIL) under Article 102(2) of the Constitution of the People's Republic of Bangladesh challenging the process of designating any Officer serving under the Government as an Officer on Special Duty beyond the stipulated period of one hundred and fifty days and thereby allowing such Officer to receive salary and other benefits without rendering any service, being in violation of the Constitution, apart from being detrimental to the interest of the taxpayers of the country.

Consequently, a Rule was issued to show cause as to why the current trend of making/posting the Civil Servants as Officers on Special Duty (OSD) without assigning any special duty, whatsoever, beyond stipulated time should not be declared illegal, *ultra vires* the Constitution and as such of no legal effect.

Ultimately, the Rule was made absolute and the continuation of the process of keeping an Officer as on OSD beyond the stipulated period of 150 days was declared *ultra vires* and, therefore, without lawful authority.

Key Words:
Article 20(2), 31, 88 and 102 (2) of the Constitution of the People's Republic of Bangladesh; Constitutionality of posting Officers on Special Duty (OSD) for unlimited period

An Officer serving under the Government can be posted as an Officer on Special Duty. However, this power or authority of the Government is circumscribed by certain conditions, which, amongst other, stipulate that the maximum period for which a person can be designated as an OSD shall not exceed 150 days. ...(Para 24)

Article 20 (2) of the Constitution of Bangladesh:
The vast number of Officers, who are presently posted as OSD, are merely attending office and going back home every day without rendering any service. However, at the end of the month, they are being paid their salaries and other benefits. This is manifestly in contravention of Article 20 (2) of the Constitution, which prohibits enjoyment of unearned income. In other words, the Government itself is violating the provisions of Article 20 (2) of the Constitution by allowing the officials to enjoy 'unearned income'. Obviously, this could not have been the intendment of the Legislature. ...(Para 30)

No authority, not even the Government, has the right to degrade or malign a person and his family members in the society without observing the due process of law:
Article 31 contains two directives; the first being a positive one and the second being a prohibitive one. In the first part, the Constitution is categorical in stating that every citizen is to be treated "in accordance with law", while the second part prohibits the taking of any action, save and except in accordance with law, which is detrimental to, amongst others, the "reputation of any person". It is undeniable that when a Government Officer is designated as an OSD, it is detrimental to his/her reputation vis-a-vis the society. In reality, such Officers face humiliation and degradation not only in the estimation of their colleagues and family members, but also before the society at large. No authority, not even the Government, has the right to degrade or malign a person and his family members in the society without observing the due process of law. Such conduct is undoubtedly arbitrary and malafide. ...(Para 36)

The continuation of the process of keeping an Officer as an OSD beyond the stipulated period of 150 days is *ultra vires*:
In the event of any Officer being designated as an OSD, the Government must, without undue delay, form a Committee and undertake an inquiry so as to ascertain the veracity of such allegation/complaint. If the allegation/complaint is found to have substance, the Government should take appropriate action against the concerned Officer, in accordance with law. However, the process of enquiry must be completed within the stipulated period of 150 days. In view of the foregoing discussion and being mindful of the mandate, as contained in Article 20(2) and Article 88 of the Constitution, we are inclined to hold that the continuation of the process of keeping an Officer as an OSD beyond the stipulated period of 150 days is *ultra vires* and, therefore, without lawful authority. ...(Paras 41 & 42)

JUDGMENT

Zubayer Rahman Chowdhury, J:

1. The petitioner, a retired bureaucrat of the country, has brought to the fore an issue of considerable public importance and significance by filing this application under Article

102(2) of the Constitution of the People's Republic of Bangladesh, consequent upon which the instant Rule was issued in the following terms :

> "Let a Rule Nisi be issued calling upon the respondents to show cause as to why the current trend of making/posting the Civil Servents as Officers on Special Duty (OSD) without assigning any special duty, whatsoever, beyond the scope of Circular No. Sa.Ma/ (Bi:Pro:)-12-90-03(200) dated 03.10.1991 and keeping them as OSD for unlimited period longer than the periods prescribed in the said Circular dated 03.10.1991 and paying them monthly salary and benefits throughout the period without receiving any service from them thereby allowing them to enjoy unearned income causing huge wastage of taxpayers' money should not be declared to be illegal, ultra vires the Constitution and as such of no legal effect and why they should not be directed to frame a guide line in addition to the Circular No. Sa.Ma/(Bi:Pro:)-12-90-03(200) dated 03.10.1991 to regulate the practice of making/posting the officers as OSD in a meaningful manner, and/or pass such other or further order or orders as to this Court may seem fit and proper."

2. This application is somewhat unique in that although a Public Interest litigation, commonly known as PIL, is instituted on behalf of the down-trodden, underprivileged and/or the helpless section of the society, in the instant case, it has been filed for espousing the cause of one of the most privileged section of the society, namely the Government officials. On one hand, this application seeks to enforce the Fundamental Right of the Government officials, numbering well over nine hundred, currently designated as 'Officer on Special Duty', to be treated in accordance with law, as enshrined in Article 31 of the Constitution; on the other hand, it seeks to prevent the wastage of the tax-payers money by the Government.

3. The Rule is being opposed by respondent no. 1 by filing an affidavit-in-opposition as well as several supplementary affidavits. The petitioner, in his turn, has also filed several supplementary affidavits, to which we shall advert in due course. It is pertinent to observe, for the purpose of record, that shortly after the conclusion of hearing, this Bench was reconstituted, resulting in some delay in the delivery of judgment.

4. A brief narration of the facts leading to the issuance of the Rule is called for. The petitioner, son of late Khan Bahadur Mohammad Ismail, joined the erstwhile Civil Service of Pakistan (briefly, CSP) in 1961. Thereafter, he served in different posts in various capacities and finally he retired as a Secretary to the Government of Bangladesh, having served in the said capacity for more than 10 years. Being a regular taxpayer of the country, the petitioner has challenged the process of designating any Officer serving under the Government as an Officer on Special Duty beyond the stipulated period of one hundred and fifty days and thereby allowing such Officer to receive salary and other benefits without rendering any service, being in violation of the Constitution, apart from being detrimental to the interest of the taxpayers of the country.

5. It has been stated in the application that hundreds of Government officials, serving in the post of Assistant Secretary, Senior Assistant Secretary and Deputy Secretary, have been designated as "Officer on Special Duty" (hereinafter referred to as OSD) without assigning any reason. It has been further stated that although any Officer serving under the Government can be designated as an OSD for a maximum period of 150 days, in each and every case, there has been a complete violation of the Rule.

6. Having placed the application and the supplementary affidavits together with the documents annexed thereto, Mr. Aneek R. Haque, the learned Advocate appearing on behalf of the petitioner submits that although the Government has the authority to designate an officer as an OSD for a maximum period of 150 days only, in almost all the cases, they have continued to remain as OSD for much longer periods, varying between five to ten years and, in two particular cases, for over seventeen years. He submits that although such Officers are not rendering any service to the Republic, they are being allowed to receive their salaries and other benefits including festival bonuses, which is violative of Article 20(2) of the Constitution. He submits that if there is any complaint/allegation against any Officer who has been designated as an OSD, the Government should initiate appropriate proceedings against such Officer and conclude the same within the stipulated period of 150 days. However, if there is no adverse finding against them, they should be allowed to discharge their duties.

7. Referring to Article 88 of the Constitution, Mr. Haque submits that the salaries and other monetary benefits are paid from the Consolidated Fund, which is mainly derived from the taxpayer's money. He submits that it is the violation of Article 20(2) and Article 88 of the Constitution which has necessitated the filing of the instant writ petition.

8. On the issue of maintainability of the writ petition, Mr. Haque submits forcefully that as the issue involves interpretation of the Constitutional provisions affecting the rights of the tax-payers of the country, this writ petition is maintainable at the instance of the petitioner, who is a tax-payer of the country. In support of his contention, Mr. Haque has relied on the celebrated case of Dr. Mohiuddin Faruque vs. Bangladesh, reported in 49 DLR (1997) AD 1.

9. On the other hand, Mr. Mahbubey Alam, the learned Attorney General appearing in opposition to the Rule submits that the process of designating a Government Officer as an OSD is neither new nor uncommon. Elaborating his submission, the learned Attorney General submits that such a practice, which also prevails in our neighbouring countries, namely India and Pakistan, began in the early sixties at the behest of the then Government of Pakistan, which is still being continued for running the administration by the Government. Referring to the relevant Rules, the learned Attorney General submits that as the Government has been vested with the authority to designate any Officer as an OSD, the exercise of such power cannot be questioned by filing a writ petition. The learned Attorney General acknowledges that for lack of available posts, some Officers had to remain as OSD for long periods well in excess of the stipulated period of 150 days. He submits that steps are now being taken by the Government to address the situation.

10. With regard to the contention of Mr. Haque that the process of keeping an Officer as an OSD for an indefinite period is causing substantial financial loss to the National Exchequer, the learned Attorney General submits that as the Officers have been designated as OSD by the Government due to various exigencies of the situation, they are entitled to receive their salaries and other benefits as per law and therefore, it cannot be construed as being violative of the Constitutional provisions. He lastly submits that the petitioner cannot be deemed to be a person aggrieved and on that count, the writ petition is not maintainable and therefore, the Rule is liable to be discharged.

11. At the very outset, let us address the issue of locus standi of the petitioner, so vigorously argued by the learned Attorney General.

12. Almost half a century ago, the issue of locus standi came up for consideration before the Supreme Court of Bangladesh in the case of Kazi Muklesur Rahman vs. Bangladesh, reported in 26 DLR (SC) (1974) 44. While delivering the landmark judgment, Abu Sadat Mohommad Sayem, the learned Chief Justice observed:

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

13. Nearly a quarter of a century later, in the case of Dr. Mohiuddin Farooque vs. Bangladesh, reported in 49 DLR (AD) (1997) 1, the Apex Court expressly endorsed the aforesaid view. The landmark judgment of Sayem, CJ in Kazi Mukhlesur Rahman's case was not only setting a trend, albiet well ahead of many other jurisdictions, it also had a profound effect on Dr. Mohiuddin Farooq's case, as evident from the dictum of Afzal CJ and I quote:

> "The liberalised view as expanded by my brother is an update, if I may say so, of liberalisation agenda which was undertaken in the case of Kazi Mukhlesur Rahman 26 DLR(SC) 44. It is a matter of some pride that quite early in our Constitutional journey the question of locus standi was given a liberal contour in that decision by this Court at a time when the Blackburn cases were just being decided in England which established the principle of "sufficient interest" for a standing and the doctrine of public interest litigation or class action was yet to take roots in the Indian Jurisdiction. The springboard for the liberalisation move was the momentous statement made in that case."

14. The learned Chief Justice then quoted the "momentous statement" of Sayem CJ verbatim and further observed:

> "Any person other than an officious intevenor or a wayfarer without any interest or concern beyond what belongs to any of the 120 million people of the country or a person with an oblique motive, having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constructional or legal provision."

15. In that very same case, Mustafa Kamal, J (as the learned Chief Justice then was) not only quoted the very same statement of Sayem CJ, but went on to observe as under :

> "Insofar as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organisation, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102.
>
> It is, therefore, the cause that the citizen-applicant or the indigenous and native association espouses which will determine whether the applicant has the competency to claim a hearing or not. If he espouses a purely individual cause, he is a person aggrieved if his own interests are affected. If he espouses a public cause involving public wrong or public injury, he need not be

> personally affected. The public wrong or injury is very much a primary concern of the Supreme Court which in the scheme of our Constitution is a constitutional vehicle for exercising the judicial power of the people."

16. The issue of locus standi of a person to maintain a writ petition has had a significant shift from its earlier position of requiring a petitioner "to be a person aggrieved" to one requiring the petitioner "to have sufficient interest." With the passage of time, the scope and extent of the writ jurisdiction has widened to such an extent that even an aggrieved person, who is not a citizen of this country, can maintain a writ petition when the functionaries of the Republic do not act in accordance with law (Northpole (BD) Ltd. vs. Bangladesh Export Processing Zones Authority, 57 DLR (2005) 631). In fact, the current position has been summed up by our Apex Court in the case of ETV vs Dr. Chowdhury Mahmood Hasan, reported in 54 DLR (AD) 2002, 132 in the following terms:

> "The narrow confines within which the rule of standing was imprisoned for long years have been broken and new dimension is being given to the doctrine of locus standi."
>
> (per K.M. Hasan, J, as the learned Chief Justice then was)

17. In this context, we may refer to two other decisions from our neighbouring jurisdiction. To begin with, in the case of Mahmood Akhtar Nagvi v. Pakistan, reported in PLD 2013 Supreme Court 195, a petition was filed in the form of public interest litigation "seeking elaboration of constitutional and legal safeguards relating to the working of civil servants." On the issue of maintainability of the petition, the Court held:

> "The petition has been held maintainable because the situation portrayed does raise a question of public importance with reference to the enforcement of fundamental rights."
>
> (per Jawwad S. Khawaja, J, as the learned Chief Justice then was)

18. In the case of Bandhua Mukti Morcha vs Union of India, reported in AIR 1984 SC 802, Pathak, J (as the learned Chief Justice then was) observed :

> "Fundamental rights guaranteed under the Constitution are indeed too sacred to be ignored or trifled with merely on the ground of technicality or any rule of procedure."

19. In the United Kingdom, the issue has been answered well and truly by Lord Diplock through the following observation made in the case of Inland Revenue vs. National Federation of Self-Employed and Small Businesses Ltd., reported in (1981) 2 All ER 93 :

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited tax-paper, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the courts to vindicate the rule of law and get the unlawful conduct stopped."

20. In 'Legal Control of Government', noted authors Professor H.W.R. Wade and Professor Schwartz observed :

> "If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest."

21. Commonly perceived, the term 'locus standi' refers to the standing or capacity of any person or group, having sufficient interest, to raise an issue involving public interest for adjudication before the Court. However, the term 'sufficient interest' cannot be defined with any precision. Suffice to say that it is best left to the discretion of the Court to decide, in light of the factual and legal position prevailing in each particular case, as to what would constitute 'sufficient interest'.

22. The petitioner is not only a retired bureaucrat, he is also a regular tax-payer of this country. As such, he has a legitimate expectation to be apprised of the manner in which the tax-payers money is being spent by the Government. In our considered view, the petitioner has the locus standi to file the instant application under Article 102(2) of the Constitution. Resultantly, the writ-petition is held to be maintainable.

23. In the instant case, the factual position is undisputed. The process of designating a Government Officer as an OSD is not novel. This is being practiced by successive Governments for a considerable period of time, right from the then Pakistan era upto the present day. For a better understanding of the issue, let us refer to the Notification No. সম/(বিপ্র)-১২-৯০-০৩(২০০) dated 03.10.1991, issued by the then Ministry of Establishment (presently Ministry of Public Administration), which reads as under :

"সংস্থাপন মন্ত্রণালয়

[নং- সম।(বিঃপ্রঃ)-১২-৯০-০৩(২০০)]

তারিখঃ ১৯-০৯-১৩৯৭ বাং

০৩-১০-১৯৯১ ইং

ও এস ডি/সুপারনিউমাররী পদ সংক্রান্ত

(Officer on Special Duty / Supplementary Post)

১। সাংগঠনিক কাঠামো পুনর্বিন্যাসের (restructuring) ফলে কোন স্থায়ী/নিয়মিত কর্মর্তা/কর্মচারী উদ্বৃত্ত ঘোষিত হলে কোন সংস্থায় তার আত্মীকরনের অথবা যে সমস্ত কর্মকর্তা/কর্মচারী অবসর গ্রহণের প্রান্তে তাদের অবসর গ্রহনের পূর্ব পর্যন্ত সুপার নীউমারারী পদের বিপরীতে বেতন ও ভাতাদি পেতে থাকবে, প্রশাসনিক মন্ত্রনালয়/বিভাগ এ সমস্ত উদ্বৃত্ত কর্মচারীদের জীবন বৃত্তান্ত ও চাকুরি সংক্রান্ত প্রয়োজনীয় তথাদিসহ তাদের নামের তালিকা আত্মীকরনের জন্য সংস্থাপন মন্ত্রণালয়ে এবং অবগতির জন্য অর্থ বিভাগে প্রেরন করবে সংস্থাপন মন্ত্রণালয় উদ্বৃত্ত ঘোষিত কর্মকর্তা। কর্মচারীগণকে সরকারের উদ্বৃত্ত কর্মকর্তা/কর্মচারীদের আত্মীকরণ সংক্রান্ত আদেশ/নির্দেশ/নীতিমালা অনুসারে শূন্য পদের বিপরীতে আত্মীকরনের ব্যবস্থা গ্রহন করবে।

২। সাময়িক অথচ অত্যাবশ্যকীয় কাজের চাপ মোকাবেলার জন্য অস্থায়ী ভিত্তিতে পদ সৃষ্টির প্রয়োজন দেখা দিলে কর্মকর্তার প্রয়োজন সংশ্লিষ্ট ক্যাডার, সাব-ক্যাডার বা এক্স-ক্যাডার থেকে সংযুক্তির (attachment) মাধ্যমে পূরণ করতে হবে এবং এর জন্য কর্মকর্তার কোন অস্থায়ী পদ সৃষ্টি করা যাবে না। তবে এ ধরনের অতিরিক্ত কার্য সম্পাদনের জন্য সহায়ক কর্মচারীর (Supporting Staff) অস্থায়ী পদ সৃষ্টি করতে হলে সংস্থাপন মন্ত্রনালয় (সংগঠন ও বাবস্থাপনা উপ-বিভাগ) ও অর্থ বিভাগের সম্মতিক্রমে মহামান্য রাষ্ট্রপতির অনুমোদন গ্রহন করতঃ সৃষ্টি করা যেতে পারে।

৩। বিভিন্ন প্রশাসনিক কারনে ইতিপূর্বে ক্যাডারভুক্ত/ক্যাডার বহির্ভূত কর্মকর্তাদের মন্ত্রণালয়ের সাথে সাথে বিশেষ ভারপ্রাপ্ত কর্মকর্তা (ও এস ডি) হিসাবে সংযুক্ত করা হত। সরকার কর্তৃক প্রদত্ত ক্ষমতাবলে ইতিপূর্বে অস্থায়ী পদ সৃষ্টি করে এ সমস্ত কর্মকর্তাদেরকে সংযুক্তকালের বেতন ভাতা প্রদানের ব্যবস্থা করা হত। প্রকৃতপক্ষে এ ধরযনের বিশেষ ভারপ্রাপ্ত কর্মকর্তার পদ সৃষ্টির ফলে অনুমোদিত সাংগঠনিক কাঠামোর কোন পরিবর্তন ঘটত না। কিন্তু সম্প্রতি এক সরকারি নির্দেশ বলে মন্ত্রণালয়/বিভাগ কর্তৃক এ ধরনের বিশেষ ভারপ্রাপ্ত কর্মবর্তার পদ সৃষ্টির ক্ষমতা রহিত করা হয়। এখন থেকে বিশেষ ভারপ্রাপ্ত কর্মবর্তার পদ (ও এস ডি) শুধুমাত্র নিম্নলিখিত ক্ষেত্রে সৃষ্টি করা হবেঃ

ক) দু মাসের বেশী ছুটি ভোগকারী। প্রশিক্ষনরত কর্মকর্তা।

খ) পুরাতন পদ/বৈদেশিক চাকুরি থেকে অব্যাহতি প্রাপ্ত/বৈদেশিক প্রশিক্ষন থেকে প্রত্যাগত এবং নতুন পদে যোগদানের জন্য অপেক্ষমান কর্মকর্তা (অনূর্ধ্ব ১ মাস ১৫ দিন)।

গ) বৈদেশিক চাকুরিতে যোগদানের জন্য/বৈদেশিক প্রশিক্ষণে যোগদানের উদ্দেশ্যে প্রয়োজনীয় বৈদেশিক ভাষা শিক্ষা (Foreign Language Course) লাভের জন্য অপেক্ষমান কর্মকর্তা (অনুর্ধ্ব ৩ মাস)।

ঘ) দূর্নীতি, শৃংখলাজনিত কারন, অসদাচরন ও অযোগ্যতার জন্য প্রত্যাহিত (Withdrawn) কর্মকর্তা (অনূর্ধ্ব একশত পঞ্চাশ দিন)

ঙ) প্রশাসনিক/অনিবার্য কারনে সংস্থাপন মন্ত্রণালয়ের নিয়ন্ত্রণাধীন বিভিন্ন মন্ত্রণালয়/বিভাগের কর্মকর্তাগনকে (আইন ও বিচার মন্ত্রণালয় ছাড়া) সংস্থাপন মন্ত্রণালয়ের সংযুক্ত করা যাবে। তবে এ ধরনের কর্মকর্তাদের তালিকা মাসিক প্রতিবেদন হিসাবে রাষ্ট্রপতির সচিবালয়ে প্রেরন করতে হবে।

৪। উপরোক্ত ক্ষেত্রে কর্মকর্তাগণকে কেবল মাত্র বেতন/ভাতা প্রদানের জন্যই বিশেষ ভারপ্রাপ্ত কর্মকর্তা ঘোষণার বিজ্ঞপ্তিকে বিশেষ ভারপ্রাপ্ত কর্মকর্তাদের পদ সৃষ্টি/বেতন ভাতা প্রদানের নির্দেশ/ভিত্তি হিসেবে গন্য হবে। বিশেষ ভারপ্রাপ্ত কর্মকর্তা (ও এস ডি) হিসেবে সংযুক্তকালে তার স্হলে অতিরিক্ত নতুন পদ সৃষ্টি করা যাবে না।"

24. A perusal of the Notification indicates that an Officer serving under the Government can be posted as an Officer on Special Duty. However, this power or authority of the Government is circumscribed by certain conditions, which, amongst other, stipulate that the maximum period for which a person can be designated as an OSD shall not exceed 150 days. It also provides that an Officer is to be paid his salaries and other benefits for the period during which he remains an OSD.

25. However, from Annexure A (2) (1) of the affidavit of compliance dated 16.05.2013, filed by respondent no. 1, it appears that some Officers have continued to remain as OSD for a considerable length of time, far beyond the stipulated period of 150 days. This is corroborated by the contesting respondent through Annexure 7 of the affidavit of compliance dated 28.04.2019, wherefrom it appears that some Officers serving in the post of Assistant Secretary, Senior Assistant Secretary, Deputy Secretary and Joint Secretary, who were designated as OSD way back in 2000 and 2001, have continued to remain so till date. Respondent no. 1 has attempted to justify the position in the affidavit-in-opposition dated 30.05.2013 through the following statement:

> "In 2005, 40 officers were promoted to the post of Secretary, 50 officers were promoted to the post of Secretary, 50 officers promoted to the post of Additional Secretary, 62 were promoted to the post of Joint Secretary and 327 were promoted to the post of Deputy Secretary. In the similar way in 2006 total 1259 officers were promoted to different position. In practice all these promotees had been made OSD for time being and thereafter they were posted in regular position gradually. And for this the figures of OSD have been shown enormous. In true sense they were not made OSD."

26. The petitioner has filed a supplementary affidavit dated 13.05.2019 enclosing a list, which is reproduced hereinbelow:

Sl. No.	Name	ID No.	PRL Date	Position	Duration (YY-MM-DD)
01.	M. Mosaddeque Hossain	1891	27.06.2019	Senior Assistant Secretary	16-10-06

02.	Mohammad Nur Hossain	3505	29.09.2019	Senior Assistant Secretary	14-00-01
03.	Abdullah-Al-Baqui	4529	09.07.2022	Deputy Secretary	10-02-02
04.	Md. Quamruzzaman Chowdhury	4572	29.12.2019	Deputy Secretary	11-04-29
05.	Khondoker Md. Moklesur Rahman	4962	09.11.2019	Deputy Secretary	09-07-19
06.	Mahsia Akter	5854	29.06.2020	Assistant Secretary	18-11-15
07.	Aysha Afsari (Aysha)	6087	02.09.2025	Assistant Secretary	17-06-25
08.	Dr. Md. Nur Islam	6089	16.09.2022	Assistant Secretary	10-03-07
09.	Sheikh Muhammad Akhlaque Ahmed	6355	30.12.2028	Senior Assistant Secretary	09-07-25
10.	Tabassum Azfar	15098	24.10.2030	Assistant Secretary	14-06-15
11.	Khadija Anwar	15501	23.10.2019	Assistant Secretary	12-10-17
12.	Mohammad Abdul Kader	4598	01.10.2020	Senior Assistant Secretary	15-2-24

27. It is to be noted that the contesting respondent has neither disputed nor challenged the veracity of the aforesaid list.

28. We do not disagree with the submission advanced by the learned Attorney General that the Government has the authority to designate any Officer working under the Government as an OSD. However, what we are concerned about is not the authority of the Government to do so, but the manner in which the process is being implemented and continued. As Lord Brightman stated in Chief Constable of the North Wales Police vs. Evans, reported in (1982) 1 W.L.R. 1155 :

> "Judicial review is concerned, not with the decision, but with the decision-making process."

29. We have also taken note from the affidavit of compliance dated 10.01.2013 that the contesting respondent has acknowledged that an amount of Tk. 103,25,64,537/- has been disbursed on account of salary and other benefits in respect of 962 officers serving as OSD covering the period from 2008-2012. Needless to observe that the said figure has increased manifold with the passage of another eight years, as the above-mentioned figure reflects the position only upto 2012. This, no doubt, goes to substantiate the argument advanced by Mr. Haque that the ordinary taxpayers of the country are being made to pay a staggering amount of money on account of the salaries of the Officers who are not discharging any duties.

30. In reality, the vast number of Officers, who are presently posted as OSD, are merely attending office and going back home every day without rendering any service. However, at

the end of the month, they are being paid their salaries and other benefits. This is manifestly in contravention of Article 20 (2) of the Constitution, which prohibits enjoyment of unearned income. In other words, the Government itself is violating the provisions of Article 20 (2) of the Constitution by allowing the officials to enjoy 'unearned income'. Obviously, this could not have been the intendment of the Legislature.

31. Furthermore, as per Article 88 of the Constitution, the payment of salaries and other benefits to Government officials are charged from the Consolidated Fund, which is made up of the revenue collected by the Government from the citizens of the country in the form of income tax, VAT and other duties. It is therefore undeniable that it is the tax payer's money which forms the Consolidated Fund. Hence, every citizen of the country, more particularly a tax payer, has a right to be apprised of the manner in which the disbursement of the Consolidated Fund is being made by the Government.

32. Despite a direction from this Court, the contesting respondent has failed to produce the relevant papers and documents regarding the process of designating an Officer as an OSD. In the affidavit-in-opposition, the contesting respondent has simply mentioned the date of the order along with a comment as to their present place of posting. Such a reply is not only incomplete, but is totally unacceptable. The power of the Government to designate any Officer as an OSD must be exercised only for some specific reason, as enumerated in the Circular dated 03.10.1991, albeit upon an objective assessment of each individual case. Regrettably, we have found that in each and every case, there was no objective assessment nor was any document produced before this Court to show the ground or reason for which the concerned Officers were designated as OSD. In the absence of any such ground, it is to be deemed that the act was arbitrary and, therefore, without lawful authority. As Professor A.W. Bradley and Professor K.D. Ewing have so aptly commented:

> "When a power vested in a public authority is exceeded, acts done in excess of the power are invalid as being ultra vires"
>
> (Constitutional and Administrative Law, 14th Ed, page 727)

33. A similar view has also been expressed by Professor H.W.R. Wade in the following words :

> "Every act of governmental power, ie., every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree."
>
> (Administrative Law 11th Ed, Wade & Forsyth, at page 15)

34. There is another important and pertinent feature in this case, which requires deliberation. In the context of our country, the social standing of the parent(s) is very important and relevant for the upbringing of the children. Therefore, when a person is made to remain as an OSD for an indefinite period, it has a negative impact and effect on the immediate family members and relatives. In two particular cases, two lady Officers, who were designated as OSD way back in 2001, have continued to remain so till date and by now, a period of over 18 years has elapsed. Unlike western countries, where the identity of the parent(s) is either immaterial or even irrelevant for the purpose of marriage, it is far from that in this country; in fact, the status of the parent(s) is not only important, it is also relevant when a marriage is arranged. Needless to observe that the process of keeping an Officer as an OSD for an indefinite period would certainly hinder the matrimonial prospect of the children, who are also citizens of this country. In our view, this is grossly unfair, unjust and an

infraction of a person's Fundamental Right, as guaranteed under Article 31 of the Constitution.

35. Article 31 of the Constitution, which is embodied in Part III of the Constitution relating to Fundamental Rights, stipulates as under :

> "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."

36. Article 31 contains two directives; the first being a positive one and the second being a prohibitive one. In the first part, the Constitution is categorical in stating that every citizen is to be treated "in accordance with law", while the second part prohibits the taking of any action, save and except in accordance with law, which is detrimental to, amongst others, the "reputation of any person". It is undeniable that when a Government Officer is designated as an OSD, it is detrimental to his/her reputation vis-a-vis the society. In reality, such Officers face humiliation and degradation not only in the estimation of their colleagues and family members, but also before the society at large. No authority, not even the Government, has the right to degrade or malign a person and his family members in the society without observing the due process of law. Such conduct is undoubtedly arbitrary and malafide. As has been held by the Supreme Court of India in the case of H. L. Trehan vs Union of India, reported in AIR 1989 SC 568 :

> "Any arbitrary or whimsical exercise of power prejudicially affecting the existing conditions of service of a Government servant will offend against the provisions of Article 14 of the Constitution."
>
> (per M. Mohon Dutt, J)

37. It is pertinent to note that Article 14 of the Constitution of India corresponds to Article 27 of our Constitution, which stipulates that 'all citizens are equal before law and are entitled to equal protection of law'.

38. Let it be made very clear once again that we do not, for a moment, question the authority of the Government to designate an Officer as an OSD. However, this power must be exercised in accordance with law and only in accordance with law. Let us not forget that Government Officers too are citizens of this country and therefore, Article 31 is squarely applicable to their case as well. Merely because a person is serving as a Government Officer that, ipso facto, does not take away the protection envisaged by Article 31 of the Constitution.

39. More than a century ago, in the celebrated case of Board of Education vs. Rice (1911) AC 179, it was observed that 'administrative power' must be exercised in strict accordance with terms of the Statute. Almost a century later, in the case of Corruption in Hajj Arrangements in 2010, which was initiated on the basis of a Suo Moto Rule, the Supreme Court of Pakistan held :

> "Every executive as administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental Rights guaranteed by the Constitution."

(per Iftikhar Muhammad Chawdhury, CJ)

40. The concept of "due process" is so fundamental that it is engrained and embedded in the social matrix of any democratic system and its application can never be excluded or restricted through any Act of Parliament, far less any Executive order. This view of ours is fortified by the language of Article 55(2) of the Constitution which requires the executive power of the Republic to be exercised "in accordance with the Constitution." To quote Lord Watson :

> "It is an important condition of statutory powers that where exercised at all, they shall be executed with due care."
> (Sanitary Commissioner Gibraltor vs. Orfila, (1890) 15AC, 400)

41. In the event of any Officer being designated as an OSD, the Government must, without undue delay, form a Committee and undertake an inquiry so as to ascertain the veracity of such allegation/complaint. If the allegation/complaint is found to have substance, the Government should take appropriate action against the concerned Officer, in accordance with law. However, the process of enquiry must be completed within the stipulated period of 150 days.

42. In view of the foregoing discussion and being mindful of the mandate, as contained in Article 20(2) and Article 88 of the Constitution, we are inclined to hold that the continuation of the process of keeping an Officer as an OSD beyond the stipulated period of 150 days is ultra vires and, therefore, without lawful authority. Consequently, we have no hesitation in coming to the conclusion that the instant Rule merits positive consideration.

43. Accordingly, the Rule is made absolute.

44. The continuation of the process of designating an Officer of Government as an 'Officer on Special Duty' beyond the stipulated period of 150 days, is declared to be without any lawful authority.

45. Each and every Government officer, presently designated as an OSD and in whose case the period of 150 days has elapsed, shall stand released forthwith from the order designating such Officer as an OSD and shall revert back to the previous place of posting.

46. Let a copy of this judgment be sent to the Senior Secretary, Cabinet Division, the Senior Secretary, Ministry of Public Administration and the Rector, PATC for their information and guidance.

47. The learned Deputy Attorney General is direct to ensure the communication of this order to the concerned officials.

48. Before parting with the matter, we wish to put on record our appreciation to Mr. Aneek R. Haque, the learned Advocate appearing for the petitioner and Mr. Amit Das Gupta, the learned Deputy Attorney General appearing with Ms. Rokeya Akhter, AAG, Ms. Abantee Nurul, AAG, Ms. Annah Khanom, AAG and Mr. A.K.M. Nur Nabi, AAG for their valuable assistance. Last but not least, this Court also wishes to put on record its appreciation for the petitioner for espousing a very pertinent and important cause. In our view, this issue ought to have been raised before this Court long before. I reminded of the old adage – "Better late than never".

49. There will be no order as to cost.

15 SCOB [2021] HCD 13

ফৌজদারী আপীল নং-৭৫৩৩/২০১৯

মোঃ হৃদয়
.....আপীলকারী।
বনাম

রাষ্ট্র
.....রেসপনডেন্ট।

জনাব এম মশিউর রহমান, অ্যাডভোকেট
.....আপীলকারীর পক্ষে।

জনাব মোঃ সারওয়ার হোসেন বাপ্পী, ডেপুটি অ্যাটর্নি জেনারেল
মিস মৌদুদা বেগম, অ্যাসিস্টেন্ট অ্যাটর্নি জেনারেল
মিস হাসিনা মমতাজ, অ্যাসিস্টেন্ট অ্যাটর্নি জেনারেল
মিস শাহানা পারভীন, অ্যাসিস্টেন্ট অ্যাটর্নি জেনারেল
.....রেসপনডেন্ট পক্ষে।

শুনানী ও রায়ের তারিখ ঃ ১৭ শ্রাবণ ১৪২৬ বঙ্গাব্দ / ০১ আগস্ট ২০১৯ খ্রিস্টাব্দ

উপস্থিত:
বিচারপতি জনাব এম. ইনায়েতুর রহিম
এবং
বিচারপতি জনাব মোঃ মোস্তাফিজুর রহমান

Editor's Note:

মাঠে শিশুদের ক্রিকেট খেলাকে কেন্দ্র করে কথা কাটাকাটি ও হাতাহাতির প্রেক্ষিতে সন্ধায় আসামীরা ভিকটিমকে লাঠি, হকিস্টিক, লোহার রড ও ধরালো চাকু দিয়ে আঘাত করে গুরুতর জখম করলে পরবর্তীতে চিকিৎসাধীন অবস্থায় ভিকটিম মারা যায়। এই ফৌজদারী আপীলটি এ সংক্রান্ত মামলায় পরবর্তীতে নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনালের বিজ্ঞ বিচারক কর্তৃক আপীলকারী শিশুর জামিন না-মঞ্জুর আদেশ হতে উদ্ভূত। এই মামলায় প্রশ্ন উঠেছে যে, প্রথমতঃ শিশু আইনের অধীনে মামলার কার্যক্রম পরিচালনায় নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল এর নাম, সিল ও বিচারকের পদবী ব্যবহার সঠিক হয়েছে কিনা; দ্বিতীয়তঃ আইনের ধারা ১৫ক এর বিধান অনুযায়ী ম্যাজিস্ট্রেট কর্তৃক অপরাধ আমলে গ্রহণ করে শিশু আদালতে কাগজাদি প্রেরনের পূর্বে শিশু আদালতের জামিন বা বয়স নির্ধারণ সহ অন্যান্য আনুষাঙ্গিক বিষয়ে আদেশ দেয়ার এবং শিশু আদালত হিসেবে ক্ষমতা প্রয়োগের এখতিয়ার আছে কিনা; এবং তৃতীয়তঃ শিশু আইনের ধারা ১৫ক অনুযায়ী সংশ্লিষ্ট ম্যাজিস্ট্রেট কর্তৃক অপরাধ আমলে গ্রহণের পূর্বে ধারা ২৯(১) এবং ধারা ৫২(১) অনুযায়ী শিশু আদালত কর্তৃক জামিন এবং ধারা ২১ অনুযায়ী শিশু আদালত কর্তৃক শিশুর বয়স সম্পর্কিত বিষয় নিষ্পত্তির এখতিয়ার কতটুকু আইন সংগত।

আপীলটি গ্রহণযোগ্যতার শুনানীকালে আদালত কর্তৃক নারী ও শিশু নির্যাতন দমন আইন ২০০০-এর ধারা ২৮ অনুযায়ী এর রক্ষণীয়তার বিষয়ে প্রশ্ন উত্থাপিত হলে আপীলকারীর বিজ্ঞ আইনজীবী আদালতের অনুমতিক্রমে আপীল দরখাস্তের (পিটিশন অফ আপীল) শিরোনাম (কজ টাইটেল) সংশোধনক্রমে ধারা ২৮, নারী ও শিশু নির্যাতন দমন আইন ২০০০-এর স্থলে ধারা-৪১, শিশু আইন-২০১৩ প্রতিস্থাপিত করেন; এবং আপীলটি শিশু আইন, ২০১৩-এর ধারা ৪১ অনুযায়ী দাখিল করা হয়েছে মর্মে গণ্য করা হয়।

উক্ত ফৌজদারী আপীলটি নিষ্পত্তি করতে গিয়ে মাননীয় হাইকোর্ট ২০১৮ সালে আনীত সংশোধনীসহ শিশু আইন, ২০১৩ বিষয়ে বিশদ আলোচনা করেন। শিশু আইনে বিদ্যমান বিভিন্ন ধরনের সংশয়, বিভ্রান্তি ও অসংগতি দূরীকরণে দ্রুততার সাথে স্বল্পতম সময়ের মধ্যে সংশোধনীর প্রয়োজনীয়তার কথা উল্লেখ করেন। এছাড়া শিশু আইনের সংশোধন বা স্পষ্টীকরণ সম্পর্কে প্রজ্ঞাপন না হওয়া পর্যন্ত শিশুর সর্বোচ্চ স্বার্থ রক্ষার্থে সংশ্লিষ্ট ম্যাজিস্ট্রেট ও শিশু আদালতসমূহকে সাত দফা নির্দেশনা প্রদান করেন। মাননীয় হাইকোর্ট রায়ে উল্লেখিত পর্যবেক্ষণ, অভিমত ও নির্দেশনাসহ আপীলটি মঞ্জুর করে আপীলকারীকে জামিন প্রদান করেন।

গুরুত্বপূর্ণ শব্দাবলী:
ধারা ২৮, নারী ও শিশু নির্যাতন দমন আইন ২০০০; ধারা ১৫ক, ২৯(১), ৫২(১) ও ৪১ শিশু আইন, ২০১৩

ধারা ২৯(১), ৫২(১), ১৫ক ও ২১ শিশু আইন, ২০১৩ঃ
আমরা যদি শিশু আইনের ধারা ২৯(১) ও ৫২(১) নিবিড় ভাবে পর্যালোচনা করি তা হলে এটা সহজেই অনুধাবনযোগ্য হবে যে, আইনের উপরোক্ত বিধান দু'টিকে ফৌজদারী কার্যবিধিসহ বা আপাতত: বলবৎ অন্য কোন আইন বা শিশু আইনের অন্য কোন বিধানে ভিন্নরুপ যা কিছুই থাকুক না কেন, তা থেকে প্রাধান্য দেয়া হয়েছে। অর্থাৎ ধারা ১৫ক-এর বিধানে যাই থাকুক না কেন

শিশু আইনের ধারা ২৯(১) ও ৫২(১) বিধানের প্রাধান্যতা অক্ষুন্ন থাকবে। এই প্রাধান্যতার কারণে অপরাধ আমলে গ্রহনের পূর্বেই শিশুর জামিন, হেফাজত বা ধারা ২১ অনুসারে বয়স নির্ধারনে শিশু আদালত-কে নিরঙ্কুশ ক্ষমতা দেয়া হয়েছে, সুতরাং এ সংশয় বা বিভ্রান্তি থাকার কোন যুক্তি বা ভিত্তি নেই যে, ধারা ১৫ক অনুযায়ী অপরাধ আমলে গ্রহণ পূর্বক কাগজাদি শিশু আদালতে প্রেরণের পূর্বে শিশু আদালতের ক্ষমতা প্রয়োগের কোন এখতিয়ার নেই। আমাদের বিবেচনায় এ ক্ষেত্রে আইনের বিধান খুবই স্বচ্ছ ও সুস্পষ্ট। ...(প্যারা ২৫ও ২৬)

এখানে উল্লেখ করা আরো প্রাসঙ্গিক হবে যে, শিশু আইনের অধীনে কোন আদেশ প্রদানকালে নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনালের নাম, সিল ও পদবী ব্যবহারের কোন সুযোগ নেই। ... (প্যারা ৩০)

ধারা ১৬(৩) ২৯(১), ৫২(১), ১৫ক ও ২১ শিশু আইন, ২০১৩ঃ

সামগ্রিক অবস্থা বিবেচনায় আমাদের অভিমত এই যে, এ ধরনের বিভিন্নমূখী প্রবনতার মূল কারণ শিশু আইনের ধারা ১৫ক এবং ১৬(৩)-এর সংযোজন। কারণ ঐ দুইটি ধারা অনুযায়ী ম্যাজিষ্ট্রেট কর্তৃক অপরাধ আমলে গ্রহণের পর শিশু আদালতে মামলার নথি (কাগজাদি) প্রেরিত না হওয়া পর্যন্ত শিশু আদালত কোন অপরাধ বিচারার্থে গ্রহণ করতে পারবে না। আমরা ইতোমধ্যে আলোচনা করেছি যে, ট্রাইব্যুনালসমূহের মধ্যে এ সংশয় হয়তো কাজ করে যে, অপরাধ আমলে গ্রহণের পূর্বে শিশু আদালত হিসেবে এখতিয়ার প্রয়োগের কোন সুযোগ নেই। এ ধারনা একেবারে অবান্তর ও ভিত্তিহীন। কারণ আমরা যদি শিশু আইনের ধারা ২১, ২৯ ও ৫২-এর বিধানসমূহ লক্ষ্য করি তা হলে এটা সুস্পষ্ট হবে যে, বিদ্যমান আইনেই শিশু আদালতকে বিচার পূর্ববর্তী অবস্থায় অর্থাৎ অপরাধ আমলে গ্রহণের পূর্বে শিশুর বয়স, জামিন এবং হেফাজত সংক্রান্ত বিষয় নির্ধারণের ক্ষমতা দেয়া হয়েছে এবং একজন শিশুকে গ্রেফতার পরবর্তী ২৪(চব্বিশ) ঘন্টা সময়ের মধ্যে নিকটস্থ শিশু আদালতে উপস্থাপনের নির্দেশনা রয়েছে। ... (প্যারা ৩৩)

ম্যাজিষ্ট্রেট ও শিশু আদালতসমূহ কর্তৃক অনুসরণীয় নির্দেশনাঃ

সরকার কর্তৃক আইনের যথাযথ সংশোধণ বা স্পষ্টীকরন সম্পর্কে প্রজ্ঞাপন না হওয়া পর্যন্ত শিশুর সর্বোচ্চ স্বার্থ রক্ষার্থে সংশ্লিষ্ট ম্যাজিষ্ট্রেট ও শিশু আদালতসমূহ-কে নিম্নলিখিত কার্য পদ্ধতি/প্রনালী (**procedure**) অনুসরণে নির্দেশনা প্রদান করা যাচ্ছে-

এক. সংশ্লিষ্ট ম্যাজিষ্ট্রেট কেবল মাত্র মামলার তদন্ত কার্যক্রম তদারকী করবেন এবং এ সংক্রান্তে নিত্যনৈমিত্তিক (**routine work**) প্রয়োজনীয় আদেশ এবং নির্দেশনা প্রদান করবেন;

দুই. রিমান্ড সংক্রান্ত আদেশ শিশু আদালতেই নিষ্পত্তি হওয়া বাঞ্ছনীয়। তবে, আইনের সংস্পর্শে আসা শিশু (ভিকটিম এবং সাক্ষী) বা আইনের সাথে সংঘাতে জড়িত শিশুর জবানবন্দী সংশ্লিষ্ট ম্যাজিস্ট্রেট লিপিবদ্ধ করতে পারবেন;

তিন. তদন্ত চলাকালীন সময়ে আইনের সাথে সংঘাতে জড়িত শিশু-কে মামলার ধার্য তারিখে ম্যাজিষ্ট্রেট আদালতে হাজিরা হতে অব্যাহতি দেয়া যেতে পারে;

চার. তদন্ত চলাকালে আইনের সাথে সংঘাতে জড়িত শিশুর রিমান্ড, জামিন, বয়স নির্ধারণসহ অন্তবর্তী যে কোন বিষয় শিশু আদালত নিষ্পত্তি করবে এবং এ সংক্রান্ত যে কোন দরখাস্ত ম্যাজিষ্ট্রেট আদালতে দাখিল হলে সংশ্লিষ্ট ম্যাজিষ্ট্রেট নথিসহ ঐ দরখাস্ত সংশ্লিষ্ট শিশু আদালতে প্রেরণ করবেন; এবং সংশ্লিষ্ট শিশু আদালত ঐ বিষয়গুলি নিষ্পত্তি করবে;

পাঁচ. অপরাধ আমলে গ্রহণের পূর্বে নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল শিশু আইনের অধীনে কোন আদেশ প্রদানের ক্ষেত্রে 'শিশু আদালত' হিসেবে আদেশ প্রদান করবে এবং এ ক্ষেত্রে বিজ্ঞ বিচারক শিশু আদালতের বিচারক হিসেবে কার্য পরিচালনা এবং শিশু আদালতের নাম ও সিল ব্যবহার করবেন;

ছয়. আইনের সুপ্রতিষ্ঠিত নীতি হলো এই যে, আইন মন্দ (**bad law**) বা কঠোর (**harsh law**) হলেও তা অনুসরন করতে হবে, যতক্ষন পর্যন্ত তা সংশোধন বা বাতিল না হয়। সে কারণে নালিশী মামলার ক্ষেত্রে শিশু কর্তৃক বিশেষ আইনসমূহের অধীনে সংঘটিত অপরাধ সংশ্লিষ্ট বিশেষ আদালত বা ক্ষেত্রমত, ট্রাইব্যুনাল শিশু আইনের বিধান ও অত্র রায়ের পর্যবেক্ষণের আলোকে অভিযোগ (**complaint**) গ্রহণের পর প্রয়োজনীয় আইনি কার্যক্রম গ্রহণের পরে অপরাধ আমলে গ্রহণের বিষয়ে সিদ্ধান্ত গ্রহণের জন্য কাগজাদি (নথি) সংশ্লিষ্ট ম্যাজিস্ট্রেট এর নিকট প্রেরণ করবে; অত:পর ম্যাজিস্ট্রেট অপরাধ আমলে গ্রহনের বিষয়ে প্রয়োজনীয় আদেশ প্রদান এবং অপরাধ আমলে গ্রহণ করলে পরবর্তীতে কাগজাদি বিচারের জন্য শিশু আদালতে প্রেরন করবেন;

সাত. শিশু আইনের প্রাধান্যতার কারণে বিশেষ আইনসমূহের অধীনে জি.আর মামলার ক্ষেত্রে শিশু কর্তৃক সংঘটিত অপরাধ এর জন্য পৃথক পুলিশ রিপোর্ট দেয়ার বিধান থাকায় সংশ্লিষ্ট ম্যাজিস্ট্রেট পুলিশ রিপোর্ট এর উপর ভিত্তি করে অপরাধ আমলে গ্রহণ করবেন।

...(প্যারা ৩৫)

রায়

বিচারপতি এম. ইনায়েতুর রহিম

১. আপীলকারী আইনের সাথে সংঘাতে জড়িত একজন শিশু (children in conflict with the law)।

২. আপীলটি নারী ও শিশু নির্যাতন দমন আইন, ২০০০-এর ধারা ২৮ অনুযায়ী নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল নং-২, ঢাকা (পরবর্তীতে শুধু মাত্র ট্রাইব্যুনাল নং-২ হিসেবে উল্লেখিত হবে) কর্তৃক কলাবাগান থানার মামলা নং-২০(১০)২০১৮ দন্ডবিধি ধারা ১৪৩/১৪৭/১৪৮/৩২৩/৩২৪/৩২৫/৩২৬/ ৩০৭/৩৭৯/৩০২-এ জামিন না-মঞ্জুর আদেশে সংক্ষুব্ধ হয়ে দায়ের করা হয়েছিল।

৩. আপীলটি গ্রহণযোগ্যতার শুনানীকালে আদালত কর্তৃক নারী ও শিশু নির্যাতন দমন আইন ২০০০-এর ধারা ২৮ অনুযায়ী এর রক্ষণীয়তার বিষয়ে প্রশ্ন উত্থাপিত হলে আপীলকারীর বিজ্ঞ আইনজীবী আদালতের অনুমতিক্রমে আপীল দরখাস্তের (পিটিশন অফ আপীল) শিরোনাম (কজ টাইটেল) সংশোধনক্রমে ধারা ২৮, নারী ও শিশু নির্যাতন দমন আইন ২০০০-এর স্থলে ধারা-৪১, শিশু আইন-২০১৩ প্রতিস্থাপিত করেন; এবং আপীলটি শিশু আইন, ২০১৩-এর ধারা ৪১ অনুযায়ী দাখিল করা হয়েছে মর্মে গণ্য করা হয়।

৪. সংবাদদাতা মোঃ শফিক ইংরেজী ২৯/০৯/২০১৮ তারিখ সন্ধ্যায় লালবাগ থানায় সর্বমোট ১২(বার) জনের নাম উল্লেখ সহ অজ্ঞাত আরো ২০/২৫ জনের বিরুদ্ধে একটি এজাহার দায়ের করেন, যা লালবাগ থানার মামলা নং-২০ তারিখ ০৯/১০/২০১৮ ইং দন্ডবিধির ধারা-১৪৩/১৪৭/১৪৮/৩২৩/৩২৪/৩২৫/৩২৬/৩০৭ হিসেবে নিবন্ধিত হয়। পরবর্তীতে দন্ডবিধির ধারা ৩০২ সংযোজন করা হয়।

৫. এজাহারে উল্লেখ করা হয় যে, ইংরেজী ২৯/০৯/২০১৮ তারিখ দুপুর আনুমানিক ০২.৩০ ঘটিকার সময় লালবাগ থানাধীন দেলোয়ার হোসেন খেলার মাঠে শিশুদের ক্রিকেট খেলাকে কেন্দ্র করে সংবাদদাতার ভাই ওসমানসহ অপর তিন ভাইয়ের সাথে আসামী মোঃ আব্দুল্লা ওরফে দ্বীপ-এর ছোট ভাই মোঃ সাগর (১৩)-এর কথা কাটাকাটি ও হাতাহাতি হয়। এ ঘটনার জের হিসেবে ঐ দিন সন্ধ্যায় আসামী মোঃ আব্দুল্লা ওরফে দ্বীপসহ অন্যান্য আসামীরা সংবাদদাতার ভাই মোঃ ওসমান-কে রাস্তায় দেখতে পেয়ে লাঠি, হকিস্টিক, লোহার রড ও ধারালো চাকু নিয়ে আক্রমন করে এবং এলোপাতাড়ি ভাবে মারপিট ও আঘাত করে গুরুতর জখম করে। পথচারীরা ভিকটিম ওসমানকে উদ্ধার করে ঢাকা মেডিকেল কলেজ হাসপাতালে চিকিৎসার জন্য নিয়ে যায়।

৬. হাসপাতালে চিকিৎসাধীন থাকা অবস্থায় ১৪/১০/২০১৮ইং তারিখে ভিকটিম ওসমান মৃত্যুবরণ করে।

৭. আপীলকারী শিশু মোঃ হৃদয়কে পুলিশ ০৯/১০/২০১৮ইং তারিখে গ্রেফতার করে এবং তার বয়স ১৯ (উনিশ) উল্লেখ করে সংশ্লিষ্ট ম্যাজিস্ট্রেট আদালতে প্রেরন করে ও রিমান্ডে নেয়।

৮. পরবর্তীতে নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল নং-২, ঢাকা ২৩/৫/২০১৯ইং তারিখের আদেশে মোঃ হৃদয়ের বয়স নির্ধারন পূর্বক তাকে শিশু গণ্যে জামিন আবেদন না-মঞ্জুর করে জাতীয় কিশোর উন্নয়ন কেন্দ্র টঙ্গী, গাজীপুরে প্রেরন করে।

৯. ট্রাইব্যুনালের ২৩/০৫/২০১৯ইং তারিখে জামিন না-মঞ্জুর আদেশে সংক্ষুব্ধ হয়ে আইনের সাথে সংঘাতে জড়িত শিশু মোঃ হৃদয় বর্তমান আপীলটি দায়ের করে।

১০. নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল নং-২, ঢাকা কর্তৃক প্রদত্ত তর্কিত আদেশ ও অন্যান্য আদেশ হতে দৃশ্যমান যে, ট্রাইব্যুনাল মোঃ হৃদয়ের বয়স নির্ধারণ ও জামিন সংক্রান্ত বিষয়ে আদেশ প্রদান করতে গিয়ে শিশু আদালত হিসেবে আদেশ প্রদান না করে নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল হিসেবে আদেশ প্রদান করেছে।

১১. ২০১৮ সালে শিশু আইন, ২০১৩ সংশোধন করা হয়। ঐ সংশোধন অনুসারে নিম্নলিখিত বিধানগুলি সংযোজন করা হয়ঃ

> "২ (১৬ক) "ম্যাজিস্ট্রেট" অর্থ ফৌজদারী কার্যবিধির ধারা ৬ এর উপ-ধারা (৩) এ উল্লিখিত জুডিশিয়াল ম্যাজিস্ট্রেট বা মেট্রোপলিটন ম্যাজিস্ট্রেট যাহার অপরাধ আমলে গ্রহণ করিবার ক্ষমতা রহিয়াছে;

২ (১৮) 'শিশু আদালত' অর্থ ধারা ১৬ এ উল্লিখিত কোনো আদালত;

১৫। পুলিশ রিপোর্ট(investigation report) বা অনুসন্ধান প্রতিবেদন (inquiry report) বা তদন্ত প্রতিবেদন (enquiry report) পৃথকভাবে প্রস্তুত ও আমলে গ্রহণ।-(১) ফৌজদারি কার্যবিধি বা আপাতত বলবৎ অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, কোনো অপরাধ সংঘটনে প্রাপ্তবয়স্ক ব্যক্তি ও শিশু জড়িত থাকিলে, পুলিশ রিপোর্ট (জি.আর মামলার ক্ষেত্রে) বা ক্ষেত্রমত, অনুসন্ধান প্রতিবেদন (সি.আর মামলার ক্ষেত্রে) বা তদন্ত প্রতিবেদন প্রাপ্তবয়স্ক ব্যক্তি ও শিশুর জন্য পৃথকভাবে প্রস্তুত করিয়া দাখিল করিতে হইবে।
(২) ফৌজদারি কার্যবিধি বা আপাতত বলবৎ অন্য কোনো আইনে যাহা কিছুই থাকুক না কেন, প্রাপ্তবয়স্ক ব্যক্তি ও শিশু কর্তৃক একত্রে সংঘটিত কোনো অপরাধ আমলে গ্রহণের ক্ষেত্রে তাহাদের অপরাধ পৃথকভাবে আমলে গ্রহণ করিতে হইবে। (প্রতিস্থাপিত)

১৫ক। মামলা বিচারের জন্য প্রেরণ বা স্থানান্তর।- কোনো অপরাধ আমলে গ্রহণ করিবার পর, মামলাটি বিচারের জন্য প্রস্তুত করিয়া-
ক) শিশু কর্তৃক সংঘটিত অপরাধ বিচারের জন্য মামলাটি প্রয়োজনীয় কাগজাদিসহ শিশু আদালতে প্রেরণ করিতে হইবে;
খ) প্রাপ্তবয়স্ক ব্যক্তি কর্তৃক সংঘটিত অপরাধ বিচারের জন্য মামলাটি প্রয়োজনীয় কাগজাদিসহ এখতিয়ারসম্পন্ন আদালতে প্রেরণ করিতে হইবে; এবং
গ) দফা (ক) ও (খ) এর অধীন মামলা প্রেরণের বিষয়টি পাবলিক প্রসিকিউটরকে অবহিত করিতে হইবে।

১৬। শিশু আদালত।- (১) আইনের সহিত সংঘাত জড়িত শিশু কর্তৃক সংঘটিত যে কোনো অপরাধের বিচার করিবার জন্য, প্রত্যেক জেলা সদরে শিশু-আদালত নামে এক বা একাধিক আদালত থাকিবে।
(২) নারী ও শিশু নির্যাতন দমন আইন, ২০০০ (২০০০ সনের ৮ নং আইন) এর অধীন গঠিত প্রত্যেক নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল স্বীয় অধিক্ষেত্রে উপ-ধারা (১) এ উল্লিখিত শিশু আদালত হিসাবে গণ্য হইবেঃ
তবে শর্ত থাকে যে, কোনো জেলায় উক্ত রূপ কোনো ট্রাইব্যুনাল না থাকিলে উক্ত জেলার জেলা ও দায়রা জজ স্বীয় অধিক্ষেত্রে উপ-ধারা (১) এ উল্লিখিত শিশু আদালত হিসাবে গণ্য হইবে।
(৩) ধারা ১৫ক এর অধীন কোনো মামলা প্রেরিত না হইলে, শিশু-আদালত শিশু কর্তৃক সংঘটিত কোনো অপরাধ বিচারার্থে গ্রহণ করিবে না।"

১২. শিশু আইন,২০১৩-এ জামিন সংক্রান্ত বিধানসমূহ নিম্নরুপঃ
"২৯। শিশু-আদালত কর্তৃক আইনের সহিত সংঘাতে জড়িত শিশুর জামিনে মুক্তি প্রদান।- **(১) এই আইনসহ ফৌজদারী কার্যবিধি বা আপততঃ বলবৎ অন্য কোন আইনে ভিন্নরূপ যাহা কিছুই থাকুক না কেন,** শিশু-আদালতে হাজিরকৃত কোন শিশুর মামলা বিকল্প পন্থায় পরিচালনা করা না হইলে, শিশু আদালত সংশ্লিষ্ট শিশুকে, অপরাধটি জামিনযোগ্য বা অজামিনযোগ্য যাহাই হউক না কেন, জামানতসহ বা জামানত ছাড়াই জামিনে মুক্তি প্রদান করিতে পারিবে।
(২) শিশুর নিজের মুচলেকায় অথবা শিশুর মাতা-পিতা এবং তাহাদের উভয়ের অবর্তমানে তত্ত্বাবধানকারী অভিভাবক বা কর্তৃপক্ষ অথবা আইনানুগ বা বৈধ অভিভাবক বা, ক্ষেত্রমত, বর্ধিত পরিবারের সদস্য, প্রবেশন কর্মকর্তা অথবা কোন প্রতিষ্ঠান বা সংস্থার, শিশু-আদালত যাহাকে উপযুক্ত বিবেচনা করিবে, তত্ত্বাবধানে জামানত প্রদান সাপেক্ষে অথবা জামানত ছাড়া শিশুকে জামিন প্রদান করা যাইবে।
(৩) উপ-ধারা (১) এবং (২) এর অধীন জামিন মঞ্জুর করা না হইলে, শিশু আদালত উক্তরূপ নামঞ্জুরের কারণ লিপিবদ্ধ করিবে এবং সংশ্লিষ্ট শিশুকে কোন প্রত্যায়িত প্রতিষ্ঠানে প্রেরনের জন্য আদেশ প্রদান করিবে।

৫২। **জামিন, ইত্যাদি।- (১) ফৌজদারী কার্যবিধিসহ বা আপাততঃ বলবৎ অন্য কোন আইন বা এই আইনের অন্য কোন বিধানে ভিন্নরূপ যাহা কিছুই থাকুক না কেন, কোন শিশুকে গ্রেফতার করিবার পর এই** আইনের অধীন মুক্তি প্রদান বা বিকল্প পন্থায় প্রেরণ করা অথবা তাৎক্ষণিকভাবে আদালতে হাজির করা সম্ভবপর না হইলে শিশুবিষয়ক পুলিশ কর্মকর্তা শিশুটিকে, ক্ষেত্রমত, তাহার মাতা-পিতা এবং তাহাদের উভয়ের অবর্তমানে তত্ত্বাবধানকারী অভিভাবক বা কর্তৃপক্ষ অথবা আইনানুগ বা বৈধ অভিভাবক বা,

ক্ষেত্রমত, বর্ধিত পরিবারের সদস্য বা প্রবেশন কর্মকর্তার তত্ত্বাবধানে শর্ত ও জামানত সাপেক্ষে, অথবা, শর্ত ও জামানত ব্যতীত জামিনে মুক্তি প্রদান করিতে পারিবেন।

(২) উপ-ধারা (১) এর অধীন কোন শিশুকে জামিনে মুক্তি প্রদানের ক্ষেত্রে সংশ্লিষ্ট অপরাধ জামিনযোগ্য বা জামিন অযোগ্য কি না তাহা শিশুবিষয়ক পুলিশ কর্মকর্তা বিবেচনায় লইবেন না।

(৩) উপ-ধারা (২) এ যাহা কিছুই থাকুক না কেন, অপরাধের প্রকৃতি গুরুতর বা ঘৃণ্য প্রকৃতির হইলে বা জামিন প্রদান করা হইলে উহা শিশুর সর্বোত্তম স্বার্থের পরিপন্থী হইলে বা জামিন প্রদান করা হইলে সংশ্লিষ্ট শিশু কোন কুখ্যাত অপরাধীর সাহচর্য লাভ করিতে পারে বা নৈতিক বিপদের সম্মুখীন হইতে পারে বা জামিন প্রদান করা হইলে ন্যায় বিচারের উদ্দেশ্য ব্যাহত হইবার আশঙ্কা থাকিলে শিশুবিষয়ক পুলিশ কর্মকর্তা সংশ্লিষ্ট শিশুকে জামিন বা মুক্তি প্রদান করিবেন না।

(৪) গ্রেফতারকৃত শিশুকে উপ-ধারা (৩) এর অধীন জামিনে মুক্তি প্রদান করা না হইলে শিশুবিষয়ক পুলিশ কর্মকর্তা, গ্রেফতারের পর আদালতে উপস্থাপনের জন্য প্রয়োজনীয় ভ্রমণ সময় ব্যতীত, ২৪ (চব্বিশ) ঘন্টার মধ্যে সংশ্লিষ্ট শিশুকে নিকটস্থ শিশু-আদালতে হাজির করিবার ব্যবস্থা গ্রহণ করিবেন।

(৫) **থানা হইতে জামিনপ্রাপ্ত হয় নাই এমন কোন শিশুকে শিশু-আদালতে উপস্থাপন করা হইলে শিশু-আদালত তাহাকে জামিন প্রদান করিবে বা নিরাপদ স্থানে বা শিশু উন্নয়ন কেন্দ্রে আটক রাখিবার আদেশ প্রদান করিবেন।"**

১৩. শিশু আইন ২০১৩-এর ধারা ১৬(১) অনুযায়ী আইনের সাথে সংঘাতে জড়িত শিশু কর্তৃক সংঘটিত কোন অপরাধ বিচার করার জন্য প্রত্যেক জেলায় শিশু আদালত নামে এক বা একাধিক আদালত স্থাপনের বিধান করা হয়েছে। আইনের ১৬(২) ধারা অনুযায়ী নারী ও শিশু নির্যাতন দমন আইন, ২০০০-এর অধীন গঠিত প্রত্যেক নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল স্বীয় অধিক্ষেত্রে শিশু আদালত হিসেবে গণ্য হবে। কোন জেলায় ট্রাইব্যুনাল না থাকলে জেলা ও দায়রা জজ শিশু আদালত হিসেবে গণ্য হবে।

১৪. বর্তমান মামলায় ট্রাইব্যুনাল নং-২ এর বিজ্ঞ বিচারক আপীলকারীর বয়স নির্ধারন ও জামিন সংক্রান্ত বিষয় নিষ্পত্তি করতে গিয়ে শিশু আইনে প্রদত্ত ক্ষমতা প্রয়োগ করেছেন অপরাধ আমলে গ্রহণের পূর্বে, অর্থাৎ বিজ্ঞ বিচারক শিশু আদালত হিসেবে কার্য সম্পাদন বা ক্ষমতা প্রয়োগ করেছেন।

১৫. সে জন্য সংগত কারণেই বর্তমান মামলায় প্রশ্ন উঠেছে যে-

প্রথমতঃ শিশু আইনের অধীনে মামলার কার্যক্রম পরিচালনায় নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল এর নাম, সিল ও বিচারকের পদবী ব্যবহার সঠিক হয়েছে কিনা;

দ্বিতীয়তঃ আইনের ধারা ১৫ক এর বিধান অনুযায়ী ম্যাজিস্ট্রেট কর্তৃক অপরাধ আমলে গ্রহণ করে শিশু আদালতে কাগজাদি প্রেরনের পূর্বে শিশু আদালতের জামিন বা বয়স নির্ধারণ সহ অন্যান্য আনুষাঙ্গিক বিষয়ে আদেশ দেয়ার এবং শিশু আদালত হিসেবে ক্ষমতা প্রয়োগের এখতিয়ার আছে কিনা; এবং

তৃতীয়তঃ শিশু আইনের ধারা ১৫ক অনুযায়ী সংশ্লিষ্ট ম্যাজিস্ট্রেট কর্তৃক অপরাধ আমলে গ্রহণের পূর্বে ধারা ২৯(১) এবং ধারা ৫২(১) অনুযায়ী শিশু আদালত কর্তৃক জামিন এবং ধারা ২১ অনুযায়ী শিশু আদালত কর্তৃক শিশুর বয়স সম্পর্কিত বিষয় নিষ্পত্তির এখতিয়ার কতটুকু আইন সংগত।

১৬. **শিশু আইনের ধারা ৫২(৪)-এ বিধান করা হয়েছে যে, ফৌজদারী কার্যবিধিসহ আপাততঃ বলবৎ অন্য কোন আইন বা এই আইনের অন্য বিধানের ভিন্নরূপ যা কিছুই থাকুক না কেন** কোন শিশুকে গ্রেফতারের পরে শিশু বিষয়ক পুলিশ কর্মকর্তা ধারা ৫২(১) অনুসারে শিশুটিকে, ক্ষেত্রমত তাহার মাতা-পিতা এবং তাদের উভয়ের অবর্তমানে তত্ত্বাবধানকারী অভিভাবক বা কর্তৃপক্ষ অথবা আইনানুগ বা বৈধ অভিভাবক বা ক্ষেত্রমত, বর্ধিত পরিবারের সদস্য বা প্রবেশন কর্মকর্তার তত্ত্বাবধানে শর্ত ও জামানত সাপেক্ষে জামিনে মুক্তি প্রদান না করলে উক্ত শিশু বিষয়ক পুলিশ কর্মকর্তা শিশুটিকে গ্রেফতারের পর আদালতে উপস্থাপনের জন্য প্রয়োজনীয় ভ্রমন সময় ব্যতীত ২৪(চব্বিশ) ঘন্টার মধ্যে নিকটস্থ শিশু আদালতে হাজির করবেন।

১৭. ধারা ৫২(৫) অনুযায়ী শিশু আদালতে উপস্থাপিত বা হাজিরকৃত শিশুটিকে জামিন প্রদান করা না হলে শিশু আদালত উক্ত শিশুকে নিরাপদ স্থান বা শিশু উন্নয়ন কেন্দ্রে আটক রাখার আদেশ প্রদান করতে পারবে।

১৮. এখানে উল্লেখ করা প্রাসঙ্গিক হবে যে, শিশু আইন,২০১৩-এ আইনের সাথে সংঘাতে জড়িত শিশুকে তদন্তের স্বার্থে রিমান্ডে নেয়া যায় কিনা সে বিষয়ে সুনির্দিষ্ট কোন বিধান নেই। সুনির্দিষ্ট বিধানের অনুপস্থিতিতে শিশু আইনের ধারা ৪২ অনুযায়ী ফৌজদারী কার্যবিধি প্রযোজ্য হবে। তবে প্রশ্ন, রিমান্ডের বিষয়ে রাষ্ট্রপক্ষের আবেদন কোন্ আদালত নিষ্পত্তি করবে; শিশু

আদালত, নাকি ম্যাজিস্ট্রেট আদালত? এটা অবাস্তব মনে হয় যে, জামিন আবেদন নিষ্পত্তির এখতিয়ার যেখানে শুধুমাত্র শিশু আদালতেরই সেখানে রিমান্ড বিষয়ে ঐ আদালতের এখতিয়ার সুস্পষ্ট নয়।

১৯. শিশু আইনের ধারা ১৬(৩)-এ উল্লেখ করা হয়েছে যে, ধারা ১৫ক অনুযায়ী কোন মামলা প্রেরিত না হলে, শিশু আদালত শিশু কর্তৃক সংঘটিত কোন অপরাধ বিচারার্থে গ্রহণ করবে না।

২০. শিশু আইনে সংযোজিত নতুন ধারা ২(১৬ক) এবং ১৫ক এর মাধ্যমে শিশুর বিরুদ্ধে অপরাধ আমলে নেয়ার পূর্ব ও পরবর্তী বিধান সুনির্দিষ্ট করার প্রয়াস বা উদ্যোগ নেয়া হয়েছে।

২১. শিশু আইনের ধারা ২(১৬ক) এবং ১৫ক একত্রে পাঠে এটাই প্রতিয়মান হয় যে, শিশু আইনের অধীন অপরাধ আমলে নেয়ার ক্ষমতা শুধুমাত্র ফৌজদারী কার্যবিধির ধারা ৬-এর উপ-ধারা (৩) এ উল্লিখিত 'জুডিশিয়াল ম্যাজিস্ট্রেট' বা 'মেট্রোপলিটন ম্যাজিস্ট্রেটের' উপর ন্যাস্ত করা হয়েছে। কিন্তু আমরা যদি দেশে বিদ্যমান বিভিন্ন বিশেষ আইনসমূহ, যথা-বিশেষ ক্ষমতা আইন ১৯৭৪, নারী ও শিশু নির্যাতন দমন আইন ২০০০, ডিজিটাল নিরাপত্তা আইন,২০১৮ সহ বিভিন্ন বিশেষ আইন পরীক্ষা করি তা হলে দেখতে পাবো যে, ঐ সমস্ত আইনের অধীন সংঘটিত অপরাধ আমলে নেয়ার এখতিয়ার বা ক্ষমতা শুধুমাত্র ঐ সকল বিশেষ আইনের অধীনে গঠিত আদালত বা ক্ষেত্রমত, ট্রাইব্যুনাল-কে দেয়া হয়েছে। বিশেষ ঐ সকল আইনের অধীনে সংঘটিত অপরাধসমূহ আমলে নেয়ার এখতিয়ার বা ক্ষমতা ম্যাজিস্ট্রেট্রের নেই। সে কারণে এটা খুবই গুরুত্বপূর্ন প্রশ্ন হিসেবে দেখা দিয়েছে যে, কোন শিশু যদি উপরোক্ত বিশেষ আইনসমূহ সহ অন্যান্য বিশেষ আইনের অধীন অপরাধ সংঘটিত করে, বিশেষতঃ নালিশী মামলার ক্ষেত্রে, তাহলেও কি ঐ সকল আইনের অধীনে গঠিত বিশেষ আদালত বা ক্ষেত্রমত, ট্রাইব্যুনাল কোন শিশুর বিরুদ্ধে বিচারের জন্য অপরাধ আমলে গ্রহণ না করে মামলার কাগজাদি (নথি) সংশ্লিষ্ট ম্যাজিস্ট্রেটের নিকট প্রেরণ করবে, যেহেতু শিশু'র বিচারের ক্ষেত্রে শিশু আইনকে অন্যান্য আইনের উপর প্রাধান্য দেয়া হয়েছে। আমাদের বলতে দ্বিধা নেই যে, শিশু আইনের ধারা ১৫ক-এর বিধান বিশেষ ক্ষমতা আইন ১৯৭৪ এর ধারা ২৭, নারী ও শিশু নির্যাতন দমন আইন,২০০০-এর ধারা ২৭, এবং ডিজিটাল নিরাপত্তা আইন,২০১৮ এর ধারা ৪৮-সহ বিভিন্ন বিশেষ আইনের সাথে শুধু অসংগতিপূর্ণ নয়, সাংঘর্ষিকও বটে।

২২. শিশু আইনের প্রাধান্যতার কারণে যদি যুক্তি দেয়া হয় যে, থানায় দায়েরকৃত মামলা অর্থাৎ জি.আর মামলার ক্ষেত্রে সংশ্লিষ্ট ম্যাজিস্ট্রেট অপরাধ আমলে গ্রহণ করবেন তাহলে সেটা হবে শিশু আইন প্রনয়নের লক্ষ্য ও উদ্দেশ্যের পরিপন্থী। শুধু তাই নয়, একই আইনের অধীনে শিশুর বিরুদ্ধে অপরাধ আমলে গ্রহন করবেন ম্যাজিষ্ট্রেট, আর প্রাপ্ত বয়স্কদের বিরুদ্ধে অপরাধ আমলে গ্রহণ করবে সংশ্লিষ্ট ট্রাইব্যুনাল বা ক্ষেত্রমত, আদালত, যা বাস্তবতা বিবর্জিত (impractical) এবং অদ্ভুত বা অস্বাভাবিক(peculiar) একটি প্রস্তাবনা (proposition)।

২৩. অপর একটি প্রশ্ন হলো এই যে, বিশেষ আইনসমূহের অধীনে দায়েরকৃত নালিশী মামলায় শিশু কর্তৃক সংঘঠিত অপরাধ কে আমলে গ্রহণ করবে এবং এর পদ্ধতি ও প্রক্রিয়া কি হবে? এ ক্ষেত্রে ট্রাইব্যুনাল বা ক্ষেত্রমত, বিশেষ আদালত অভিযোগ (petition of complain)-টি গ্রহন করে আইনের আনুসাঙ্গিক বিধান প্রতিপালনের পরে শুধুমাত্র অপরাধ আমলে গ্রহণের বিষয়টি বিবেচনা এবং নিষ্পত্তির জন্য মামলার কাগজাদি কি সংশ্লিষ্ট ম্যাজিস্ট্রেটের নিকট প্রেরণ করবে? যদি তাই করতে হয় তা হলে আবারো বলতে দ্বিধা নেই যে, এটাও একটি অবাস্তব এবং অদ্ভুত প্রস্তাবনা (proposition)।

২৪. উল্লিখিত বিষয়গুলি বিবেচনায় নিয়ে আমাদের সুচিন্তিত অভিমত যে, শিশু আইনের ধারা ২(১৬ক)-এ উল্লিখিত 'ম্যাজিস্ট্রেট' অর্থ ফৌজদারী কার্যবিধির ধারা ৬-এর উপ-ধারা (৩)-এ উল্লিখিত জুডিশিয়াল ম্যাজিস্ট্রেট ও মেট্রোপলিটন ম্যাজিস্ট্রেট যার অপরাধ আমলে গ্রহণ করবার ক্ষমতা রয়েছে এর পাশাপাশি 'সংশ্লিষ্ট বিশেষ আদালত বা ক্ষেত্রমত, ট্রাইব্যুনাল' যোগ করা অত্যান্ত জরুরী এবং তা হবে বাস্তবসম্মত। এ সংশোধন না হলে বিশেষ আদালত বা ট্রাইব্যুনালসমূহকে মামলার নথি, বিশেষত: নালিশী মামলার ক্ষেত্রে অপরাধ আমলে নেয়ার বিষয়টি নিষ্পত্তির জন্য সংশ্লিষ্ট ম্যাজিস্ট্রেটের নিকট পাঠাতে হবে এবং ম্যাজিস্ট্রেট যদি শিশুর বিরুদ্ধে অপরাধ আমলে গ্রহণ করেন তৎপরিবর্তিতে সংশ্লিষ্ট নথি বা কাগজাদি তিনি আবারো শিশু আদালতে বিচারের জন্য পাঠাবেন। এক্ষেত্রে, আইন সংশোধনের মাধ্যমে কেবল মাত্র উপরোক্ত জটিল ও অবাস্তব (impractical) প্রক্রিয়া বা কার্যপ্রনালী (proceedure) এড়ানো সম্ভব হবে।

২৫. আমাদের অভিজ্ঞতা বলছে যে, ধারা ১৫ক-এর কারণে শিশু আদালতের বিজ্ঞ বিচারকের মধ্যে এক ধরনের সংশয় ও বিভ্রান্তি কাজ করছে যে, যেহেতু ধারা ১৫ক-অনুযায়ী শিশু আদালতের অপরাধ আমলে গ্রহন করার এখতিয়ার নেই, সেহেতু বিচার শুরু হওয়ার পূর্বে শিশুর জামিন, বয়স কিংবা রিমান্ড বিষয়ে 'শিশু আদালত' হিসেবে আদেশ প্রদান যুক্তি সংগত নয়। সে কারণে আমাদের কাছে আরো প্রতীয়মান হয়েছে যে, অপরাধ আমলে গ্রহণের পূর্বে শিশু সংক্রান্ত বিষয়ে শিশু আদালতসমূহ

বিভিন্ন ধরনের আদেশ প্রদান করলেও বিজ্ঞ বিচারকগণ শিশু আদালত হিসেবে ক্ষমতা প্রয়োগে দ্বিধাগ্রস্থ। এ বিষয়ে আমাদের সুচিন্তিত অভিমত হলো এই যে, আমরা যদি শিশু আইনের ধারা ২৯(১) ও ৫২(১) নিবিড় ভাবে পর্যালোচনা করি তা হলে এটা সহজেই অনুধাবনযোগ্য হবে যে, আইনের উপরোক্ত বিধান দু'টিকে ফৌজদারী কার্যবিধিসহ বা আপাতত: বলবৎ অন্য কোন আইন বা শিশু আইনের অন্য কোন বিধানে ভিন্নরুপ যা কিছুই থাকুক না কেন, তা থেকে প্রাধান্য দেয়া হয়েছে। অর্থাৎ ধারা ১৫ক-এর বিধানে যাই থাকুক না কেন শিশু আইনের ধারা ২৯(১) ও ৫২(১) বিধানের প্রাধান্যতা অক্ষুন্ন থাকবে।

২৬. এই প্রাধান্যতার কারণে অপরাধ আমলে গ্রহনের পূর্বেই শিশুর জামিন, হেফাজত বা ধারা ২১ অনুসারে বয়স নির্ধারনে শিশু আদালত-কে নিরঙ্কুশ ক্ষমতা দেয়া হয়েছে, সুতরাং এ সংশয় বা বিভ্রান্তি থাকার কোন যুক্তি বা ভিত্তি নেই যে, ধারা ১৫ক অনুযায়ী অপরাধ আমলে গ্রহণ পূর্বক কাগজাদি শিশু আদালতে প্রেরণের পূর্বে শিশু আদালতের ক্ষমতা প্রয়োগের কোন এখতিয়ার নেই। আমাদের বিবেচনায় এ ক্ষেত্রে আইনের বিধান খুবই স্বচ্ছ ও সুস্পষ্ট।

২৭. **তবে প্রাসঙ্গিকভাবে আরো কিছু প্রশ্ন এসে যায়, যথাঃ**

এক. বিচার পূর্ববর্তী অবস্থায় শিশু আদালত যদি শিশুর বয়স নির্ধারণ, জামিন সংক্রান্ত বিষয় সহ আনুষাঙ্গিক বিষয়ে আদেশ প্রদানে এখতিয়ারবান অর্থাৎ ক্ষমতাপ্রাপ্ত হয়ে থাকে তা হলে ধারা ১৫ক অনুসারে সংশ্লিষ্ট ম্যাজিস্ট্রেটের ভূমিকা কি শুধুমাত্র অপরাধ আমলে গ্রহণের মধ্যে সীমাবদ্ধ থাকবে;

দুই. অপরাধ আমলে গ্রহণের পূর্বে তদন্তকালীন সময়ে মামলার প্রতি ধার্য তারিখে আইনের সাথে সংঘাতে জড়িত শিশুকে কি অন্যান্য মামলার আসামীদের মতো ম্যাজিস্ট্রেট আদালতে হাজির করতে হবে;

তিন. তদন্তের স্বার্থে ম্যাজিস্ট্রেট কর্তৃক আদেশ প্রদানের ক্ষমতা কতটুকু বিস্তৃত; এবং

চার. শিশুর রিমান্ড আবেদন কোন্ আদালত নিষ্পত্তি করবে।

২৮. শিশু আইন-২০১৩ প্রনয়নের মূল লক্ষ্যই ছিল আইনের সাথে সংঘাতে জড়িত শিশু এবং আইনের সংস্পর্শে আসা শিশু (ভিকটিম এবং সাক্ষী)-দের সর্বোত্তম স্বার্থ সংরক্ষণ করা। সে কারণে শিশু আদালত কক্ষের ধরন, সাজ-সজ্জা ও আসন বিন্যাস বিধি দ্বারা নির্ধারণ করার কথা আইনে উল্লেখিত হয়েছে (ধারা ১৯), যাতে করে আদালতে শিশুবান্ধব পরিবেশ নিশ্চিত করা যায়। এ সত্য অস্বীকার করা যাবে না যে, দেশের শিশু আদালতসমূহে এখন পর্যন্ত শিশু বান্ধব পরিবেশ সৃষ্টি করা সম্ভব হয়নি। সেক্ষেত্রে শিশু আদালতের বাহিরে ম্যাজিস্ট্রেট আদালতসমূহে এই মূহূর্তে শিশু বান্ধব পরিবেশ তৈরী করা নিঃসন্দেহে একটা বড় চ্যালেঞ্জ।

২৯. **এটা বাস্তবতা যে, শিশু আইন ২০১৩-এ ধারা ২(১৬ক), ১৫ক এবং ১৬(৩) সংযোজিত হওয়ায় বিভিন্ন ধরনের সংশয়, বিভ্রান্তি এবং সাংঘর্ষিক অবস্থার সৃষ্টি হয়েছে। সে কারণে শিশুদের সর্বোচ্চ স্বার্থ নিশ্চিতের লক্ষ্যে সৃষ্ট সংশয়, বিভ্রান্তি ও অসংগতি দূর করা অতি জরুরী।**

৩০. এখানে উল্লেখ করা আরো প্রাসঙ্গিক হবে যে, শিশু আইনের অধীনে কোন আদেশ প্রদানকালে নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনালের নাম, সিল ও পদবী ব্যবহারের কোন সুযোগ নেই। আমরা লক্ষ্য করছি যে, বিচার পূর্বকালীন সময়ে বিভিন্ন আদেশ প্রদানকালে নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল-এর নাম, সিল ব্যবহার করা হচ্ছে। বিজ্ঞ বিচারকগণ ট্রাইব্যুনালের বিচারক হিসেবে আদেশে স্বাক্ষর করছেন, যা বর্তমান মামলার ক্ষেত্রেও হয়েছে। ফলে, সংক্ষুব্ধ পক্ষের উচ্চতর আদালতে আসার ক্ষেত্রে এখতিয়ার নিয়েও জটিলতা সৃষ্টি হচ্ছে।

৩১. নারী ও শিশু নির্যাতন দমন আইন, ২০০০ অনুযায়ী ট্রাইব্যুনাল কর্তৃক যে কোন আদেশ বা রায় ২৮ ধারা অনুযায়ী হাইকোর্ট বিভাগে আপীলযোগ্য। কোন ট্রাইব্যুনাল যদি শিশু আইনের অধীনে কোন আদেশ প্রদান করে তাহলে কোন কোন ক্ষেত্রে দেখা যাচ্ছে যে সংক্ষুব্ধ পক্ষ নারী ও শিশু নির্যাতন দমন আইনের ধারা ২৮ অনুযায়ী আপীল করছেন; এবং কেউ শিশু আইনের ধারা ৪১ অনুযায়ী আপীল করছেন। আবার এটাও লক্ষ্য করা যাচ্ছে যে, ট্রাইব্যুনাল কর্তৃক শিশুর জামিন না-মঞ্জুর আদেশের বিরুদ্ধে ফৌজদারী কার্যবিধির ধারা ৪৯৮ অনুসারে হাইকোর্ট বিভাগে জামিনের দরখাস্ত করা হচ্ছে।

৩২. **দৈনন্দিন বিচারিক কাজের অভিজ্ঞতার আলোকে এ কথা উচ্চারণে আমাদের দ্বিধা নেই যে, শিশু আইন ও আদালত নিয়ে বর্তমানে নিম্ন আদালত ও হাইকোর্ট বিভাগে এক ধরনের বিচারিক বিশৃঙ্খলা বিরাজ করছে।**

৩৩. সামগ্রিক অবস্থা বিবেচনায় আমাদের অভিমত এই যে, এ ধরনের বিভিন্নমূখী প্রবনতার মূল কারণ শিশু আইনের ধারা ১৫ক এবং ১৬(৩)-এর সংযোজন। কারণ ঐ দুইটি ধারা অনুযায়ী ম্যাজিস্ট্রেট কর্তৃক অপরাধ আমলে গ্রহণের পর শিশু আদালতে মামলার নথি (কাগজাদি) প্রেরিত না হওয়া পর্যন্ত শিশু আদালত কোন অপরাধ বিচারার্থে গ্রহণ করতে পারবে না। আমরা ইতোমধ্যে আলোচনা করেছি যে, ট্রাইব্যুনালসমূহের মধ্যে এ সংশয় হয়তো কাজ করে যে, অপরাধ আমলে গ্রহণের পূর্বে শিশু আদালত হিসেবে এখতিয়ার প্রয়োগের কোন সুযোগ নেই। এ ধারনা একেবারে অবান্তর ও ভিত্তিহীন। কারণ আমরা যদি শিশু

আইনের ধারা ২১, ২৯ ও ৫২-এর বিধানসমূহ লক্ষ্য করি তা হলে এটা সুস্পষ্ট হবে যে, বিদ্যমান আইনেই শিশু আদালতকে বিচার পূর্ববর্তী অবস্থায় অর্থাৎ অপরাধ আমলে গ্রহণের পূর্বে শিশুর বয়স, জামিন এবং হেফাজত সংক্রান্ত বিষয় নির্ধারণের ক্ষমতা দেয়া হয়েছে এবং একজন শিশুকে গ্রেফতার পরবর্তী ২৪(চব্বিশ) ঘন্টা সময়ের মধ্যে নিকটস্থ শিশু আদালতে উপস্থাপনের নির্দেশনা রয়েছে।

৩৪. উপরোক্ত আলোচনা এবং সার্বিক অবস্থা বিবেচনায় আদালতের সুচিন্তিত, পর্যবেক্ষণ ও অভিমত এই যে, শিশু আইনে সাংঘর্ষিক অবস্থা, বিদ্যমান অসংগতি, অস্পষ্টতা ও বিভ্রান্তি অবিলম্বে দূর করা প্রয়োজন; এবং আদালত এটাও প্রত্যাশা করছে যে, এ লক্ষ্যে সরকার দ্রুততার সাথে স্বল্পতম সময়ের মধ্যে প্রয়োজনীয় পদক্ষেপ গ্রহণ করবে। সরকার শিশু আইন সংশোধন অথবা শিশু আইন ২০১৩-এর ধারা ৯৭-এর বিধান মূলে গেজেটে প্রজ্ঞাপন দ্বারা অস্পষ্টতা ও অসংগতি দূর করতে পারে।

৩৫. **সরকার কর্তৃক আইনের যথাযথ সংশোধণ বা স্পষ্টীকরন সম্পর্কে প্রজ্ঞাপন না হওয়া পর্যন্ত শিশুর সর্বোচ্চ স্বার্থ রক্ষার্থে সংশ্লিষ্ট ম্যাজিষ্ট্রেট ও শিশু আদালতসমূহ-কে নিম্নলিখিত কার্য পদ্ধতি/প্রনালী** (procedure) **অনুসরণে নির্দেশনা প্রদান করা যাচ্ছে-**

এক. সংশ্লিষ্ট ম্যাজিষ্ট্রেট কেবল মাত্র মামলার তদন্ত কার্যক্রম তদারকী করবেন এবং এ সংক্রান্তে নিত্যনৈমিত্তিক (routine work) প্রয়োজনীয় আদেশ এবং নির্দেশনা প্রদান করবেন;

দুই. রিমান্ড সংক্রান্ত আদেশ শিশু আদালতেই নিষ্পত্তি হওয়া বাঞ্ছনীয়। তবে, আইনের সংস্পর্শে আসা শিশু (ভিকটিম এবং সাক্ষী) বা আইনের সাথে সংঘাতে জড়িত শিশুর জবানবন্দী সংশ্লিষ্ট ম্যাজিস্ট্রেট লিপিবদ্ধ করতে পারবেন;

তিন. তদন্ত চলাকালীন সময়ে আইনের সাথে সংঘাতে জড়িত শিশু-কে মামলার ধার্য তারিখে ম্যাজিষ্ট্রেট আদালতে হাজিরা হতে অব্যাহতি দেয়া যেতে পারে;

চার. তদন্ত চলাকালে আইনের সাথে সংঘাতে জড়িত শিশুর রিমান্ড, জামিন, বয়স নির্ধারণসহ অন্তবর্তী যে কোন বিষয় শিশু আদালত নিষ্পত্তি করবে এবং এ সংক্রান্ত যে কোন দরখাস্ত ম্যাজিষ্ট্রেট আদালতে দাখিল হলে সংশ্লিষ্ট ম্যাজিষ্ট্রেট নথিসহ ঐ দরখাস্ত সংশ্লিষ্ট শিশু আদালতে প্রেরণ করবেন; এবং সংশ্লিষ্ট শিশু আদালত ঐ বিষয়গুলি নিষ্পত্তি করবে;

পাঁচ. অপরাধ আমলে গ্রহণের পূর্বে নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল শিশু আইনের অধীনে কোন আদেশ প্রদানের ক্ষেত্রে 'শিশু আদালত' হিসেবে আদেশ প্রদান করবে এবং এ ক্ষেত্রে বিজ্ঞ বিচারক শিশু আদালতের বিচারক হিসেবে কার্য পরিচালনা এবং শিশু আদালতের নাম ও সিল ব্যবহার করবেন;

ছয়. আইনের সুপ্রতিষ্ঠিত নীতি হলো এই যে, আইন মন্দ (bad law) বা কঠোর (harsh law) হলেও তা অনুসরন করতে হবে, যতক্ষন পর্যন্ত তা সংশোধন বা বাতিল না হয়। সে কারণে নালিশী মামলার ক্ষেত্রে শিশু কর্তৃক বিশেষ আইনসমূহের অধীনে সংঘটিত অপরাধ সংশ্লিষ্ট বিশেষ আদালত বা ক্ষেত্রমত, ট্রাইব্যুনাল শিশু আইনের বিধান ও অত্র রায়ের পর্যবেক্ষণের আলোকে অভিযোগ (complaint) গ্রহণের পর প্রয়োজনীয় আইনি কার্যক্রম গ্রহণের পরে অপরাধ আমলে গ্রহণের বিষয়ে সিদ্ধান্ত গ্রহণের জন্য কাগজাদি (নথি) সংশ্লিষ্ট ম্যাজিস্ট্রেট এর নিকট প্রেরণ করবে; অত:পর ম্যাজিস্ট্রেট অপরাধ আমলে গ্রহনের বিষয়ে প্রয়োজনীয় আদেশ প্রদান এবং অপরাধ আমলে গ্রহণ করলে পরবর্তীতে কাগজাদি বিচারের জন্য শিশু আদালতে প্রেরন করবেন;

সাত. শিশু আইনের প্রাধান্যতার কারণে বিশেষ আইনসমূহের অধীনে জি.আর মামলার ক্ষেত্রে শিশু কর্তৃক সংঘটিত অপরাধ এর জন্য পৃথক পুলিশ রিপোর্ট দেয়ার বিধান থাকায় সংশ্লিষ্ট ম্যাজিস্ট্রেট পুলিশ রিপোর্ট এর উপর ভিত্তি করে অপরাধ আমলে গ্রহণ করবেন।

৩৬. বর্তমান মামলায় আপীলকারী একজন শিশু, এজাহারে ১২ জনের নাম উল্লেখ থাকলেও আপীলকারীর নাম উল্লেখ নেই এবং সহ-আসামীদের স্বীকারোক্তিমূলক জবানবন্দীসমূহে আপীলকারীর বিরুদ্ধে অভিযোগ সুনির্দিষ্ট নয়। উপরোক্ত বিষয়গুলি বিবেচনায় নিয়ে রাষ্ট্রপক্ষের আপত্তি সত্ত্বেও আপীলকারীকে জামিন প্রদান করা ন্যায় সংগত হবে।

৩৭. অতএব, বর্তমান আপীলটি রায়ে উল্লেখিত পর্যবেক্ষন, অভিমত ও নির্দেশনা-সহ মঞ্জুর করা হলো।

৩৮. আপীলকারী **মোঃ হৃদয়**-কে শিশু আদালত-২ (নারী ও শিশু নির্যাতন দমন ট্রাইব্যুনাল নং-২) এর বিজ্ঞ বিচারকের সন্তুষ্টি সাপেক্ষে জামিননামা (Bail Bond) সম্পাদনের শর্তে জামিন প্রদান করা হলো।

৩৯. আপীলকারী কর্তৃক অন্তবর্তীকালীন জামিনের সুবিধা অপব্যবহারের অভিযোগ প্রমাণিত হলে সংশ্লিষ্ট আদালত আইনের নির্ধারিত নিয়মে জামিন বাতিল করতে পারবে।

৪০. এই রায় ও আদেশের কপি প্রয়োজনীয় অবগতি ও ব্যবস্থা গ্রহণের জন্য সংশ্লিষ্ট আদালত/ট্রাইব্যুনাল-সহ ১। সচিব, সমাজকল্যাণ মন্ত্রণালয়, ২। সচিব, আইন ও বিচার বিভাগ, আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়, এবং ৩। রেজিস্ট্রার জেনারেল, বাংলাদেশ সুপ্রীম কোর্ট-এর নিকট অবিলম্বে প্রেরণ করা হোক।

15 SCOB [2021] HCD 21

HIGH COURT DIVISION

(Special Original Jurisdiction)
WRIT PETITION NO. 13133 OF 2015

Md. Lutfor Rahman and others
…..PETITIONERS
-Versus-
Govt. of Bangladesh, represented by the Secretary, Ministry of Housing and Public Works, Bangladesh Secretariat, Ramna, Dhaka and others.
….RESPONDENTS

Mr. Md. Bazlur Rashid, Advocate
.... For the Petitioners

Mr. Md. Mokleshur Rahman,
... For the Respondent No. 1.

Heard on: 06.04.2017, 04.06.2017 & 25.01.2018
Judgment on: 07.02.2018

Present:
Ms. Justice Naima Haider
&
Mr. Justice Zafar Ahmed

Editor's Note:

This Writ Petition was filed challenging the enlistment of the disputed property in the Bangladesh Gazette dated 23.09.1986 as abandoned property under Section 5 (1)(a) of the Abandoned Building (Supplementary Provisions) Ordinance, 1985. The contention of the petitioners was that as the Government did not have any possession in the property, the alleged inclusion of the property under Section 5(1)(a) of the Abandoned Building (Supplementary Provisions) Ordinance, 1985 is illegal. The Petitioners also stated that land tax had been paid by the predecessors of the petitioners prior to inclusion of the property in the Bangladesh Gazette. Furthermore, the Government accepted land tax on the property till 2015. Apart from that RAZUK issued permission for construction of multistoried building over the property in question. Thereby, they have control and possession over the alleged property.

The Division Bench of the HCD considering the aforementioned documents stated that there is a presumption of possession in favour of the petitioners and their predecessors. But the Government did not annex any document to show that the Government took possession of the property in question. It is clear from the wordings of Section 5 (1) (a) of the Abandoned Buildings (Supplementary provisions) Ordinance, 1985 that the Government must take possession of the property in question; this is a mandatory precondition for inclusion of a property in the list of abandoned property under Section 5(1)(a) of the 1985 Ordinance. Accordingly, the Honorable Court directed all the respondents not to treat the property in question as abandoned property and formally release the property in question. Thereby, Honorable Court made the Rule absolute with observation and directions.

Key Words:
Abandoned Property; Section 5(1)(a) of the Abandoned Buildings (Supplementary provisions) Ordinance, 1985; P.O. 16 of 1972;

Section 5(1)(a) of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985:

It is clear from the wordings of Section 5(1)(a) of the Abandoned Buildings (Supplementary provisions) Ordinance, 1985 that the Government must take possession of the property in question; this is a mandatory precondition for inclusion of a property in the list of abandoned property under Section 5(1)(a) of the 1985 Ordinance. This is also the consistent view of both Divisions of the Supreme Court of Bangladesh. The Hon'ble Appellate Division, in the case of Marzina Khatun vs Bangladesh [13 BLC (AD) 140] took the view that in certain circumstances, actual possession is not necessary; constructive possession would suffice. ... (Para 11)

This Division is of the view that in case of dispute, the Government must show that the possession of property has been taken by it. The onus is upon the Government because the Government has the relevant documents which would prove that it has taken possession. In the instant case, land tax had been paid by the predecessor of the petitioners prior to inclusion of the property in the Bangladesh Gazette. This prima facie show that the Government did not take possession of the property in question. It also noted that RAJUK issued permission for construction of multistoried building over the property in question. Therefore, there is a presumption of possession in favour of the petitioners and their predecessors. Now, the issue is whether the respondent No.1 provided any documents to controvert the presumption of possession in favour of the petitioners. In the Affidavit in Opposition, the respondent No.1 did not annex any document(s) which show that the Government took possession of the property in question. The respondent No.1 did not even make such assertion. We are therefore, inclined to hold that the petitioner has prima facie satisfied this Division of the continued possession of the property in question. ... (Para 12)

The settled position of law is that two legislations dealing with the same subject matter should be interpreted harmoniously. ...(Para 14)

Section 5(1)(a) of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 and Order 7 and 18 of P.O 16 of 1972:

Section 5(1)(a) of the 1985 Ordinance is attracted if and only if the Government took possession of the property. So the attributable interpretation is that Section 5(1)(a) of the 1985 Ordinance can be applied if the possession has been taken by the Government under Order 7 of P.O. 1972. Order 18 of P.O. 16 of 1972 provides that the Government shall maintain a separate account for each abandoned property. P.O. 16 of 1972 also provides that Government shall impose fine on tress passers on abandoned property. In respect of the property in question, the respondents failed to show that the Government took possession in accordance with the provisions of P.O. 16 of 1972. The respondents also failed to show the account for the property in question. If the predecessors of the petitioners were infact unlawfully occupying the property in question, then the Government would have proceeded against them. No such evidence was shown. To the contrary, the petitioners have annexed documents which suggest that even in 1979, the predecessor of the petitioners was the owner on record of the property in question; even in 1979 the Government received land tax from the predecessor of the petitioners. Therefore, the only logical conclusion that this Division has arrived is that the property in question is not an abandoned property and the property was erroneously included in the impugned Gazette. ...(Para 14)

JUDGMENT

Naima Haider, J:

1. In this application under Article 102 of the Constitution, Rule Nisi was issued in the following terms:

> *Let a Rule Nisi be issued calling upon the respondents to show cause as to why the inclusion 7.50 decimals of land, Housing No. 1088/1 Mouza-Ibrahimpur, J.L. No. 269, C.S. Khatian No. 11, C.S. Plot No. 268, S.A. Khatian No. 8, S.A. Plot No. 268, R.S. Khatian No. 365, R.S. Plot No. 1106, Police Station-Kafrul, Dhaka Cantonment Area, Dhaka having been enlisted in "Ka" list of Abandoned Building published in Bangladesh Gazette dated 23.069.1986 under serial No. 12, page No. 9762(4) under the provision of Abandoned Building (Supplementary Provisions) Ordinance, 1985(Ordinance LIV of 1985) should not be declared to have been made without lawful authority and is of no legal effect and as such the case prosperity in question, shall not be excluded from the said list of Abandoned Building (as contained in Annexure-J) and/or pass such other or further order or orders as to this Court may seem fit and proper.*

2. In this writ petition, the dispute arises out of inclusion of the property/land in question, measuring 7.50 decimals, in the Bangladesh Gazette on 23.09.1986. Through this Gazette, the Government treated the property in question as abandoned property under Section 5(1) (a) of The Abandoned Buildings (Supplementary Provisions) Ordinance 1985 ("the 1985 Ordinance").

3. In the instant writ petition, the petitioners claim that they are the owners of the property in question. In support, the petitioners elaborately states, with supporting documents, how the property devolved in their favour. Essentially, the petitioners acquired the property in question after the death of their father Md. Shamsul Haque. Mr. Haque became the owner of the property further to a gift from one Md. Main Uddin. The petitioners' father had been in possession of the property during his lifetime. The petitioners have been in possession after their father's death. On the land/property in question, building was constructed after obtaining permission from RAJUK. The tax for the land/property was also paid to the Government regularly till 1421 B.S. The petitioners became aware of the inclusion of the property in the Bangladesh Gazette in 1422 B.S. when the tahsilder office refused to accept the rent on the plea that the property was declared abandoned property through the Bangladesh Gazette dated 23.09.1986. Being aggrieved by the inclusion, the petitioners moved this Division and obtained the instant Rule.

4. The learned Counsel for the petitioners, taking us through the writ petition and the documents annexed, submits that the petitioners and their predecessors were in possession of the property in question and therefore, treating the property as abandoned property was illegal. He further submits that the petitioners and the predecessors paid land taxes to the Government till 1422 BS and therefore, the property cannot be treated as abandoned property. He also submits that the record of rights is in favour of the petitioners, the petitioners constructed multi storied building on the land after obtaining permission from the regulators and therefore, the land in question cannot be treated as abandoned property. On these, among other counts, the learned Counsel submits that the Rule should be made absolute with appropriate direction upon the respondents.

5. The Rule is opposed by the respondent No.1. An Affidavit in Opposition was filed. The learned Counsel appearing for the respondent No.1, taking us through the Affidavit in Opposition submits that the property in question is abandoned property under P.O. 16 of 1972. The learned Counsel also submits that the writ is not maintainable as the petitioners did not agitate their grievance before alternative forum, being the Court of Settlement. The learned Counsel further submits that the instant writ petition gives rise to disputed questions of fact regarding the ownership of the property and therefore, this Division should not interfere. On these, among other counts, the learned Counsel submits that the Rule should be discharged.

6. We have heard the learned Counsels at length and perused the pleadings and the documents annexed.

7. In the event a property is treated as abandoned property, the person aggrieved is required to agitate the grievance before the Court of Settlement within a stipulated time. This is a statutory requirement. The issue is whether the petitioners ought to have or could have referred the dispute before the Court of Settlement.

8. Section 7 of the 1985 Ordinance gives opportunity to the persons claiming any right or interest in a property to apply to the Court of Settlement to exclude the particulars of the property from the list of abandoned property. However, such application is required to be filed within one hundred and eight days from the date of publication of the official Gazette. Admittedly the petitioners have not done so. The issue is whether this should bar to exercise of our supervisory jurisdiction under Article 102 of the Constitution.

9. Since Section 7 of the 1985 Ordinance provides an opportunity to apply to the Court of Settlement to exclude property from the list of abandoned property, the said provision also implies that the person must know of the inclusion. How else can he apply? Why else should he apply? The issue before us is whether the petitioners could be construed to have knowledge of the inclusion. We note from the documents annexed that the Government accepted land tax till 2015. Furthermore, RAJUK also issued permission for construction of multi storied building on the land in question. If the authorities treated the property as abandoned property, they would neither have accepted rent from the petitioners nor would have issued construction permit. Thus the petitioners had no reason to believe that the property in question was included in the list. By the time the petitioners realized that the property was included in the list, it became too late for the petitioners to avail the alternative remedy. The petitioners could not have agitated the grievance before the Court of Settlement. Furthermore, since the Court of Settlement had been specifically empowered by statute to exclude any property from the list of abandoned property, the petitioners could not have agitated their grievance before any other Court. This is set out in Section 6 of the 1985 Ordinance. Unless this Division interferes, the petitioners, who for bona fide reason did not agitate grievance before the Court of Settlement, would be without forum. This Division cannot permit this to happen. Accordingly, this Division is of the view that it should exercise jurisdiction over the matter. We therefore hold that in the present circumstances, that the writ petition is maintainable.

10. The property in question was listed in the Bangladesh Gazette under Section 5(1)(a) of the 1985 Ordinance. This is set out in the impugned notification (Annexure-J). Section 5(1)(a) of the 1985 Ordinance is set out below for ease of reference:

> *" 5(1) The Government shall, after the commencement of this Ordinance and before the 31st day of December, 1988, publish, from time to time in the official gazette-*
>
> *(a) list of buildings the possession of which have been taken as abandoned property, under the President's Order;* (emphasis added)

11. It is clear from the wordings of Section 5(1)(a) of the 1985 Ordinance that the Government must take possession of the property in question; this is a mandatory precondition for inclusion of a property in the list of abandoned property under Section 5(1)(a) of the 1985 Ordinance. This is also the consistent view of both Divisions of the Supreme Court of Bangladesh. The Hon'ble Appellate Division, in the case of Marzina Khatun vs Bangladesh [13 BLC (AD) 140] took the view that in certain circumstances, actual possession is not necessary; constructive possession would suffice. The issue before this Division is whether the Government took possession of the property in question, either actual or constructive.

12. This Division is of the view that in case of dispute, the Government must show that the possession of property has been taken by it. The onus is upon the Government because the Government has the relevant documents which would prove that it has taken possession. In the instant case, we note that land tax had been paid by the predecessor of the petitioners prior to inclusion of the property in the Bangladesh Gazette. This prima facie show that the Government did not take possession of the property in question. Had it been otherwise, the Government would not have accepted land tax from the predecessors of the petitioners. Furthermore, we also note that the Government accepted tax on the property till 2015. We also note that RAJUK issued permission for construction of multistoried building over the property in question. Therefore, there is a presumption of possession in favour of the petitioners and their predecessors. Now, the issue is whether the respondent No.1 provided any documents to controvert the presumption of possession in favour of the petitioners. In the Affidavit in Opposition, the respondent No.1 did not annex any document(s) which show that the Government took possession of the property in question. The respondent No.1 did not even make such assertion. We are therefore, inclined to hold that the petitioner has prima facie satisfied this Division of the continued possession of the property in question.

13. The learned Counsel for the respondent No.1 submits that the property in question is abandoned property within the meaning of P.O. 16 of 1972 and therefore, the property had been correctly included in the impugned Gazette.

14. The settled position of law is that two legislations dealing with the same subject matter should be interpreted harmoniously. The relevant legislations are P.O. 16 of 1972 and the 1985 Ordinance. Under P.O. 16 of 1972 a property can be regarded as abandoned property subject to certain conditions. Order 7 of P.O. 16 of 1972 contains the functions of the Government in respect of abandoned properties. Under P.O. 16 of 1972, the Government is required to take possession of abandoned properites. Section 5(1)(a) of the 1985 Ordinance is attracted if and only if the Government took possession of the property. So the attributable interpretation is that Section 5(1)(a) of the 1985 Ordinance can be applied if the possession

has been taken by the Government under Order 7 of P.O. 1972. Order 18 of P.O. 16 of 1972 provides that the Government shall maintain a separate account for each abandoned property. P.O. 16 of 1972 also provides that Government shall impose fine on tress passers on abandoned property. In respect of the property in question, the respondents failed to show that the Government took possession in accordance with the provisions of P.O. 16 of 1972. The respondents also failed to show the account for the property in question. If the predecessors of the petitioners were infact unlawfully occupying the property in question, then the Government would have proceeded against them. No such evidence was shown. To the contrary, the petitioners have annexed documents which suggest that even in 1979, the predecessor of the petitioners was the owner on record of the property in question; even in 1979 the Government received land tax from the predecessor of the petitioners. Therefore, the only logical conclusion that this Division has arrived is that the property in question is not an abandoned property and the property was erroneously included in the impugned Gazette.

15. The learned Counsel further submits that there are disputed questions of facts. Accordingly, intervention is uncalled for. This argument is misconceived. The issue before this Division is whether the inclusion of the property in question in the impugned Gazette Notification was in accordance with law. As stated above, for the inclusion to be in accordance with law, the Government must take possession. The respondent No.1 despite having all the documents relating to this property, failed to produce a single document which shows that the Government took possession of the property in question, either actual or constructive. To the contrary, the petitioners have shown evidence of possession, pre 1986 as well as post 1986. Therefore, we are not entirely sure how a disputed issue arose in the given facts and circumstances.

16. In light of the above, we are inclined to hold that the inclusion of the property in question in the impugned Gazette Notification was illegal and without lawful authority.

17. This Division therefore, disposes the Rule. This Division holds that the property in question was wrongly treated as abandoned property through Bangladesh Gazette dated 23.09.1986. All executives, who are not impleaded in the instant writ petition, are directed not to treat the property in question as abandoned property. The writ respondents are directed to formally release the property in question (particulars are set out in Bangladesh Gazette dated 23.09.1986 in page 9764(2) under serial No. 12) from Bangladesh Gazette dated 23.09.1986 within 1 (one) month from the date of receipt of our Judgment and order without fail. (emphasis added)

18. With the aforesaid observation and directions, the Rule is disposed of without any order as to costs.

19. Communicate our Judgment and Order at once for immediate compliance.

15 SCOB [2021] HCD 27

(দেওয়ানী আপীলের অধিক্ষেত্র)

প্রথম আপীল নং ৫৬/ ২০১৩
সংগে
দেওয়ানী রুল নং ১৫৯(এফ)/২০১৩

আব্দুল লতিফ
.....আপীলকারী।
-বনাম-
মোহাম্মদ কামাল উদ্দীন এবং অন্যান্য।
.....প্রতিবাদীগণ।

শ্রী ষষ্ঠী সরকার, এ্যাডভোকেট সংগে
জনাব আকরামুল হক, এ্যাডভোকেট
.....আপীলকারীর পক্ষে।

জনাব আবুল কালাম চৌধুরী, এ্যাডভোকেট
.....১ নং প্রতিবাদীর পক্ষে (ভার্চুয়াল প্রযুক্তির মাধ্যমে)।

শুনানীঃ ৩১-০১-২০২১, ০৯-০২-২০২১
এবং ১০-০২-২০২১ খ্রিঃ

রায় প্রদানের তারিখঃ ২৫-০২-২০২১খ্রিঃ

উপস্থিত (কোর্টে শারীরিকভাবে) ঃ

বিচারপতি শেখ হাসান আরিফ
এবং
বিচারপতি আহমেদ সোহেল

Editor's Note

এই দেওয়ানী আপিল মোকদ্দমাটি যুগ্ম জেলা জজ, দ্বিতীয় আদালত, ফেনী কর্তৃক দেওয়ানী ৪৩/২০০৮ নং মোকদ্দমায় প্রদত্ত রায় ও ডিক্রি হতে উদ্ভূত। উক্ত মামলায় নিম্ন আদালত আরজির তফসিল বর্ণিত ৭ শতাংশ জমিতে বাদীপক্ষে (অত্র আপিলের ১ নং প্রতিবাদী) স্বত্ব ঘোষনা এবং দখল উদ্ধারের রায় ও ডিক্রি প্রদান করেন। উক্ত রায় ও ডিক্রি দ্বারা সংক্ষুব্ধ হয়ে ১ নং বিবাদী অত্র আপিলটি দায়ের করেন। সাক্ষী গনের সাক্ষ্য এবং দালিলিক সাক্ষ্য সমূহ পর্যালোচনা করে এবং সাক্ষ্য আইনের ৬৫ ও ১১৫ ধারা এবং সিভিল রুলস এন্ড অর্ডার এর চাপ্টার-১৭, বিধি ৬ এর অধীন উপবিধি ৩৯৬ এবং ৩৯৭ বিশ্লেষণ করে হাইকোর্ট বিভাগ নিম্ন আদালতের রায় ও ডিক্রি বহাল রেখে অত্র আপিলটি খারিজ করেন ।

গুরুত্বপূর্ণ শব্দাবলীঃ
সিভিল রুলস এন্ড অর্ডার এর চাপ্টার-১৭, বিধি ৬ এর অধীন উপবিধি ৩৯৬ এবং ৩৯৭; সম্ভাব্যতার ভারসাম্য (Balance of Probability); সাক্ষ্য আইন ১৮৭২ এর ৬৫ ও ১১৫ ধারা

সিভিল রুলস এন্ড অর্ডার এর চাপ্টার-১৭, বিধি ৬ এর অধীন উপবিধি ৩৯৬ এবং ৩৯৭ঃ
সাক্ষ্য হিসেবে গৃহীত কোন দলিল আদালত কর্তৃক প্রদর্শনী চিহ্নিত না করা হলে সাক্ষ্য হিসেবে উক্ত দলিলের গ্রহণযোগ্যতাঃ

সি.এস. খতিয়ান নং ৪৫৮ এর অস্তিত্ব বিবাদী কর্তৃক স্বীকৃত। শুধুমাত্র উক্ত খতিয়ানের মর্ম নিয়ে পক্ষদ্বয়ের মধ্যে বিপত্তি বা বিরোধিতা রয়েছে। তাই পি.ডব্লিউ-১ এর সাক্ষ্য অনুযায়ী যেহেতু দেখা যায় যে, সি.এস. ৪৫৮ নং খতিয়ানটি কোনো ধরনের আপত্তি ছাড়া আদালতে দাখিল হয়েছে, সেহেতু এটি দালিলিক সাক্ষ্য হিসেবে গৃহীত হয়েছে বলে গণ্য করা গেল। আবার যেহেতু এটি দালিলিক সাক্ষ্য হিসেবে গৃহীত হয়েছে, সেহেতু সিভিল রুলস এন্ড অর্ডার এর চাপ্টার-১৭, বিধি ৬ এর অধীন উপবিধি ৩৯৬ এবং ৩৯৭ এর বিধান মতে এটিকে Exhibit বা প্রদর্শনী নাম্বার দিয়ে Vol-2 এর Form No. (J) 23 তে সংযুক্ত করা উচিত ছিল। যেহেতু এই কাজটি ভুলবশতঃ নিম্ন আদালত কর্তৃক করা হয় নাই, অত্র আপীল আদালত কর্তৃক এটিকে প্রমানিত দালিলিক সাক্ষ্য হিসেবে প্রদর্শনী নাম্বার বা চিহ্ন প্রদান করা সমীচীন হবে বলে মনে করি। তাই এই দালিলিক সাক্ষ্যটিকে প্রদর্শনী-১ এর সাথে "প্রদর্শনী ১/ক" হিসেবে চিহ্নিত করা গেল। ফলশ্রুতিতে এটি সিভিল রুলস এন্ড অডার্স এর Vol-2, Form No. (J) 23 তে অন্যান্য প্রদর্শনীর সাথে সংযুক্ত করা হলো। ...(প্যারা-১৩)

সম্ভাব্যতার ভারসাম্য (Balance of Probability) :

বর্তমান সময়ে একজন বাদীর পক্ষে এতো পুরোনো খতিয়ান (যা এস. এ. খতিয়ানেরও আগের খতিয়ান) থেকে কোন বিষয় সন্দেহাতীত ভাবে প্রমান আশা করা সমীচীন নয়। মনে রাখতে হবে এটি একটি দেওয়ানী মামলা এবং এখানে প্রমানের স্টান্ডার্ড হলো সম্ভাব্যতার ভারসাম্য (Balance of Probability)–তথা এখানে ফৌজদারী মামলার মতো সন্দেহাতীতভাবে প্রমান করতে হয় না। ...(প্যারা-১৬)

সাক্ষ্য আইন ১৮৭২ এর ৬৫ ধারাঃ

যখন কোনো দলিলের মূল কপি নষ্ট হয়ে যায়, হারিয়ে যায় ইত্যাদি তখন সেই দলিলটি সহি মহুরী নকল দিয়ে প্রমাণ করা যায়। সুতারাং যেহেতু উপরিল্লিখিত তালাশীপত্র মোতাবেক (প্রদর্শনী-৮ ও ১১) রেন্ট স্যুটের মূল নথি ধ্বংস করে দেওয়া হয়েছে এবং বয়নামা, দখলনামা এবং স্যুট রেজিস্ট্রারের সহি মহুরী নকলসমূহ মামলা রজু হওয়ার ৩০ বছর পূর্বে উত্তোলিত এবং যেহেতু আমাদের পরীক্ষান্তে উক্ত প্রদর্শনী সমূহ জাল-জালিয়াতির মাধ্যমে সৃষ্ট বলে প্রতীয়মান হয় না এবং জাল জালয়াতির মাধ্যমে সৃষ্ট রয়েছে মর্মে বিবাদী পক্ষ কোনো ধরনের সাক্ষ্য দাখিল করতে পারে নাই, সেহেতু এই তিনটি প্রদর্শিত দলিল সমূহ (প্রদর্শনী-২, ৩ এবং ৪) বিশ্বাস না করা বা তাদের উপর নির্ভর না করার কোনো যৌক্তিক কারন আমরা খুঁজে পাচ্ছি না। সেহেতু আমরা মনে করি, বিচারিক আদালত এই তিনটি এবং আরো কিছু দলিলিক সাক্ষ্যের উপর ভিত্তি করে নিলাম বিক্রয়ের বিষয়টি বিশ্বাস করেন এবং প্রমানিত হওয়া মর্মে যে সিদ্ধান্ত নিয়েছেন তা হস্তক্ষেপ করার কোনো বৈধ ও আইনসঙ্গত কারন নাই। ...(প্যারা-১৭)

সাক্ষ্য আইন ১৮৭২ এর ১১৫ ধারাঃ

বিবাদী পক্ষ অথবা তাদের বায়াগণ বিভিন্ন ক্রয় দলিল ও কবুলিয়তে নালিশী সম্পত্তি নিলাম বিক্রয়ের বিষয়টি কোনো না কোনোভাবে স্বীকার করে নিয়েছেন। এ প্রসঙ্গে প্রদর্শনী-১৩খ, ১৪খ এবং ১৪গ দৃষ্টে প্রতীয়মান হয় যে, বিবাদী ও বিবাদীর বায়াগণ নালিশী সম্পত্তি নিলামের বিষয়টি মেনে নিয়েই সি.এস. ৪৬০ নং খতিয়ানের অধীন বিভিন্ন সম্পত্তির ক্রয় এবং বন্দোবস্তী নিয়েছেন। তাই সেই নিলাম ক্রয় সম্পর্কে বা নিলাম অনুষ্ঠিত হওয়া সম্পর্কে বিবাদী পক্ষের ওজর আপত্তির ক্ষেত্রটি অত্যন্ত দুর্বল এই প্রসঙ্গে সাক্ষ্য আইনের ১১৫ ধারা তথা এসটোপেল নীতিটি প্রনিধানযোগ্য। ...(প্যারা-১৯)

রায়

বিচারপতি শেখ হাসান আরিফঃ

[২১শে ফেব্রুয়ারির ভাষা শহিদদের প্রতি সম্মান প্রদর্শনপূর্বক এ রায়টি বাংলায় প্রদান করা হলো।]

১. ভূমিকাঃ ২০০৮ ইং সালের ৪৩ নং দেওয়ানী মোকদ্দমার ১ নং বিবাদী উক্ত মামলায় যুগ্ম জেলা জজ, ২য় আদালত, ফেনী কর্তৃক প্রদত্ত ০৪.১১.২০১২ ইং তারিখের রায় ও ডিক্রি দ্বারা সংক্ষুব্ধ হয়ে অত্র আপীলটি আনায়ন করেছেন। উক্ত মামলায় নিম্ন আদালত বাদীর পক্ষে স্বত্ব ঘোষনা এবং দখল উদ্ধারের রায় ও ডিক্রি প্রদান করেন। অত্র আপীলের ১নং প্রতিবাদী বাদী হয়ে আর্জির তপসিল বর্ণিত ৭(সাত) শতাংশ ভূ-সম্পত্তির স্বত্ব ঘোষনা এবং দখল উদ্ধারের প্রার্থনায় উক্ত মামলাটি দায়ের করেন।

২. প্রেক্ষাপটঃ

বিচারিক আদালতের সম্মুখে বাদীর সংক্ষিপ্ত কেস ছিল নিম্নরুপঃ

(১) ফেনী থানার অন্তর্গত সি.এস খতিয়ান নং ৪৬০ এ তিনটি গ্রুপে মালিক দখলদার ছিলেন। 'ক' গ্রুপে মালিক ছিলেন ফর্জ আলী ও রজ্জব আলী, 'খ' গ্রুপে ছিলেন মোহাম্মদ মিয়া ও নাবালক মিয়া এবং 'গ' গ্রুপে মালিক ছিলেন দেওয়ান আলী ও ছফর আলী । উক্ত ভুমির উপরস্থ মালিক ছিলেন বাবু ভবানী চরণ লাহা। উক্ত ভবানী চরণ লাহা উপরে উল্লেখিত অধীনস্থ মালিকদের বিরুদ্ধে ফেনীর ২য় মুনসেফ আদালতে ১৯৩৬ ইং সনে ১৬৪২ নং কর মামলা দায়ের করেন এবং ডিক্রি প্রাপ্ত হন । উক্ত অধীনস্থ মালিকগণ উক্ত ডিক্রীর টাকা প্রদানে ব্যর্থ হওয়ায় উপরিস্থিত মালিক ডিক্রিজারীর মামলা করলে (১৯৩৭ ইং সনের ১৫৮৬ নং কর ডিক্রিজারী মামলা) উক্ত মামলায় নালিশী খতিয়ানের ভূমি নিলামক্রমে উক্ত উপরিস্থিত মালিকের পক্ষে উকিল বাবু বিপিন বিহারী মজুমদার নিলাম খরিদ করে আদালত হতে বয়নামা ও দখলনামা প্রাপ্তে মালিক হন। পরবর্তিতে উক্ত উপরিস্থিত মালিক নালিশী খতিয়ানের ৪০৩ নং দাগের সম্পূর্ণ ৩৬ ডিং ভূমি ও ৪০৯ দাগের সম্পূর্ণ ১৮ ডিং ভূমি, তথা সর্বমোট ৫৪ ডিং ভূমি, গত ১৭-০১-১৯৩৯ ইং তারিখে রেজিস্ট্রিকৃত ২২৬ নং কবুলিয়ত মূলে বাদীর পিতামহ নাবালক মিয়ার নিকট বন্দোবস্ত প্রদান করেন। নাবালক মিয়া মৃত্যুবরণ করলে বাদীর পিতা জনাব ছিদ্দিকুর রহমান ও বাদীর পিতার বোন মনকিরের নেছা ওয়ারিশ হন। পরবর্তিতে মনকিরের নেছা তার অংশের ভূমি তার ভাই ছিদ্দিকুর রহমানকে আপোষে ছেড়ে দিয়ে নিঃস্বত্ববান হন। এভাবে বিগত এস, এ, জরিপকালীন সময়ে বাদীর পিতার নামে ১২৬০ নং এস,এ খতিয়ান, এস. এ. দাগ নং ৩৮৯ ও ৩৯৩ মূলে সম্পূর্ণ ভূমি তথা ৫৪ ডিং ভূমি বিশুদ্ধরুপে প্রস্তুত ও প্রচারিত হয়।

(২) পরবর্তিতে উক্ত ভূমি থেকে কিছু অংশ তথা সি,এস, ৪০৩ দাগের ৩৭ শতাংশের আন্দরে ২৭ শতাংশ, ও সি,এস, ৪০০ দাগের আন্দরে ১৮ শতাংশ সহ সর্বমোট ৪৫ শতাংশ ভূমি অধিগ্রহণ মামলা নং ৪(১৫)১৯৬৬-৬৭ মূলে সড়ক ও জনপদ বিভাগ এর বরাবরে অধিগৃহিত হয়। তৎপরিপ্রেক্ষিতে বাদীর পিতা জনাব ছিদ্দিকুর রহমান অধিগৃহিত ভূমির বিপরীতে ক্ষতিপূরণ তুলতে গেলে ১ নং বিবাদীর বায়া ১৩৯/১৪২/১৪৩ নং বিবাদীর পূর্বসুরি সুজা মিয়া, মুজা মিয়া ও বজলুর রহমান আপত্তি দাখিল করেন। তৎপ্রেক্ষিতে তৎকালীন নোয়াখালীর ডেপুটি কমিশনার শুনানী অন্তে ১৩-০৬-১৯৬৭ ইং তারিখের আদেশ মুলে তাদের আপত্তি না-মঞ্জুর করে ৬(ছয়) সপ্তাহের মধ্যে উপযুক্ত দেওয়ানী আদালতে ক্ষতিগ্রস্ত পক্ষকে মামলা করার আদেশ দেয় । কিন্তু ১নং বিবাদীর উপরোক্ত বায়া সুজা মিয়া, মুজা মিয়া ও বজলুর রহমান ঐ না-মঞ্জুর আদেশের বিরুদ্ধে উপযুক্ত কর্তৃপক্ষ/আদালতের কাছে কোন প্রকার প্রতিকার না চাওয়ায় বাদীর পিতা সিদ্দিকুর রহমান উক্ত ক্ষতিপূরনের টাকা উত্তোলন করেন। তদুপরি উক্ত সুজা মিয়া ও মুজা মিয়া গং নিঃস্বত্ববান হওয়া সত্ত্বেও ১ নং বিবাদী তাদের নিকট থেকে উক্ত সি.এস. ৪০৩ নং দাগের ০৭ ডিং ভূমি বাবদ ১৪-১০-১৯৯৬ ইং তারিখের ৫৫৮৮ নং এওয়াজ দলিল তৈরি করলেও তা দ্বারা উক্ত ভূমিতে তাদের কোন স্বত্ব দখল সৃষ্টি বা প্রাপ্তি হয়নি। উক্ত অধিগ্রহণকৃত ভূমি বাদে সি.এস. ৪০৩ নং দাগের এবং এস.এ. ৩৮৯ নং দাগের ৩৬ ডিং ভূমির আন্দরে ০৯ ডিং ভূমিতে বাদির পিতা মালিক থাকাবস্থায় পুনরায় সি.এস. ৪০৩ দাগের ও এস.এ. ৩৮৯ দাগের ০২ ডিং ভূমি ফেনী পল্লী বিদুৎ সমিতি বরাবরে অধিগৃহিত হয়। ফলশ্রুতিতে বাদীর পিতা বাদবাকি ০৭ শতাংশ ভূমিতে মালিক দখলকার থাকেন।

(৩) কিন্তু গত ১২-০৩-১৯৯৮ ইং তারিখ অনুমান ২ ঘটিকার সময় ১ ও ২ নং বিবাদী জোরপূর্বক উক্ত ভূমিতে একটি চাপড়া টিনের গৃহ নির্মান করেন যার পরিপ্রেক্ষিতে বাদীর পিতা তাদের বিরুদ্ধে ১ম শ্রেণির হাকিম আদালত বরাবরে ফৌজদারী কার্যবিধির ১৪৫ ধারার কার্যধারা আনায়ন করিলে (পিটিশন মামলা নং ২৭/৯৮) ফেনী থানা হতে একটি তদন্ত প্রতিবেদন দেওয়া হয়। উক্ত মিছ মামলাটি পরবর্তিতে মিছ-৬/৯৮ হিসেবে বিগত ১২-০২-২০০২ ইং তারিখে খারিজ হলে বাদীর পিতা আইনজীবীর ভুল পরামর্শের কারণে রিভিশন মামলা নং-১১৪/২০০২ দায়ের করেন। কিন্তু বাদীর পিতা উক্ত রিভিশন মামলা চলাকালীন সময়ে মৃত্যুবরণ করায় সেই রিভিশন মামলাটি গত ২৯-০৬-২০০৪ ইং তারিখে খারিজ হয়। বাদীর পিতা মৃত্যুকালে বাদীসহ ০৪ পুত্র, ০৩ কন্যা ও ০১ স্ত্রীকে ওয়ারিশ রেখে যান। পরবর্তিতে উক্ত ওয়ারিশগণের মধ্যে মৌখিক পারিবারিক আপোষমূলে বাদী নালিশী ভূমির ০১ শতাংশ প্রাপ্ত হন এবং বাকি ০৬ শতাংশ ভূমি বাদীর ০৩ ভগ্নি হতে বিগত ১৬-০২-২০০৫ ইং তারিখের রেজিস্ট্রি কবলা নং ১০৪১ মূলে ক্রয় করেন এবং এভাবে সম্পূর্ণ ০৭ শতাংশের মালিক হন । বাদী এও উল্লেখ করেন যে, বাদীর পিতা দখল থাকা অবস্থায় বিগত ১২-০৩-১৯৯৮ ইং তারিখে ১নং বিবাদী ১৫X১০ ফুট বিশিষ্ট একচালা টিনের চাপড়া গৃহ এবং ১৫-০১-২০০২ ইং তারিখে নালিশী ভূমির দক্ষিনাংশে ২০X১০ ফুট বিশিষ্ট একটি দোচালা টিনের গৃহ এবং পূর্বাশেং একচালা বেড়াবিহীন টিনের ২০X৬ ফুট বিশিষ্ট গৃহ নির্মাণ করে বাদীর পিতাকে ও বাদীকে নালিশী সম্পত্তি হতে বেদখল করে।

(৪) এছাড়াও বাদী উল্লেখ করেন যে, উপরে বর্ণিত নিলাম স্বীকারপূর্বক ১নং বিবাদীর মাতা জৈতন বিবি বিগত ০৭-০৮-১৯৮২ ইং তারিখে রেজিষ্ট্রিকৃত ৮০২৭ নং ছাফ-কবলা মূলে জনৈক সেকান্দার মিয়া হতে সি.এস. ৪৬০ নং খতিয়ানের ৪১৮ নং দাগের ১৩ ডিং ভূমি খরিদ করে মালিক দখলদার হয় এবং উক্তভাবে ১নং বিবাদীর মাতার বায়া সেকান্দার মিয়াও উক্ত নিলাম স্বীকারে ১৪-০১-১৯৩৯ ইং তারিখে রেজিস্ট্রিকৃত ১০১ নং কবুলিয়ত মূলে উক্ত উপরিস্থিত মালিক লাহা গংদের নিকট হতে বন্দোবস্ত পেয়েছেন মর্মে স্বীকার করেন। এছাড়াও ১নং বিবাদীর পিতা ছফর আলী নালিশী সি.এস. ৪৬০ নং খতিয়ানের ৪১০ নং দাগের ৪৯ ডিং, ৪১৯ নং দাগের ১৩ ডিং, ৪০২ নং দাগের ৩.৫ ডিং, ৪০৬ নং দাগের ০৩ ডিং সহ সর্বমোট ৬৮.৫০ ডিং ভূমি বন্দোবস্ত পান যার রেজিস্ট্রিকৃত কবুলিয়ত নামা নং ১৫৩ তারিখ ১৪-০১-৩৯। বাদী আরো উল্লেখ করেন যে, ১নং বিবাদীর জেঠা দেওয়ান আলীও বিগত ১৪-০১-৩৯ইং তারিখে রেজিস্ট্রিকৃত ১৫২ নং কবুলিয়তমূলে উপরিস্থ মালিক ভবানী চরণ লাহা গং হতে নিলাম স্বীকারে নালিশী ৪৬০ নং খতিয়ানের ৪১০ নং দাগের ৪৯ ডিং, ৪১৯ নং দাগের ১৩ ডিং, ৪০২ নং দাগের ৩.৫০ ডিং এবং ৪০৬ নং দাগের ০৩ ডিং সহ সর্বমোট ৬৮.৫০ ডিং ভূমি বন্দোবস্ত গ্রহন করেন । একই ভাবে ১নং বিবাদীর একই বাড়ীর জরিফা খাতুন, স্বামী আবদুল করিম, বিগত ১৪-০১-৩৯ ইং তারিখের রেজিস্ট্রিকৃত ১৫৫ নং কবুলিয়ত মূলে উক্ত লাহা গংদের নিকট হতে নিলাম স্বীকারে সর্বমোট ৫২ শতাংশ জমি বন্দোবস্ত গ্রহণ করে। এছাড়াও উক্ত নিলাম ও বন্দোবস্ত স্বীকারে ১নং বিবাদীর মাতা জৈতন বিবি বিগত ১৮-০৮-৫১ ইং তারিখের রেজিস্ট্রিকৃত ৪০৫৮ নং ছাপ কবলা মূলে সি.এস. ৪৬০ খতিয়ানের ৪১৮ নং দাগের ১৩ ডিং ভূমি জনৈক জরিফা খাতুন হতে খরিদ করেন।

(৫) উপরোক্ত অবস্থায়, বাদীর বক্তব্য মতে বাদী দখলচ্যুত হওয়ার কারনে বাদী তপসিল বর্ণিত ৭ (সাত) শতাংশ ভূমির উপর সত্ব ঘোষনা এবং দখল পুনরুদ্ধারের জন্য উক্ত মামলাটি আনায়ন করেন যা প্রথমে ২০০৭ ইং সনের দেওয়ানী মামলা হিসেবে নিবন্ধিত হলেও ট্রান্সফার পরবর্তি বিজ্ঞ যুগ্ম জেলা জজ, ফেনী, আদালত নং ২ এ ২০০৮ ইং সনের ৪৩ নং দেওয়ানী মামলা হিসেবে নিবন্ধিত হয়।

৩. অপরদিকে ১নং বিবাদী উক্ত মামলায় প্রতিদ্বন্দ্বিতা করে জবাব দাখিল করেন এবং মামলাটি পক্ষদোষে ত্রুটিপূর্ণ হওয়ার অভিযোগ তুললে বাদীর প্রশ্ন সরবরাহ (interrogatory) পদক্ষেপের ফলে ১ নং বিবাদীর উত্তর প্রদানের প্রেক্ষিতে আরো প্রায় ২০০ জনকে এ মামলায় বিবাদীভূক্ত করা হয়। তবে শুধুমাত্র ১নং বিবাদী মামলাটির জবাব দাখিল পূর্বক প্রতিদ্বন্দ্বিতা করেন। ১নং বিবাদীর লিখিত বর্ণনা মতে সংক্ষিপ্ত বক্তব্য নিম্নরুপঃ

(ক) ফেনী সদর থানাধীন ৯৩ নং রামপুরা মৌজার উপরিস্থিত সি.এস. খতিয়ান তথা ৪৫৮ নং সি. এস. খতিয়ানের মালিক ছিলেন ওমেদ রাজা মিয়া গং এবং তাদের অধীনে ৪৬০ নং খতিয়ানের সম্পুর্ন ২৭২ ডিং ভূমিতে তিনটি গ্রুপের মালিকানা ছিল, তথা 'ক গ্রুপ', 'খ গ্রপ' এবং 'গ গ্রুপ'। 'ক' গ্রুপের মালিক ছিলেন ফর্জ আলী (হিস্যা ছিল ৪৫$\frac{১}{৪}$ ডিং) ও রজ্জব আলী (হিস্যা ছিল ৪৫$\frac{১}{৪}$ ডিং), 'খ' গ্রুপের মোহাম্মদ মিয়ার হিস্যা ছিল ২২$\frac{১}{২}$ ডিং, নাবালক মিয়ার হিস্যা ছিল ২২$\frac{১}{২}$ ডিং এবং উক্ত খতিয়ানে 'গ' গ্রুপে দেওয়ান আলীর হিস্যা ছিল ৬৮ ডিং এবং ১নং বিবাদীর পিতা ছফর আলীর হিস্যা ছিল ৬৮ ডিং ভূমিতে। 'ক গ্রুপের' ফর্জ আলী তার অংশে মালিক থাকাবস্থায় মৃত্যুকালে ইছমাইল, আবদুল করিম ও সেকান্দার মিয়া নামে ০৩ পুত্র ওয়ারিশ রেখে মারা গেলে তারা হিস্যানুপাতে মালিক হয় এবং বিগত এস,এ, জরিপে তাদের নামে ১২৫৭ নং এম, আর, ও, আর, খতিয়ান প্রচারিত হয় [M.R.O.R: Modified Record Of the Rights–যা এস. এ. খতিয়ান প্রস্তুত হওয়ার পরে প্রস্তুত হয়]। পরবর্তীতে ফর্জ আলীর পুত্র ইছমাইল মৃত্যুবরণ করলে–বজলর রহমান, সফিকের রহমান ও মজল হককে ০৩ পুত্র ও আমেনা খাতুনকে ০১ কন্যা ওয়ারিশ রেখে যায়। বজলুর রহমান মৃত্যুকালে আবদুল মান্নান ও নুরুল আমিনকে দুই পুত্র এবং খতিজা বেগম ও জাহানারা বেগমকে দুই কন্যা ওয়ারিশ রেখে মারা যায়। সফিকের রহমান মৃত্যুকালে নাছির উদ্দিন, আলা উদ্দিন ও শাহজাহানকে তিন পুত্র এবং ছেমনা খাতুন, সেদোয়ারা বেগম ও মনোয়ারা বেগমকে তিন কন্যা এবং ছবুরা খাতুনকে এক স্ত্রী ওয়ারিশ রেখে যান। ফর্জ আলীর পুত্র সেকান্দর মিয়া মৃত্যুকালে সমছু মিয়া ও ছাইদুল হককে দুই পুত্র এবং আংকুরের নেছাকে এক কন্যা ওয়ারিশ রেখে যায়। পরবর্তিতে ফর্জ আলীর অপর পুত্র আবদুল করিম মৃত্যুকালে আবদুল ছাত্তার, আবদুল রাজ্জাক, আবদুল জব্বার ও আবদুল মালেককে চার পুত্র এবং আজিফা খাতুনকে এক কন্যা ওয়ারিশ রেখে য়ায় । উক্ত আবদুল ছাত্তার গং তাদের মালিকী-দখলীয় ভূমি আন্দরে ০৭ ডিং ভূমি ১৮-০৫-৭৯ ইং তারিখের রেজিস্ট্রিকৃত ৫২২৩ নং ছাফ কবলা মূলে মনকিরের নেছা গং এর নিকট, ৭ ডিং ভূমি ১৯-০৫-৭৯ ইং তারিখের রেজিস্ট্রিকৃত ৫২২৪ নং ছাফ কবলা মূলে আলী আশ্রাদের নিকট এবং ০৩ ডিং ভূমি ২১-০৫-৭৯ ইং তারিখে রেজিস্ট্রিকৃত ৫২৫৬ নং ছাফ কবলা মূলে নুরুল আলম গং দের নিকট বিক্রয় করেন । বিবাদীর মাতা জৈতন বিবি প্রার্থী হয়ে মনকিরের নেছার খরিদের বিরুদ্ধে ফেনীর আদালতে ১৯৮১ ইং সনের ৮ নং বিবিধ অগ্রক্রয়ের মামলা, মোঃ আলী আশ্রাদের খরিদের বিরুদ্ধে একই আদালতে ১৯৮১ ইং সনের ৯ নং বিবিধ অগ্রক্রয়ের মোকদ্দমা এবং নুরুল আলম গংয়ের বিরুদ্ধে তৎকালীন ফেনীর ২য় মুন্সেফী আদালতে ১৯৮১ ইং সনের ৩৮ নং বিবিধ অগ্রক্রয়ের মোকদ্দমা দায়ের করলে উক্ত মামলা সমূহ ২৫-০৮-৮২ ইং তারিখের ছোলে মূলে উক্ত জৈতন বিবির পক্ষে ডিক্রি হয়। উক্ত মামলায় বাদীর পিতা পক্ষ থাকা সত্ত্বেও কোনো আপত্তি দাখিল করেনি এবং নিলাম বিক্রয়ের বিষয়ে কোন কথা প্রকার প্রকাশ করেনি । এই বিবাদীর মতে বাদীর বক্তব্য এবং বাদীর বর্ণিত নিলাম ক্রয়ের বক্তব্য সঠিক হলে বাদীর পিতা উক্ত মামলায় প্রতিদ্বন্দ্বিতা করে নিলামের বিষয়টি উত্থাপন করতো।

(খ) এভাবে অত্র বিবাদী উক্ত খতিয়ান বর্ণিত 'ক গ্রুপে' বর্ণিত মালিক রজ্জব আলীর হিস্যা উত্তরাধিকার সূত্রে বিভিন্ন জন প্রাপ্ত হওয়ার কথা বর্ণনা করে তাদেরকে পক্ষভুক্ত করা হয়নি বলে উল্লেখ করে। একইভাবে উক্ত ৪৬০ নং খতিয়ানের 'গ গ্রুপের' বর্ণিত মালিক ছফর আলীর সম্পত্তি ও দেওয়ান আলীর প্রাপ্ত হিস্যাও ওয়ারিশ সূত্রে বিভিন্ন ব্যক্তি মালিক হওয়ার কথা বিস্তারিত বর্ণনা করেন এবং তাদেরকে পক্ষভুক্ত করা হয়নি মর্মে উল্লেখ পূর্বক মামলাটি পক্ষ দোষে ত্রুটিপূর্ণ হওয়ার কথা উল্লেখ করেন। [বিঃদ্রঃ এই বিবাদীর বর্ণনা মতে নালিশী ভূমির উক্ত ৪৬০ খতিয়ানের বর্ণিত 'খ গ্রুপের' মালিক দুই ভ্রাতা মোহাম্মদ মিয়া ও নাবালক মিয়ার প্রাপ্য হিস্যা তথা সুনির্দিষ্টভাবে মোহাম্মদ মিয়ার হিস্যা হতে আবর্তিত। এই কারনে বিবাদীর বর্ণিত উক্ত ৪৬০ নং খতিয়ানের মালিক দখলকার 'ক' ও 'গ' গ্রুপের বর্ণিত মালিকদের প্রাপ্য হিস্যার ক্রম বিবর্তন বিস্তারিতভাবে অত্র রায়ে উল্লেখ করা হলো না এবং শুধুমাত্র 'খ' গ্রুপের বর্ণিত মালিকদের হিস্যার বিবর্তন উল্লেখ করা হয়েছে।]

(গ) এই বিবাদীর মতে 'খ' গ্রুপের দুই ভ্রাতা মোহাম্মদ মিয়া ও নাবালক মিয়ার দখল সি.এস. ৪০৩ নং দাগের ৩৬ ডিং এবং ৪০৯ নং দাগের মন্তব্য কলামে লিপি আছে এবং পারিবারিক মৌখিক আপোষ বন্টনে নাবালক মিয়া সি.এস. ৪০৩ নং দাগে ২৭ ডিং, ৪০৯ নং দাগে ১৮ ডিং–মোট ৪৫ ডিং প্রাপ্ত হন এবং মোহাম্মদ মিয়া সি.এস. ৪০৩ নং দাগে ০৭ ডিং এবং অপরাপর বেনালিশী সম্পত্তি প্রাপ্ত হন। মোহাম্মদ মিয়া মৃত্যুবরণ করলে সুজা মিয়া এবং মুজা মিয়া নামে ০২ পুত্র এবং নুর বানু ও আশ্রাব বিয়াকে দুই কন্যা ওয়ারিশ রেখে যান। সুজা মিয়া গং ভ্রাতা ভগ্নিগণের মধ্যে আপোষ বন্টনে সুজা মিয়া ও মুজা মিয়া (দুই ভ্রাতা) সি.এস. ৪০৩ দাগে ০৭ ডিং ভূমি প্রাপ্ত হন । পরবর্তিতে মুজা মিয়া মৃত্যুকালে পুত্র সাহাবউদ্দিনকে একমাত্র ওয়ারিশ রেখে যান । সুজা মিয়া ও মুজা মিয়া তাদের মালিকী দখলীয় নালিশী ৪০৩ দাগের ০৭ ডিং ভূমিতে মালিক দখলকার থাকাবস্থায় সম্পূর্ণ ভূমি

০৯-১০-৯৬ ইং তারিখে সম্পাদিত ও ১৪-১০-৯৬ ইং তারিখে রেজিস্ট্রিকৃত ৫৫৮৮ নং এওয়াজ দলিল মূলে ১নং বিবাদীর সাথে এওয়াজ বদল করেন। এভাবে ১নং বিবাদী নালিশী ৪০৩ নং দাগের ০৭ ডিং ভূমিতে মালিক দখলকার থাকাবস্থায় সেখানে মাটি ভরাট ক্রমে ভিটি ভূমিতে রুপান্তরিত করে উক্ত ভূমিতে বসত বাড়ী নির্মান করে পরিবার পরিজন নিয়ে এলাকার সর্বসাধারণের অবগতি ও দেখা মতে বায়া পরম্পরায় তামাদী ও দর তামাদীর উর্দ্ধকাল যাবত ভোগদখল করে আসছেন। উক্ত ভূমিতে এই বিবাদী ২২×১১ ফুট পরিমাপের ০১ টি দোচালা টিনের থাকার ঘর, ১৮×৬ ফুট পরিমাপের একটি রান্না ঘর ও একটি একচালা টিনের লাকড়ির ঘর প্রস্তুত করেছে।

(ঘ) বাদীর পিতা ছিদ্দিকুর রহমান নালিশী জমির দখল সংক্রান্তে ফৌজদারী কার্যবিধির ১৪৫ ধারার মোকদ্দমা দায়ের করলে তা খারিজ হয় এবং পরবর্তিতে রিভিশন মোকদ্দমা দায়ের করলে তাও খারিজ হয় ।

(ঙ) এছাড়াও ১নং বিবাদী ৪০৭ নং খতিয়ানের ভুমি আন্দরে খরিদ সূত্রে পিতা ছফর আলী হতে ২২ $\frac{১}{২}$ ডিং, ভ্রাতা আবদুল জব্বার হতে ১৩ ডিং, ভ্রাতা আবদুল মালেক হতে ০৩$\frac{১}{২}$ ডিং, মাতা জৈতন বিবি হতে ৩০ ডিং, আবুল হোসেন গং হতে ০৪ ডিং, ছিদ্দিকুর রহমান হতে $\frac{১৪}{১৬}$ ডিং ও সুজা মিয়া হতে এওয়াজ সূত্রে নালিশী ০৭ ডিং ভূমি সহ মোট ৮০$\frac{১৪}{১৬}$ ডিং ভূমি এবং ১নং বিবাদীর কন্যা ফেরদৌস আরা খরিদ সূত্রে ০১$\frac{১০}{১৬}$ ডিং ভূমি সহ মোট ৮২$\frac{১}{২}$ ডিং ভূমিতে মালিক দখল থাকাবস্থায় ১নং বিবাদী রমজান আলী ও ছিদ্দিকুর রহমানের নিকট ০৫ ডিং ভূমি হস্তান্তর করেন। উপরোওভাবে ১নং বিবাদী ও তৎ কন্যা ফেরদৌস আরা হস্তান্তরবাদ বাকী ৭৭$\frac{১}{২}$ ডিং ভূমিতে চিহ্নিত মতে মালিক দখলকার আছে এবং উক্তরুপভাবে ১নং বিবাদীর নামে বি.এস. জরিপে ৫৩৭ নং বি.পি. খতিয়ান প্রচারিত হয়েছে।

(চ) এই বিবাদী আরো উল্লেখ করেন যে, নালিশী খতিয়ানের ভূমি বাকী করের দায়ে নিলাম হওয়ার উক্তি মিথ্যা ও বানোয়াট। নালিশী ৪৬০ নং খতিয়ানের রায়তগণের তালুকদার ৪৫৮ নং খতিয়ানের মালিক উমেদ রাজা মিয়া ও উমরালী ভূঁঞা গং এবং ফর্জ আলী গং কখনই ভবানী চরণ লাহার অধীনে প্রজা ছিলেন না । তথাপি ফর্জ আলী গংয়ের সাথে ভবানী চরণ লাহা গংয়ের প্রজা ও তালুকদার সম্পর্ক ছিল না এবং খাজনা দেওয়া ও নেওয়ার কোন কারণ বিদ্যমান ছিল না। ফর্জ আলী ছিলেন উমেদরাজা গংয়ের রায়ত এবং তাদের নিকট খাজনা আদায় করত। তথাপি নিলাম মূলে ডিক্রিদার ও বিপিন বিহারী মজুমদারের নিলাম খরিদ করণ এবং নালিশী সি.এস. ৪০৩ দাগে ৩৬ ডিং ও সি,এস, ৪০৯ দাগে ১৮ ডিং সহ ৫৪ ডিং ভূমি ১৭-০১-১৯৩৯ ইং তারিখের রেজিস্ট্রিকৃত ২২৬ নং কবুলিয়ত মূলে বাদীর দাদা নাবালক মিয়াকে বন্দোবস্ত প্রদান করার ঘটনা মিথ্যা ও বানোয়াট। এছাড়াও বাদীর বর্ণিত দখল ও বেদখলের ঘটনা মিথ্যা ও বানোয়াট । উপরোক্ত অবস্থায় এই বিবাদী মামলাটি খারিজের প্রার্থনা করেন।

৪. উপরিউক্ত আর্জি এবং লিখিত বর্ননার পরিপ্রেক্ষিতে নিম্ন আদালত নিম্নবর্ণিত বিচার্য বিষয় ধার্য্য করেনঃ

(i) বাদীর মামলা বর্তমান আকারে চলে কিনা।
(ii) বাদীর মামলা পক্ষ দোষে অচল কিনা।
(iii) বাদীর মামলা তামাদীতে বারিত কিনা।
(iv) নালিশী সম্পত্তিতে বাদীর স্বত্ব আছে কিনা।
(v) বাদীর প্রার্থিত মতে প্রতিকার পেতে পারে কিনা।

৫. অতঃপর নিম্ন আদালত পক্ষগণকে পর্যাপ্ত শুনানি প্রদান, সাক্ষ্য গ্রহণ এবং মামলার সমর্থনে বিভিন্ন কাগজপত্র সাক্ষ্য হিসেবে গ্রহণ করে বাদীর প্রদত্ত দালিলিক সাক্ষ্যগুলোকে প্রদর্শনী ক, খ, গ .... ইত্যাদি মর্মে চিহ্নিত করেন এবং বিবাদী প্রদত্ত দালিলিক সাক্ষ্যসমূহকে প্রদর্শনী ১, ২, ৩.... ইত্যাদি মর্মে চিহ্নিত করেন। এভাবে পক্ষ গণের বিজ্ঞ আইনজীবীগণের বক্তব্য শুনানী পূর্বক আদালত তর্কিত রায় ও ডিক্রির মাধ্যমে মামলাটি বাদীর পক্ষে ডিক্রি প্রদানপূর্বক নালিশী ভূমিতে বাদীর সত্ব ঘোষণা ও দখল সাব্যস্ত করেন এবং বিবাদী কর্তৃক বাদীর বর্ণিত মতে বেদখল প্রমান হয়েছে বলে নির্ধারণ করেন ও সেই মর্মে নালিশী ভূমিতে বাদীর স্বত্ব ঘোষনা পূর্বক বিবাদীর দখল উচ্ছেদের ডিক্রি প্রদান করেন।উক্ত রায় ও ডিক্রির দ্বারা সংক্ষুব্ধ হয়ে ১ নং বিবাদী অত্র আপীলটি আনায়ন করেছেন।

৬. <u>মৌখিক বক্তব্যঃ</u>

আপীল শুনানী কালে বিজ্ঞ আইনজীবীগণ আপীলকারী এবং প্রতিবাদী পক্ষে মৌখিকভাবে বিভিন্ন যুক্তি তর্ক উপস্থাপন করেন, যার সংক্ষিপ্ত বিবরণ নিম্নে দেওয়া হলোঃ

আপীলকারী পক্ষের বিজ্ঞ আইনজীবী শ্রী ষষ্ঠী সরকারের বক্তব্যের স্বারসংক্ষেপ নিম্নরুপঃ

(ক) প্রথমেই তিনি সি.এস. খতিয়ান নং ৫৫৮ এর গ্রহণযোগ্যতা নিয়ে প্রশ্ন তোলেন এবং বলেন যে এটি যেহেতু বিচারিক আদালতে exhibited বা প্রদর্শিত হয়নি তথা প্রদর্শনী নাম্বার পড়েনি, এটি কোনো ভাবেই গ্রহণযোগ্য ছিল না এবং নিম্ন আদালত এটি গ্রহণ করে—তথা এটির উপর নির্ভর করে কথিত নিলামের বক্তব্য প্রমাণিত হয়েছে বলায় বা তা বিশ্বাস করায় তাঁর রায় ভুল রায় হিসাবে পর্যবশিত হয়েছে। এ প্রসংগে তিনি সিভিল রুলস্ এন্ড অর্ডার ভলিউম-১ এর উপ-বিধি ৪০৭ উল্লেখ করেন এবং বলেন যে, যেহেতু সি.এস. ৫৫৮ খতিয়ানটি প্রদর্শনী আকারে গৃহীত হয়নি, সেহেতু এটি আমলে নেওয়া উচিত হয়নি তথা এটি ধ্বংস করে ফেলার কথা ছিল।

(খ) মামলার বাদীপক্ষ কথিত কর মামলায় ডিক্রি এবং ডিক্রি জারী মূলে বয়নামা ও দখলনামা প্রাপ্ত হওয়া এবং ঐ দখলনামার পরিপ্রেক্ষিতে বাদীর উত্তরসুরী নাবালক মিয়া বরাবরে কবুলিয়ত দেয়া—কোনোটিই প্রমান করতে পারেনি। তারপরেও নিম্ন আদালত ভুল তথ্য ও ছলনার বশবর্তী হয়ে উক্ত নিলাম, বয়নামা, দখলনামা ইত্যাদি বিশ্বাস করে বাদীর উত্তরসুরির পক্ষে কবুলিয়তনামা মূলে বন্দোবস্তি পাওয়ার কথা প্রমানিত হয়েছে মর্মে সিদ্ধান্ত গৃহিত হওয়ায় রায়টি বাতিলযোগ্য ।

(গ) কথিত বয়নামা কোনভাবেই একটি স্বত্বের দলিল হতে পারে না। তাই শুধুমাত্র বয়নামা এবং দখলনামার উপর ভিত্তি করে বাদীর স্বত্ব প্রমানিত হয়েছে মর্মে সিদ্ধান্তে উপনিত হওয়ায় নিম্ন আদালতের রায়টি ভুল, বেআইনী এবং বাতিল যোগ্য ।

(ঘ) কথিত বয়নামা ও দখলনামার সহি মহুরী নকল, যথাক্রমে প্রদর্শনী-২ ও প্রদর্শনী-৩, সাক্ষ্য আইনের ৬৫ ধারা মতে প্রমানিত না হওয়ায় তা গ্রহনযোগ্য ছিল না এবং আদালত তা গ্রহণ করে সাক্ষ্য হিসেবে বিবেচনা করে রায় দেওয়ায় উক্ত রায় ত্রুটিপূর্ণ এবং বাতিলযোগ্য।

(ঙ) নালিশী সম্পত্তিতে বাদীর কথিত দখল এবং বিবাদী কর্তৃক বাদীর বেদখল হওয়া কোনভাবেই প্রমানিত না হওয়ায় দখল-বেদখল সংক্রান্ত বিষয়ে নিম্ন আদালতের পর্যবেক্ষন এবং সিদ্ধান্ত সম্পূর্ণ ভুল এবং বাতিলযোগ্য।

(চ) সি.এস. খতিয়ান ৪৬০ (প্রদর্শনী ১) মতে কোনোভাবেই ভবানী চরণ লাহা গং উপরিস্থিত মালিক ছিলেন না, বরংঞ্চ উপরিস্থত মালিক ছিলেন ভিন্ন ব্যক্তি। তাই ৪৬০ নং সি.এস. খতিয়ানের ভূমির পরিপ্রেক্ষিতে কর মামলায় ভবানী চরণ লাহা গংদের পক্ষে ডিক্রি হওয়া, ডিক্রি জারি হওয়া এবং উক্ত ভবানী চরণ লাহা গংদের পক্ষে উকিল বিপীন বিহারী নিলাম ক্রয় করা ইত্যাদি ঘটনা কোনোভাবেই উপযুক্ত দালিলিক সাক্ষ্য এবং মৌখিক সাক্ষ্য দ্বারা প্রমান হওয়া কোনো ভাবেই সম্ভব ছিল না। যেহেতু ৪৬০ নং খতিয়ানের উপরিস্হিত মালিক ভবানী চরণ লাহা গং ছিলেন না সেহেতু তাঁদের পক্ষে নিলাম বিক্রি হওয়া সম্পূর্ণ অবাস্তব ঘটনা মাত্র ।

৭. উপরিউক্ত বক্তব্যের প্রেক্ষিতে বাদী তথা অত্র আপীলের প্রতিবাদী পক্ষের বিজ্ঞ আইনজীবী জনাব আবুল কালাম চৌধুরীর বক্তব্যের সার-সংক্ষেপ নিম্নরুপঃ

(১) সি.এস. খতিয়ান নং ৪৫৮ এর সহি মহুরী নকল পি.ডব্লিউ-১ এর মাধ্যমে রিকল পূর্বক বিচারিক আদালতে দাখিল করা হয়েছিল এবং কোনো রকমের আপত্তি ব্যতীত প্রমানিত হয়েছিল। কিন্তু নিম্ন আদালত ভুলবশতঃ সেই সি.এস. ৪৫৮ নং খতিয়ানটিকে প্রদর্শনী নাম্বার দেয়নি। তাই আপীল আদালত হিসেবে এই আদালত কর্তৃক উক্ত দালিলিক প্রমানটি প্রদর্শনী নাম্বার প্রদান পূর্বক গ্রহণ করা উচিত।

(২) উক্ত সি.এস. খতিয়ান নং ৪৫৮, যা নিম্ন আদালতের নথিতে সামিল আছে মর্মে স্বীকৃতভাবে দেখানো হয়েছে, তা প্রদর্শনপূর্বক তিনি দেখাতে সচেষ্ট হয়েছেন যে, সি. এস. ৪৬০ নং খতিয়ানের সম্পত্তির উপরিস্থিত মালিক ছিলেন ভবানী চরণ লাহা গং এবং এই মর্মে তিনি সি.এস. খতিয়ান নং ৪৫৮ এবং ৪৬০ পাশাপাশি তুলনামূলকভাবে আদালতের সম্মুখে উপস্হাপন করে দেখানোর চেষ্টা করেছেন যে, সি. এস. খতিয়ান নং ৪৬০ এ বর্ণিত 'ক', 'খ' এবং 'গ' গ্রুপের মালিকগণের উপরিস্থিত মালিক ছিলেন ভবানী চরণ লাহা গং। তাই তাঁর মতে ভবানী চরণ লাহা গং পক্ষে কর মামলা রুজু হওয়া, তাতে ডিক্রি হওয়া, নিলাম মূলে বয়নামা হওয়া এবং দখলনামা হওয়ার ঘটনা অবিশ্বাস করার কোনো কারণ বিচারিক আদালতের ছিল না বলেই আদালত তা বিশ্বাস করে বাদীর মামলা প্রমানিত হয়েছে মর্মে সিদ্ধান্তে উপনীত হয়েছেন।

(৩) বিভিন্ন কবুলিয়তনামা এবং হস্তান্তর দলিল, যা নিম্ন আদালতের সম্মুখে সাক্ষ্য হিসেবে গৃহিত হয়েছে এবং প্রদর্শনী নাম্বার পড়েছে, তা দেখিয়ে জনাব চৌধুরী বলতে সচেষ্ট হয়েছেন যে, উপরোক্ত দলিল সমূহের মাধ্যমে বিবাদী পক্ষ তথা তাদের পূর্বসূরীগণ বিভিন্ন সম্পত্তির মালিক হয়েছেন এবং ঐ সমস্ত দলিল ও কবুলিয়তনামায় তারা বাদীর কথিত নিলামের কথা স্বীকার করে নিয়েছেন। সেহেতু প্রতিদ্বন্দ্বিতাকারী বিবাদী তথা অত্র আদালতের সম্মুখে আপীলকারী সাক্ষ্য আইনের ১১৫ ধারা অনুযায়ী এস্টোপেল (Estoppel) নীতি দ্বারা বারিত মর্মে প্রতীয়মান হওয়া উচিত এবং তারা কোনোভাবেই বর্ণিত মোকদ্দমায় এবং অত্র আপীলে নিলাম হয়নি মর্মে বক্তব্য দিতে আইনত পারেন না।

(৪) বাদীপক্ষ যেহেতু Evidance Act এর ৬৫ ধারা অনুযায়ী বয়নামা এবং দখলনামার সার্টিফাইট কপি (প্রদর্শনী-২ এবং প্রদর্শনী-৩) এবং রেন্ট স্যুট রেজিস্ট্রারের সার্টিফাইট কপি (প্রদর্শনী-৪) দ্বারা কথিত রেন্ট স্যুটের অস্তিত্ব প্রমান করতে সক্ষম হয়েছেন এবং যেহেতু বিবাদী উক্ত মামলায় উক্ত নিলাম সম্পর্কে তেমন কোনো সন্দেহ সৃষ্টি করতে পারেনি, সেহেতু নিম্ন আদালত

সঠিক সিদ্ধান্তে উপনীত হয়ে বাদীর পক্ষে তর্কিত সম্পত্তির স্বত্ব ঘোষণা ও দখল উদ্ধারের রায় ও ডিক্রি প্রদান করেছেন। সুতরাং অত্র আপীল আদালতের সম্মুখে উক্ত রায় ও ডিক্রিতে হস্তক্ষেপ করার কোন বৈধ এবং আইনত কারণ বিদ্যমান নাই।

(৫) আপীলকারী বিবাদীর দাখিলকৃত লিখিত জবাব প্রদর্শন করে জনাব চৌধুরী দেখান যে, বিবাদী নিজেই উপরিস্থিত সি.এস. খতিয়ান ৪৫৮ স্বীকার করে নিয়েছেন। তাই Evidence Act এর ৫৮ ধারা অনুযায়ী উক্ত সি.এস. ৪৫৮ খতিয়ানটি এমনিতেই প্রমানিত হয়েছে বলে গণ্য হবে। ফলশ্রুতিতে নিম্ন আদালত উক্ত সি.এস. ৪৫৮ নং খতিয়ানের উপর নির্ভর করে সি.এস. ৪৬০ নং খতিয়ান সম্পর্কে তথা সি.এস. ৪৬০ নং খতিয়ানের ভূমি নিলাম হওয়া সম্পর্কে যে সিদ্ধান্তে উপনীত হয়েছেন তা হস্তক্ষেপ করার কোনো বৈধ এবং আইনত কারণ বিদ্যমান নাই।

(৬) সিভিল রুলস এন্ড অর্ডার এর উপ-বিধি ৪০৭ সম্পর্কে জনাব চৌধুরী বলেন যে, এইবিধানটি কোনোভাবেই সি.এস. খতিয়ান নং ৪৫৮ এর গ্রহণযোগ্যতার বিষয় সম্পর্কিত নয়, কেননা সি. এস. ৪৫৮ নং খতিয়ানটি সাক্ষীর মাধ্যমে কোনো প্রকার ওজর আপত্তি ছাড়া আদালতে দাখিল করা হয়েছে, শুধুমাত্র ভুলবশতঃ প্রদর্শনী নাম্বার দেয়া হয়নি। এ প্রসঙ্গে তিনি পি.ডব্লিউ-১ এর রিকলকৃত সাক্ষ্য এবং বিবাদী কর্তৃক জেরার অংশ পড়ে শোনান।

৮. **<u>অত্র আদালতের পর্যবেক্ষন, বিশ্লেষন এবং আদেশঃ</u>**

বিজ্ঞ আইনজীবীগণের উপরোক্ত বক্তব্যের প্রেক্ষিতে সঠিক সিদ্ধান্তে উপনীত হতে প্রথমেই দেওয়ানী কার্য্যবিধির ৪১ নং আদেশের ৩১(ক) বিধি অনুযায়ী নিম্নবর্ণিত Points for Determination নির্ধারণ করা গেলঃ

(১) সি.এস. ৪৫৮ নং খতিয়ানের সইমুহুরী নকলটি দালিলিক সাক্ষ্য হিসাবে গ্রহন করা এবং প্রদর্শনী নাম্বার প্রদান পূর্বক নির্ভর করা যায় কিনা।

(২) কথিত কর মামলা, বয়নামা, দখলনামা ইত্যাদি বাদি প্রমান পূর্বক নালিশী ভূমিতে স্বত্ব প্রমানে সক্ষম হয়েছে কিনা।

(৩) বাদি নালিশী ভূমিতে তার দখল এবং কথিত বেদখল প্রমান করতে সক্ষম হয়েছে কিনা।

৯. আমাদের প্রথমেই দেখতে হবে সি.এস. ৪৫৮ নং খতিয়ানটি আসলে সাক্ষ্য হিসেবে গৃহিত হয়েছিল কি-না? তথা আপীলকারীর বিজ্ঞ আইনজীবী শ্রী ষষ্ঠী সরকারের বক্তব্য অনুযায়ী যেহেতু সি. এস. ৪৫৮ নং খতিয়ানটি প্রদর্শনী নাম্বার পড়ে নাই, সেহেতু সেটি গৃহিত দালিলিক সাক্ষ্য হিসেবে তাতে প্রদর্শনী নাম্বার এই আপীল পর্যায়ে দেয়া যায় কি-না। দেখা যায় বিবাদী পক্ষ তার লিখিত জবাবের ১১ নং দফায় সি.এস. ৪৫৮ নং খতিয়ানের অস্তিত্ব এবং তা যে সি.এস. ৪৬০ নং খতিয়ানে উপরিস্থিত খতিয়ান তা স্বীকার করে নিয়েছেন। তবে তিনি বলতে সচেষ্ট হয়েছেন যে, উক্ত খতিয়ানে উপরিস্থিত মালিক হিসেবে উমেদ রাজা মিয়া গংকে দেখানো হয়েছে। সুতরাং আমরা আপাতত এই সিদ্ধান্তে উপনিত হতে পারি যে, সি.এস. ৪৫৮ নং খতিয়ানটি সি. এস. ৪৬০ নং খতিয়ানের উপরিস্থিত খতিয়ান।

১০. এখন দেখা যাক সি.এস. ৪৫৮ নং খতিয়ানটি সাক্ষ্য হিসেবে গৃহিত হয়েছিল কি-না। এটি দেখা প্রয়োজন এই জন্যে যে, সি.এস. ৪৫৮ নং খতিয়ানের যে বর্ণনা তা নিয়ে পক্ষগণের মধ্যে চরম বিরোধ বিদ্যমান। বাদীপক্ষ দাবী করেছেন যে, সি.এস. ৪৫৮ নং খতিয়ান প্রমান করে যে সি.এস. ৪৬০ নং খতিয়ানের ভূমির উপরিস্থিত মালিক ছিলেন ভবানী চরণ লাহা গং। অন্যদিকে বিবাদী তথা আপীলকারীপক্ষ দাবী করেন যে উক্ত খতিয়ান মতে দেখা যায় সি.এস. ৪৬০ নং খতিয়ানের উপরিস্থিত মালিক ছিলেন উমেদ রাজা মিয়া গং। এ প্রসঙ্গে বাদীপক্ষের সাক্ষী পি.ডব্লিউ-১ তথা বাদী নিজে রি-কল পরবর্তি যে সাক্ষ্য দিয়েছেন তার প্রাসংগিক অংশ হুবহু তুলে ধরা হলোঃ

> "সত্য নহে যে, ১৫-০১-৯৪ ইং তারিখের ৩২৩৫ নং এওয়াজ দলিলমূলে আমার পিতা বরাবর আঃ রাজ্জাক ও আঃ রওফ এওয়াজ দলিল দেয়নি বা পরবর্তীতে পিতা ১৩-১০-৯৪ ইং তারিখে রেজিস্ট্রিকৃত কবলাধীন মালিক হয়নি বা ভূয়া ।
>
> উক্ত দু'টি আমার সইমহুরী নকল দাখিল করেছি ।"
>
> ৪৫৮ নং খতিয়ান দাখিল ।
>
> জেরাঃ
>
> আমার নালিশী ৪৫৮ নং খতিয়ানের মালিক ছিলেন উমর আলী ভূইয়া গং ।

১১. পি.ডব্লিউ-০১ এর উপরোক্ত বক্তব্য থেকে দেখা যায় যে, তিনি সি.এস. ৪৫৮ নং খতিয়ানের সহি মহুরী নকল আদালতে দাখিল করেছিলেন এবং উক্ত খতিয়ানের উপর বিবাদী পক্ষ তাকে জেরা করেছিলেন। এ প্রসঙ্গে দেওয়ানী কার্যবিধির ১৩ নং আদেশের ৪(১) নং বিধিটি প্রণিধানযোগ্য, যা নিম্নে হুবহু তুলে ধরা হলোঃ

> *4(1)Subject to the provisons of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:-*
>
> *a) the number and title of the suit,*

b) the name of the person producing the document,
c) the date on which it was produced, and
d) a statement of its having been so admitted;

And the endorsement shall be signed or initialled by the Judge.

১২. দেওয়ানী কার্যবিধির উপরোক্ত বিধান থেকে প্রতীয়মান হয় যে, যখনই একটি দলিল একটি মামলায় সাক্ষ্য হিসেবে গৃহিত হবে, উক্ত দলিলের উপর কিছু নোট (endorsements) এবং চিহ্ন দেওয়ার বিধান রয়েছেঃ যথা উক্ত দলিলের উপর সংশ্লিষ্ট মামলাটির নাম্বার, যে ব্যক্তি দলিলটি দাখিল করেছে তার নাম, যে তারিখে দলিলটি আদালতে দাখিল হয়েছে উক্ত তারিখ, এ দলিলটি যে সাক্ষ্য হিসাবে গৃহীত হয়েছে তার একটি বক্তব্য এবং এ সমস্ত তথ্য সন্নিবেশ করে দালিলিক সাক্ষ্যটির উপর বিজ্ঞ বিচারকের ইনিশিয়াল। এ ছাড়াও সিভিল রুলস এন্ড অর্ডার এর ভলিয়ম-১, চাপ্টার-১৭, বিধি ৬ এর উপবিধি ৩৯৬ এবং ৩৯৭ অনুযায়ী ব্যবস্থা গ্রহণ করতে হবে। উক্ত উপবিধি ৩৯৬ ও ৩৯৭ দ্বয় নিম্নে হুবহু তুলে ধরা হলোঃ

"396. If any document included in the list is referred to in the proceedings or shown to a witness before it is tendered in evidence and formally proved, it should immediately be marked for indentification.

397. Every document "admitted in evidence" shall be detached from the list and annexed to a separate list in Form No. (J) 23, Volume II, after being immediately endorsed with the particulars stated in Or, 13, r. 4, and signed or initialled by the Judge in the manner required by that rule, and marked with an exhibit number."

১৩. সিভিল রুলস এন্ড অর্ডারের উপরোক্ত বিধি সমূহ থেকে দেখা যায় যে, যখন একটি দলিল একজন সাক্ষিকে রেফার করা হয় বা দেখানো হয় এবং আনুষ্ঠানিকভাবে প্রমাণিত হয়, উক্ত দলিলের উপর সাথে সাথে একটি পরিচিতি চিহ্ন দিতে হয় ("be marked for identification") এবং উক্ত দলিলটিকে সংশ্লিষ্ট পক্ষের ফিরিস্তিমূলে দাখিল কৃত দলিল সমুহ থেকে আলাদা করে সিভিল রুলস এন্ড অর্ডার্সের ভলিউম-২ এ প্রদত্ত Form No. (J) 23 মতে একটি সেপারেট লিস্টে সংযুক্ত করা হয় যা দেওয়ানী কার্যবিধির আদেশ ১৩, রুল ৪ মতে এনডোর্সড (endorsed) এবং বিজ্ঞ বিচারক দ্বারা সংক্ষিপ্তভাবে স্বাক্ষরিত (initialed) হয়। এ প্রসঙ্গে বিজ্ঞ আইনজীবী শ্রী ষষ্ঠী সরকার কর্তৃক উল্লেখিত সিভিল রুলস এন্ড অডার্সের বিধি ৬, উপবিধি ৪০৭ এর বিধানকেও পরীক্ষা করে দেখা হলো। এতে দেখা এ বিধানটিতে ভিন্ন বিষয়ে উল্লেখ করা হয়েছে তথা যে সমস্ত দলিল সাক্ষ্য হিসাবে গৃহীত হয় নাই সে সমস্ত দলিল বিষয়ে করনীয় কি তা নিয়ে বিধান করা হয়েছে। সুতরাং এই ৪০৭ নং উপবিধির বিধানটি আমাদের প্রতিপাদ্য সি.এস. খতিয়ান নং ৪৫৮ সম্পর্কে কোনোভাবেই প্রাসঙ্গিক নয়। আগেই উল্লেখ করা হয়েছে, সি.এস. খতিয়ান নং ৪৫৮ এর অস্তিত্ব বিবাদী কর্তৃক স্বীকৃত। শুধুমাত্র উক্ত খতিয়ানের মর্ম নিয়ে পক্ষদ্বয়ের মধ্যে বিপত্তি বা বিরোধিতা রয়েছে। তাই পি.ডব্লিউ-১ এর সাক্ষ্য অনুযায়ী যেহেতু দেখা যায় যে, সি.এস. ৪৫৮ নং খতিয়ানটি কোনো ধরনের আপত্তি ছাড়া আদালতে দাখিল হয়েছে, সেহেতু এটি দালিলিক সাক্ষ্য হিসেবে গৃহীত হয়েছে বলে গণ্য করা গেল। আবার যেহেতু এটি দালিলিক সাক্ষ্য হিসেবে গৃহীত হয়েছে, সেহেতু সিভিল রুলস এন্ড অর্ডার এর চাপ্টার-১৭, বিধি ৬ এর অধীন উপবিধি ৩৯৬ এবং ৩৯৭ এর বিধান মতে এটিকে Exhibit বা প্রদর্শনী নাম্বার দিয়ে Vol-2 এর Form No. (J) 23 তে সংযুক্ত করা উচিত ছিল। যেহেতু এই কাজটি ভুলবশতঃ নিম্ন আদালত কর্তৃক করা হয় নাই, অত্র আপীল আদালত কর্তৃক এটিকে প্রমানিত দালিলিক সাক্ষ্য হিসেবে প্রদর্শনী নাম্বার বা চিহ্ন প্রদান করা সমীচীন হবে বলে মনে করি। তাই এই দালিলিক সাক্ষ্যটিকে প্রদর্শনী-১ এর সাথে **"প্রদর্শনী ১/ক"** হিসেবে চিহ্নিত করা গেল। ফলশ্রুতিতে এটি সিভিল রুলস এন্ড অডার্স এর Vol-2, Form No. (J) 23 তে অন্যান্য প্রদর্শনীর সাথে সংযুক্ত করা হলো।

১৪. এখন দেখা যাক উক্ত সি.এস. ৪৫৮ নং খতিয়ান মতে সি.এস. ৪৬০ নং খতিয়ানের উপরিস্থিত মালিক কারা ছিলেন। উক্ত প্রদর্শনী-১/ক তথা সি.এস. খতিয়ান নং ৪৫৮ পরীক্ষান্তে দেখা যায় যে উপরিস্থিত স্বত্বের ঘরে রাজা কৃষ্ণ দাস লাহা গং উল্লেখ আছে এবং দখল ঘরে ওমর আলী ভুঞাঁ, হায়দার আলী ও ওমেদ রাজা মিয়া উল্লেখ আছে । উক্ত খতিয়ান পরীক্ষান্তে আরো দেখা যায় যে, খতিয়ানটি পরবর্তিতে ভাগ হয়ে ৪টি আলাদা খতিয়ান হয়, তথা সি.এস. ৪৫৯-৪৬২ নং খতিয়ান। অর্থাৎ সি.এস. ৪৬০ নং খতিয়ানটি সি.এস. ৪৫৮ নং খতিয়ান থেকে সৃষ্ট তথা এর পরবতির্ত খতিয়ান। এই বিষয়ে সন্দেহ থাকার কোনো অবকাশ নেই।

১৫. এখন দেখা যাক, বাদী পক্ষ বিচারিক আদালতে নালিশী ভূমি সহ অন্যান্য ভূমি তাদের দাবি মতে রাজা ভবানী চরণ লাহা গং এর পক্ষে নিলাম হয়েছে, এ ঘটনাটি প্রমান করতে পেরেছে কি-না। নিম্ন আদালতের নথি তথা বাদী কর্তৃক দাখিলকৃত গৃহীত দালিলিক সাক্ষ্য হতে দেখা যায় যে, সি.এস. ৪৬০ নং খতিয়ানটি বাদী ১নং প্রদর্শনী এবং বিবাদী প্রদর্শনী-ক হিসেবে দাখিল করেছেন। এই খতিয়ান দৃষ্টে দেখা যায় যে, যদিও এতে উপরিস্থিত স্বত্ব হিসেবে ওমেদ রাজা মিয়া গং এবং ওমর আলী ভুঞাঁ গং এর নাম উল্লেখ আছে এবং দখলদার হিসেবে আর্জি এবং লিখিত বর্ণনায় উল্লেখিত তিনটি গ্রুপ তথা 'ক', 'খ' এবং 'গ' গ্রুপ এর দখল বলা আছে, এটি সি.এস. ৪৫৮ নং খতিয়ানের সাথে মিলিয়ে পরীক্ষায় প্রতিয়মান হয় যে উক্ত খতিয়ানের সম্পত্তির মূল উপরিস্থিত মালিক ছিলেন লাহা গং, যদিও তা সন্দেহাতীত ভাবে প্রমান করা এতদিন পর বাস্তবে সম্ভব নয়।

১৬. বর্তমান সময়ে একজন বাদীর পক্ষে এতো পুরোনো খতিয়ান (যা এস. এ. খতিয়ানেরও আগের খতিয়ান) থেকে কোন বিষয় সন্দেহাতীত ভাবে প্রমান আশা করা সমীচীন নয়। মনে রাখতে হবে এটি একটি দেওয়ানী মামলা এবং এখানে প্রমানের স্টান্ডার্ড হলো সম্ভাব্যতার ভারসাম্য (Balance of Probability)–তথা এখানে ফৌজদারী মামলার মতো সন্দেহাতীতভাবে প্রমান করতে হয় না। সেহেতু ভবানী চরণ লাহা গং সি.এস. ৪৬০ খতিয়ানের সম্পত্তির মূল উপরিস্থিত মালিক ছিল তা বলা যায়।

১৭. এখন দেখা যাক কথিত কর মামলায় নিলামের মাধ্যমে ভবানী চরন লাহার পক্ষে নিলাম ক্রয় এবং বাদীর উত্তরসূরি নাবালক মিয়া বরাবরে Sattlement বা কবুলিয়ত ইত্যাদি বিষয় বাদী প্রমান করতে সক্ষম হয়েছে। নিলাম প্রমান করার জন্য বাদী মূলত ৩ টি দালিলিক সাক্ষ্য উপস্থাপন করেছেনঃ (১) বয়নামার সহি মহুরী নকল (প্রদর্শনী-২), (২) দখলনামার সহি মহুরী নকল (প্রদর্শনী-৩), এবং (৩) কথিত ল্যান্ড স্যুট মামলার রেজিস্ট্রির সহি মহুরী নকল (প্রদর্শনী-৪)। এছাড়াও বাদী তালাশীপত্র (প্রদর্শনী-৮) এবং তলাশীপত্র (প্রদর্শনী-১১) দাখিল করে দেখিয়েছেন যে, কথিত রেন্ট মামলার নথিগুলো ৩য় শ্রেণির নথি হওয়ায় তা ইতিমধ্যে বিধিমোতাবেক ধ্বংস করা হয়েছে এবং সে সমস্ত নথির সহি মহুরী নকল পাওয়া এখন আর সম্ভব নয় । বিচারিক আদালত প্রদর্শনী-২, প্রদর্শনী-৩ এবং প্রদর্শনী-৪ পর্যবেক্ষণ করে সিদ্ধান্তে উপনীত হয়েছেন যে, এই সহি মহুরী নকলগুলি ৩০ বছর পূর্বে উত্তোলিত তাই এ সমস্ত সহি মহুরী নকল জাল-জালিয়াতি করে সৃষ্ট মর্মে মনে করার কোনো কারণ থাকতে পারেনা । এ প্রসঙ্গে সাক্ষ্য আইনের ৬৫ ধারাটি প্রণিধানযোগ্য, যেখানে বিধান আছে যে, যখন কোনো দলিলের মূল কপি নষ্ট হয়ে যায়, হারিয়ে যায় ইত্যাদি তখন সেই দলিলটি সহি মহুরী নকল দিয়ে প্রমাণ করা যায়। সুতারাং যেহেতু উপরিল্লিখিত তালাশীপত্র মোতাবেক (প্রদর্শনী-৮ ও ১১) রেন্ট স্যুটের মূল নথি ধ্বংস করে দেওয়া হয়েছে এবং বয়নামা, দখলনামা এবং স্যুট রেজিস্ট্রারের সহি মহুরী নকলসমূহ মামলা রজু হওয়ার ৩০ বছর পূর্বে উত্তোলিত এবং যেহেতু আমাদের পরীক্ষান্তে উক্ত প্রদর্শনী সমূহ জাল-জালিয়াতির মাধ্যমে সৃষ্ট বলে প্রতীয়মান হয় না এবং জাল জালয়াতির মাধ্যমে সৃষ্ট রয়েছে মর্মে বিবাদী পক্ষ কোনো ধরনের সাক্ষ্য দাখিল করতে পারে নাই, সেহেতু এই তিনটি প্রদর্শিত দলিল সমূহ (প্রদর্শনী-২, ৩ এবং ৪) বিশ্বাস না করা বা তাদের উপর নির্ভর না করার কোনো যৌক্তিক কারন আমরা খুঁজে পাচ্ছি না। সেহেতু আমরা মনে করি, বিচারিক আদালত এই তিনটি এবং আরো কিছু দলিলিক সাক্ষ্যের উপর ভিত্তি করে নিলাম বিক্রয়ের বিষয়টি বিশ্বাস করেন এবং প্রমানিত হওয়া মর্মে যে সিদ্ধান্ত নিয়েছেন তা হস্তক্ষেপ করার কোনো বৈধ ও আইনসঙ্গত কারন নাই।

১৮. এছাড়াও প্রদর্শনী-১০ এবং ১০ক দ্বারা বাদী প্রমান করেছেন যে নালিশী সম্পত্তি বাদীর পিতার নামে রেকর্ড ভুক্ত হওয়ার পর তারা খাজনাও দিয়েছেন। অর্থাৎ বাদীর পিতা নালিশী ভূমির দখলে ছিলেন। যদিও বিবাদী পক্ষ লিখিত জবাব এবং সাক্ষ্য দিয়ে বলতে চেয়েছেন যে তারা এওয়াজ নামা মূলে সুজা মিয়া ও মুজা মিয়ার কাছ থেকে নালিশী সম্পত্তি পেয়েছেন, কিন্তু বিবাদী পক্ষ তাদের বায়ার দখল প্রমানের জন্য কোনো প্রকার খাজনার রশিদ দাখিল করেননি। তাহলে ধরে নেয়া যায় যে, বাদীর পিতা বাদীর পিতামহ নাবালক মিয়া থেকে উত্তরাধিকার সূত্রে প্রাপ্ত হয়ে এই সম্পত্তিতে দখলে ছিলেন। পক্ষান্তরে যেহেতু বিবাদী পক্ষ কিভাবে বা কি প্রকারে নালিশী সম্পত্তি দখল প্রাপ্ত হয়েছেন তা প্রমান করতে ব্যর্থ হয়েছে তথা কোনো খাজনার রশিদ দাখিল করতে ব্যর্থ হয়েছে, সেহেতু ধরে নেওয়া যায় যে, তারা কোনো আইনগত পন্থায় উক্ত ভূমিতে দখল প্রাপ্ত হয় নাই। এছাড়াও বাদীর পিতার কথিত বেদখল হওয়ার পর যখন ফৌজদারী কার্যবিধির ১৪৫ ধারা অনুযায়ী কার্যধারা রুজু হয়, যা পরবর্তিতে খারিজ হয়, সেখানেও পুলিশ প্রতিবেদনে (প্রদর্শনী-১২/ক) উল্লেখ করা হয়েছে যে বাদীর পিতাকে ১২-০৩-১৯৯৮ ইং তারিখে বেদখল করা

হয়েছে। সংশ্লিষ্ট হাকীমের আদেশ (প্রদর্শনী-১২/খ) হতে এটাও প্রমানিত হয় যে, সেই ১৪৫ ধারার কার্য ধারাটি বিজ্ঞ হাকিম এই মর্মে খারিজ করে দেন যে, বিরোধটি সিভিল নেচারের।

১৯. উপরিল্লিখিত বিষয় ছাড়া এও প্রতীয়মান হয় যে, বিবাদী পক্ষ অথবা তাদের বায়াগণ বিভিন্ন ক্রয় দলিল ও কবুলিয়তে নালিশী সম্পত্তি নিলাম বিক্রয়ের বিষয়টি কোনো না কোনোভাবে স্বীকার করে নিয়েছেন। এ প্রসঙ্গে প্রদর্শনী-১৩খ, ১৪খ এবং ১৪গ দৃষ্টে প্রতীয়মান হয় যে, বিবাদী ও বিবাদীর বায়াগণ নালিশী সম্পত্তি নিলামের বিষয়টি মেনে নিয়েই সি.এস. ৪৬০ নং খতিয়ানের অধীন বিভিন্ন সম্পত্তির ক্রয় এবং বন্দোবস্তী নিয়েছেন। তাই সেই নিলাম ক্রয় সম্পর্কে বা নিলাম অনুষ্ঠিত হওয়া সম্পর্কে বিবাদী পক্ষের ওজর আপত্তির ক্ষেত্রটি অত্যন্ত দুর্বল এই প্রসঙ্গে সাক্ষ্য আইনের ১১৫ ধারা তথা এসটোপেল নীতিটি প্রনিধানযোগ্য। এছাড়াও প্রতিবাদি পক্ষের বিজ্ঞ আইনজীবী জনাব আবুল কালাম চৌধুরী হাইকোর্ট বিভাগের একটি একক বেঞ্চের সিদ্ধান্ত উত্থাপন করেছেন যার সাইটেশন হলো **বজলুর রহমান গং বনাম সাদু মিয়া গং, ৪৫ ডি.এল.আর (১৯৯৩) পৃষ্ঠা-৩৯১**, যেখানে সিদ্ধান্ত প্রদান করা হয়েছে যে, পূর্বপুরুষ কর্তৃক স্বীকৃত কোন বিষয়ে উত্তরসুরীগণ আপত্তি উত্থাপন করতে পারবে না এবং সে রকম আপত্তি উত্থাপন করলে তা সাক্ষ্য আইনের ১১৫ ধারামূলে বারিত হবে। উক্ত মামলার উক্ত সিদ্ধান্তে মূল প্রতিপাদ্য আইনগত ব্যাখ্যাটি হুবহু তুলে ধরা হলোঃ

> *"Estoppel-It binds heirs-The plaintiff is claiming interest in the property by inheritance through his father. If his father had accepted the title of the defendants as tenants of the property, his father would be estopped from challenging the title of his landlord, and if his father would be estopped, the plaintiff would also be bound by the said estoppel, as estoppel binds heirs."*

২০. উপরোক্ত বিষয়গুলো ছাড়াও আরো কিছু বিষয় বাদীর পিতার স্বত্ব জোরদার করে। সাক্ষ্য প্রমানে দেখা যায় যে, নাবালক মিয়ার রেজিস্টার্ড কবুলিয়ত নামা ২২৬ তারিখঃ ১৭-০১-১৯৩৯ ইং (প্রদর্শনী-১৪) মূলে প্রাপ্ত নাবালক মিয়ার ৫৪ শতাংশ ভূমির মধ্যে কিছু অংশ তথা সি.এস. ৪০৩ নং দাগের ২৭ ডিং এবং সি.এস. ৪০৯ নং দাগের ১৮ ডিং, সর্বমোট ৪৫ ডিং সম্পত্তি, সড়ক ও জনপদ বিভাগ বরাবরে এবং ০২ ডিং ভূমি ফেনী পল্লী বিদ্যুৎ উন্নয়ন বোর্ড বরাবরে সরকার কর্তৃক অধিগৃহিত হয় এবং সেই অধিগ্রহণের ক্ষতিপূরণ বাবদ প্রদত্ত টাকা বাদীর পিতা সিদ্দিকুর রহমান আদায় করতে গেলে বিবাদীর বায়াগণ, তথা সুজা মিয়া ও মুজা মিয়া, তাতে আপত্তি দিলে সে আপত্তি খারিজ হয় এবং সে খারিজ আদেশের বিরুদ্ধে বিবাদীর উক্ত বায়াগণ কোনোধরনের আইনগত প্রতিকার না চেয়ে তা মেনে নিয়েছেন। এই বিষয়গুলো প্রদর্শনী-৬,৭,৮,৯ এবং ৯খ দ্বারা বাদী প্রমান করতে সক্ষম হয়েছেন। সুতরাং এটি বলা যায় যে, যেহেতু বিবাদীর বায়াগণ ক্ষতিপূরণ দাবী করে পরবর্তিতে কোনো প্রকার প্রতিকার চায় নাই, সেহেতু তারা সংশ্লিষ্ট ভূমিতে বাদীর পিতার মালিকানা স্বীকার করে নিয়েছিলেন। তাই তাদের উক্ত ভূমিতে কোনো সত্ব না থাকা সত্ত্বেও তারা যে কথিত এওয়াজ বদলের মাধ্যমে ০৭ শতাংশ ভূমি বিবাদীকে প্রদান করেছে মর্মে যে বক্তব্য বিবাদী উত্থাপন করেছেন, তা ভিত্তিহীন এবং এই এওয়াজ বদলের মাধ্যমে বিবাদীপক্ষ কোনো ধরণের স্বত্ব বা দখল অর্জন করেনি।

২১. উপরোক্ত আলোচনা, সাক্ষীগণের সাক্ষ্য এবং দালিলিক সাক্ষ্যসমূহ পুনঃপর্যালোচনা (Re-assesment) করে অত্র আপীল আদালত সিদ্ধান্ত নিতে সক্ষম হয়েছে যে, নিম্ন আদালত প্রতিবাদীর তথা বাদীর দায়ের করা মামলায় প্রার্থীত স্বত্ব ঘোষনার ও দখল উদ্ধারের ডিক্রি প্রদান করে কোনো ধরনের আইনগত, তথ্যগত বা অন্যকোন ভূল করেনি । তাই উক্ত তর্কিত রায় ও ডিক্রি হস্তক্ষেপ করার মতো কোনো বৈধ ও গ্রহণযোগ্য কারণ না থাকায়, অত্র আপীলটি খারিজ হতে বাধ্য।

২২. অতএব আদেশ হয় যে, অত্র আপীলটি কোনো ধরনের খরচের আদেশ ব্যতীত খারিজ হলো । অত্র আপীল হতে উদ্ভূত যদি কোনো অন্তবর্তিকালীন আদেশ থেকে থাকে, তাও রিকল ও বাতিল করা হলো।

২৩. উপরোক্ত কারনে সংযুক্ত রুলটিও [সিভিল রুল নং ১৫৯(এফ)/২০১৩] নিস্পত্তি করা হলো।

২৪. নিম্ন আদালতের নথি পাঠিয়ে দেয়া হোক ।

15 SCOB [2021] HCD 37

HIGH COURT DIVISION

Criminal Appeal No. 6799 of 2011

Md. Anis Miah
…Appellant
-Versus-
The State
… Respondent

Mr. SM Shajahan with Md. Abu Hanif Advocates
…for the appellant

Mr. Md. Moniruzzaman Rubel, Deputy Attorney General (not in office now); Mr. Md. Aminul Islam and Mr. Md. Shafiquel Islam Siddique, Deputy Attorney Generals with Mr. Abul Kalam Azad Khan and Md. Shafayet Jamil, Assistant Attorney Generals
... for the State

Mr. Khandker Mahbub Hossain and Mr. M I Farooqui, Senior Advocates and Mr. Shahdeen Malik, Advocate
… Amici Curiae

Judgment on 28.08.2019

Bench:
Mr. Justice Md. Shawkat Hossain
and
Mr. Justice Md. Ruhul Quddus
and
Mr. Justice ASM Abdul Mobin

Editor's Note:
On a reference from a Division Bench, honourable Chief Justice of Bangladesh constituted Larger Bench (Full Bench) consisting of three honourable judges to decide the law point involved herein, namely, legal implication of confession made by child in conflict with law under section 164 of the Code of Criminal Procedure as well as jurisdiction of a juvenile court constituted under the Children Act, 1974 and that of different tribunals constituted under different special laws enacted before or after the Children Act came into force. The Full Bench after extensive hearing held amongst others that confession of a child in conflict with law recorded under section 164 of the Code of Criminal Procedure has no legal evidentiary value and, therefore, such confession cannot form the basis of finding of guilt against him.

Key Words:
Confession of a child in conflict with law; Constitution and Jurisdiction of a Juvenile Court; 5, 51, 52 and 66 of the Children Act, 1974; Shishu Ain, 2013, section 47 (1); expressum facit cessare tacitum; Section 2(n), 18 and 71 of Children Act, 1974; Scetion 2(3) and 42 of Shishu Ain, 2013; Section 164 read with section 364 of Code of Criminal Procedure, 1898

Druto Bichar Tribunal Ain, 2002 and the Children Act, 1974:
Despite the Druto Bichar Tribunal Ain, 2002 was enacted after the Children Act, 1974 the overriding clause in section 2 of the Ain shall not in any way take away the jurisdiction of the Juvenile Court and confer the same on the Druto Bichar Tribunal

constituted under the Ain to try any notified case, where a youthful offender is charged with criminal offence. Even in absence of any Juvenile Court in any particular territorial jurisdiction, a Druto Bichar Tribunal has no jurisdiction to try any case where a child is charged. ...(Para 60)

Section 5, 51, 52 and 66 of Children Act, 1974 read with article 35 (1) of the Constitution:
According to section 66 of the Act, 1974 whenever a person, whether charged with an offence or not, is brought before a criminal Court otherwise than as a witness and he appears to be a child, it is incumbent upon the Judge to make an inquiry for determination of his age. In a cognizable offence, a person allegedly involved in commission of the offence, may be arrested on lodging of the FIR. The words "person … charged with an offence" as used in section 66 of the Act, therefore, includes a child as well against whom allegation of offence is brought in the FIR. This is not the mandate of law that the Court would wait till submission of charge sheet and framing of charge to determine his age on that day. Article 35 (1) of the Constitution says that punishment cannot be imposed on a person, which is greater than what was prescribed at the time of commission of the offence. The constitutional protection to a person that includes a child as well must be maintained in awarding punishment on him. Sections 5, 51 and 52 of the Act, 1974 are to be read with article 35 (1) of the Constitution and also with the whole scheme and purpose of the Act. Since on the day of occurrence, the juvenile offender was a boy of less than 16 years and imprisonment more than 10 years could not be imposed upon him on that day, we do not think that with the passage of time consumed for a protracted trial, he could be awarded more punishment. It would violate the constitutional protection regarding punishment as enshrined in article 35 (1) of the Constitution. In that view of the matter, we are in full agreement with the learned Advocate for the appellant and also with the learned Amici Curiae that there is no scope to award punishment upon a child more than what is prescribed in section 52 of the Act. So, a juvenile offender, if found guilty of offence on completion of trial, he cannot be simply put in prison except fulfillment of the conditions as mentioned in preceding section 51 thereof and punishment more than 10 years cannot be awarded on him.
...(Para 61)

There is no scope to argue that despite proof of age of a juvenile offender, he can be punished for more than ten years' detention/imprisonment in case of offences punishable with death or life term imprisonment. ...(Para 63)

Shishu Ain, 2013, section 47 (1) and Evidence Act 1872, Section 25 and 26:
Shishu Ain, 2013, section 47 (1) whereof provides that during investigation, a police-officer assigned to the child-desk may record statement of a juvenile offender, but in presence of his parents/legal guardians/any other member of his extended family and also a probation officer or social welfare officer. Section 25 of the Evidence Act says that no confession made to a police-officer shall be proved as against an accused and section 26 thereof further says that no confession made by any person in custody of police-officer shall be proved as against him. From a combined reading of the said provisions of law it can be inferred that in order to carry out investigation and find out the names of other offenders, if any, a child can be interrogated. But no provision of making confession and using the same against him is provided within the subsequent enactment in 2013. ...(Para 73)

A child is not supposed to make a confession:
When the case of *Jaibar Ali Fakir* was already published and before that, the provisions of recording confessional statement by an accused were already there in different laws, the legislature, in the repealing law i.e in the Ain, 2013, could have easily incorporated the provision of recording such confession by a child in conflict with the law and awarding punishment on him on that basis, but it did not do so. It can be said thus the legislature deliberately omitted to make such law. Every word in a law has a definite meaning and similarly every intentional omission should be given a meaning. The omission in the Ain, 2013 of making confession by a child has also a meaning that a child is not supposed to make a confession. For a clear understanding of the legislative intent and for interpreting the scope of recording confessional statement of a child within the scope of Children Act we may also take recourse to the oft-quoted Latin doctrine, *expressum facit cessare tacitum* meaning express mention of one thing implies exclusion of other. ...(Para 74)

Section 2(n), 18 and 71 of Children Act, 1974; Scetion 2(3) and 42 of Shishu Ain, 2013; Section 164 read with section 364 of Code of Criminal Procedure, 1898:
The Act, 1974 in its section 2 (n) defined "youthful offender" as any child who has been found to have committed any offence. Section 71 of the Act prohibited the words "conviction" and "sentence" to be used in relation to the children or youthful offenders. The Act in its entire text did not use the word "accused" against a youthful offender. Similarly the Shishu Ain, 2013 in its definition clause [section 2 (3)] used the phrase 'children in conflict with the law' and prohibited the words 'guilty', 'convicted' and 'sentenced' to indicate any child in conflict with the law. On the other hand, section 164 read with section 364 of the CrPC speaks of confession of "accused" to be made before the Magistrate. In view of the discrepancies of the indicative words in the Children Act/Shishu Ain and the Code of Criminal Procedure, we find it difficult to accept that by virtue of section 18 of the Children Act or section 42 of the Shishu Ain, confession of a child under section 164 of the CrPC can be recorded and used against him. ...(Para 75)

Use of confession of a child recorded under section 164 of the CrPC against himself is beyond the scope of law:
In view of the development and spirit of the law, purpose of legislation of the Children Act, 1974 that was in force at the material time and the subsequent Shishu Ain, 2013, one's constitutional protection from self-incrimination as guaranteed under article 35 (4) and the incompetency of a child to waive this right given to him by the Constitution and also his right to remain silent, use of confession of a child recorded under section 164 of the CrPC against himself is beyond the scope of law. ...(Para 77)

We completely disapprove the making of confession by a child and use of the same against himself in a juvenile case:
We have already discussed that the Children Act, 1974 that was in force at the material time did not contain any legal provision of recording child confession. The law of confession was, however, incorporated in the Evidence Act, 1872 and the Code of Criminal Procedure, 1898, the Anti-Terrorism Act, 2009 and some other laws in general for the purpose of disclosure of the manner of offence and names of the offenders by a

repenting accused. That is why recording of confession on allurement, false hope, pressure, coercion, physical torture etcetera are strictly prohibited and have no evidentiary value. It is a common attitude of all human beings that they conceal their involvement in any punishable offence. It is equally common that an offender after commission of an offence under whatever circumstances for whatever reasons, tries to escape the liability. So, voluntariness of confession is extremely exceptional in human nature. Only in rarest of the rare cases, an accused makes confession out of repentance and guilty feelings. In our criminal investigation system, the investigating agencies appear to be more interested in taking an accused on remand and extract confession from him rather than collecting reliable and scientific evidence regarding his involvement in the alleged occurrence. In such a position, if the children are brought within the scope of recording confession, the purpose of punishing the real offender may fail and there is every possibility that innocent children will be victimized. It will also keep the investigating agencies confined to remand, coercion, torture and confession based investigation and would narrow down the thorough investigation focusing on collection of better scientific evidence to bring the real offenders to book. Besides, children are the emotional centers of their parents. In our prevailing standard of policing, legalization of their confessions may also open up the scope of blackmailing their parents for extraction of illegal money. We, therefore, completely disapprove the making of confession by a child and use of the same against himself in a juvenile case.

... (Para 84)

In view of the discussions made above, our answers to the questions raised in this case are:

(1) Confession of a child in conflict with law recorded under section 164 of the Code of Criminal Procedure has no legal evidentiary value and, therefore, such confession cannot form the basis of finding of guilt against him.

(2) A Juvenile Court constituted under the Children Act, 1974 as was in force before and now under the Shishu Ain, 2013 has got exclusive jurisdiction to try the cases, where children in conflict with law are charged with criminal offences. No other Court or Tribunal constituted under any other special or general law irrespective of its age of legislation has jurisdiction to try such cases unless the jurisdiction of Juvenile Court is expressly excluded there. The Druto Bichar Tribunal constituted under the Druto Bichar Tribunal Ain, 2002 cannot assume the jurisdiction of Juvenile Court in any manner whatsoever.

(3) In imposing punishment for offences punishable with death or imprisonment of life, the maximum term of imprisonment against a juvenile offender, or a person who crossed childhood during trial or detention, cannot be more than 10 years.

... (Para 85)

JUDGMENT

Md. Ruhul Quddus, J:

1. This criminal appeal under section 28 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 is directed against judgment and order dated 13.10.2011 passed by the Judge, Juvenile Court and Druto Bichar Tribunal No.4, Dhaka in Juvenile Case No. 01 of 2011 finding the appellant

(a juvenile offender) guilty under sections 8 and 30 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (hereinafter referred to the Ain, 2000) read with section 52 of the Children Act, 1974 (hereinafter referred to the Act, 1974) and awarding him punishment of detention and imprisonment for 10 (ten) years in total, out of which he would be detained in a certified institute till attainment of 18 years of age and thereafter suffer imprisonment for the remaining period.

2. In course of simultaneous hearing of this appeal with Death Reference No. 61 of 2011 and three other connected cases by a Division Bench, the matters were referred to the learned Chief Justice for constitution of a Full Bench to decide the law points involved in the present appeal, namely, legal implication of confession made under section 164 of the Code of Criminal Procedure by a child in conflict with law and jurisdiction of a Juvenile Court constituted under the Children Act and that of different Tribunals constituted under different special laws enacted before or after the Children Act came in force. Learned Chief Justice by order dated 02.10.2018 constituted this Full Bench for hearing and disposal of the matters including the instant criminal appeal.

3. Considering the importance and gravity of the above law points, we requested Mr. Khandker Mahbub Hossain and Mr. M I Farooqui, both Senior Advocates and Mr. Shahdeen Malik, Advocate of the Supreme Court of Bangladesh to assist this Court as Amicus Curiae, and also requested them to make their submissions on two other collateral issues as to whether the Druto Bichar Tribunal constituted under the Druto Bichar Tribunal Ain, 2002 (hereinafter referred to the Ain, 2002) can *suo motu* assume the jurisdiction of a Juvenile Court and what should be the maximum term of imprisonment in case of sentence for offence punishable with death or imprisonment for life both against a child and the person who crossed childhood during trial or detention. They were generous to appear and make their valued submissions on the law points involved.

4. Facts of the case in brief are that the informant Md. Siddikur Rahman (PW 1) lodged a first information report (FIR) with Kalmakanda Police Station, Netrokona on 16.02.2010 against accused Oli, Sabuz Miah, Tapash Chandra Saha, Feroz Miah, Rafiqul, Emdadul and Farid Miah bringing allegations of kidnapping and murder of his son Saikat, a boy of 7 years of age. It was stated in the FIR that the informant had long pending enmity with accused Oli and Farid Miah. Before 20/25 days of the occurrence, accused Oli asked him to give Taka one lac as he was intending to contest the Students Union election in the college he was studying. As the informant refused, Oli mounted pressure on him and at one stage on 10.02.2010 threatened his wife of dire consequences. Two days thereafter, Oli made a phone call to him (informant) at 7:00 am on 12.12.2010 threatening that he would see the result of the refusal within 12 hours. At about 5:00 pm on that day his son Saikat (7) went to play outside, but did not return home. Despite exhaustive search, they could not trace him out and subsequently recorded a general diary (GD) with the local police station. On the following day the accused persons repeatedly called him from cellular phone No. 01929375229 to his phone No. 01719960374 at about 7.35 am, 7.45 pm, 8.57 pm and 10.07 pm and demanded ransom of Taka one lac if he wanted to get his son alive. On the next day i.e. 14.02.2010 the accused called him again from the same number at 8.30 am and 12.09 pm demanding the ransom in the same way. On the hope of getting his son alive, the informant agreed to pay the money. According to their instruction he went along with the money at the eastern bank of river Vogai on 15.02.2010 at about 9:00 pm, when accused Oli, Sabuz and Tapash came, took the money and told him that he would get back his son within an hour. Other accused persons were standing at a distance of 50 yards or thereabout. After an hour, Oli made a phone call

and informed him that his son would be available in an abandoned house situated at the eastern side of his house. Then and there he rushed there and got the dead body of his son. His (victim's) neck was wrung tightly by a nylon cord, right side of the face was injured and right eye was injured by burn.

5. Police took up the case and after completion of investigation submitted a charge sheet under sections 7, 8 and 30 of the Ain, 2000 read with sections 302, 201 and 34 of the Penal Code against nine including the appellant Anis Miah, a juvenile offender and cousin of the victim, whose age was mentioned 18 years in the charge sheet. During investigation, the police arrested the juvenile offender on 21.02.2010 and on the following day produced him before the Magistrate, where he made a confession purportedly under section 164 of the Code of Criminal Procedure (hereinafter referred to the CrPC).

6. The case being ready for trial was sent to the Nari-o-Shishu Nirjatan Daman Tribunal, Netrokona where the learned Judge of the Tribunal took cognizance of offence under sections 7, 8 and 30 of the Ain, 2000 read with sections 302, 201 and 34 of the Penal Code against the charge sheeted accused including the juvenile offender by order dated 21.07.2010 and transferred the case to the Additional Sessions Judge and Nari-o-Shishu Nirjatan Daman Tribunal, Netrokona for trial. The case was transferred again to the Druto Bichar Tribunal No.4, Dhaka on a notification in official gazette. The case was fixed for framing of charge on 15.02.2011, when the juvenile offender filed an application for holding his trial by the Juvenile Court. The application was accompanied by his birth certificate and school registration card showing his date of birth 01.07.1995, on which count his age was 15 years 7 months on that day. Learned Judge of the Tribunal allowed the application by order dated 15.02.2011, but without sending the case to the Juvenile Court assumed its jurisdiction on his own motion, split the record and registered the present case as Juvenile Case No. 01 of 2011. Learned Judge, thereafter, framed charge against the appellant under sections 7 and 8 of the Act VIII of 2000 read with sections 302, 201 and 109 of the Penal Code on the same day. The charge was read over to him, to which he pleaded not guilty and claimed justice.

7. In order to prove its case, prosecution examined 13 witnesses including the informant Md. Siddiqur Rahman, his brother Salauddin Ahmed who recorded the GD on 13.02.2010, two Investigating Officers and the Magistrate who recorded the confession of the juvenile offender.

8. PW 1 Md. Siddiqur Rahman, the informant stated that in the afternoon on 12.02.2010 his son Saikat went outside to play, but did not return home. He unsuccessfully searched for him everywhere. In the next morning at about 9:00/9:30 o'clock some kidnappers informed him over a phone call that Saikat was under their custody, demanded ransom of Taka one lac and threatened him of killing Saikat in case of failure. The informant wanted for proof that Saikat was really under their custody. In response thereto they made another phone call at about 12:00 o'clock and connected Saikat to talk to him. Getting no way, the informant arranged the money and got ready to hand it over to the kidnappers. At the evening, the kidnappers asked him to go to a machine room situated behind his house. At that time, accused Farid came there, observed the situation and told the kidnappers not to come to receive the money as there was a possibility of their apprehension by the local people. As a result they did not come to receive the money.

9. On the following day at about 8:30 pm the kidnappers called him again and asked him to go to the eastern bank of river Vogai with the money and a gas lighter in hand.

Accordingly, he went there, when accused Sabuz took position at his right side and Tapash at the left. Then accused Oli appeared in his front and took the money while accused Farid, Rakibul, Emdadul and Asad were standing at a distance. The informant asked them the whereabouts of his son, when they replied that he would get his son after an hour. After an hour, the kidnappers asked him over cell phone to go to his abandoned homestead adjacent to his present house and get his son there covered by dried leafs. He along with others rushed there and found the dead body of his son. His neck was twisted by a nylon cord, right side of his face and right eye were injured and there were burn injuries caused by cigarette on his person. They brought the dead body home, where the police came and prepared an inquest report. He signed the inquest report. Police sent the dead body for conducting autopsy and thereafter, he lodged the FIR. Earlier his brother made a GD entry on 13.02.2010. He proved his signatures on the FIR and inquest report, and also proved the GD entry made by his brother. The defence declined to cross-examine him (PW 1).

10. PW 2 Md. Bazlur Rashid, a hearsay witness and cousin of victim Saikat stated that at the time of occurrence he was on training at PTI (Primary Teachers Training Institute), Netrokna. On receipt of the news of occurrence, he came home. Before that the dead body was recovered. He was in contact with home and learnt the missing news of Saikat over cellular phone. Then he narrated the prosecution case in brief and further stated that the Police had arrested his cousin Anis, who made a confession stating that the accused persons had kidnapped Saikat and killed him after payment of ransom.

11. In cross-examination PW 2 stated that Ichhar Uddin (PW 5) was his father and Shahin (PW 3) and Molim were brothers. He came home on 15.02.2010 at quarter to 11:00 pm. After staying one day at home, he went back to join the training. He denied the defence suggestion that out of jealousness to their property, the appellant was falsely implicated or that he deposed falsely.

12. PW 3 Shahin stated that Saikat was his cousin. He (Saikat) went missing at 5:00 pm on 12.02.2010. On the following day his uncle Salauddin made a GD entry with the local police station. The accused persons made phone call to his uncle Siddiqur Rahman (PW 1), demanded ransom of Taka one lac disclosing the occurrence of kidnapping, and threatened him of killing Saikat in case of failure. As his uncle agreed, they asked him to bring the money alone on 14.02.2010 at the machine room near to their house. They (PW 3 and his companions) planned to follow his uncle and apprehend the kidnappers. Since accused Farid alerted the kidnappers to the consequence of their apprehension, they did not come to receive the money on that day. On the next day i.e. 15.02.2010 they made phone call to the informant again and asked him to hand over the money within the day; otherwise, to face dire consequence. They asked his uncle to carry a *hariken* in hand and go to the place as they would instruct instantly. His uncle along with the money and a gas lighter in hand went to the bank of river Vogai at about 9:00 pm. Just after reaching there, his uncle saw accused Sabuz to stand at his right side and Tapash at left. Accused Oli, Farid, Rakibul and Emdad were also standing there. His uncle handed over the money to Oli, who told him that he would get his son after an hour. His uncle then came back home and informed the matter to all of them. After an hour, Oli told him over a phone call to go to the abandoned homestead adjacent to his house and get his son there covered by dried leafs. They rushed there and found the dead body of Saikat. His (victim's) neck was fastened tightly by a nylon cord, right side of his face was injured and right eye was protruded. There were burn injuries on his person caused by cigarette. On receipt of the information, the police came and prepared an inquest report. They seized the nylon cord under a seizure list and took his signature there.

Subsequently the police arrested his cousin Anis (appellant herein) with a mobile phone set and seized the phone under another seizure list, which he also signed. PW 3 proved his signatures on the seizure lists and also proved the seized article as material exhibit. The defence declined to cross-examine him.

13. PW 4 Md. Salauddin stated that on 12.02.2010 at about 5 pm Saikat went outside to play, but did not return home. As they could not trace him out, he (PW 4) had recorded a GD with the local police station. Oli made a phone call to the informant on 13.02.2010 at about 9:00 am and demanded ransom of Taka one lac disclosing that he and his accomplices had kidnapped Saikat. They also threatened the informant of killing Saikat in case of failure in payment of the ransom. The informant had to agree and according to their instruction got ready to hand over the money on 14.02.2010 in the evening, when Oli's brother accused Farid came to their house and observed the situation. After the informant party left the house towards the designated place for handing over the money, Farid alerted the kidnappers to the possibility of their apprehension, if they would come to receive the money. As a result the kidnappers did not come. Oli called the informant again on 15.02.2010 at the noontime and asked him to give the money within the day; otherwise, they would kill Saikat. According to his instruction, the informant along with the money and a gas lighter in hand went to the bank of river Vogai at about 9:00 pm. Accused Oli, Tapash and Sabuz received the money while Farid, Emdadul and Rakibul were standing nearby. Oli told him that he would get his son after an hour. The informant came back home and informed the matter to all of them. After an hour, Oli told him over a phone call that Saikat was at the northern side of their abandoned homestead. They rushed there and found the dead body of Saikat. On receipt of information the police came, prepared an inquest report and sent the dead body for conducting autopsy. PW 4 then gave description of the injuries found on the dead body and stated that police seized the nylon cord under a seizure list and took his signature there.

14. PW 4 further stated that after Saikat was missing, he recorded a GD being No. 420 dated 13.02.2010 with Kalmakanda police station. He proved his signature on the GD. He also proved his signatures on the inquest report and seizure lists.

15. In cross-examination PW 4 could not say the IME number of the phone recovered from the appellant, and stated that he was at Netrokona when the appellant was arrested. He came on the following day of his arrest. He denied the defence suggestions that he did not go to police station, or that he did not sign the seizure list but signed it without going through its content.

16. PW 5 Md. Ichhar Uddin stated that his nephew Saikat was found missing at the evening on 12.02.2010, upon which a GD was recorded. The kidnappers called the informant on the next day at about 8:00/8:30 am and demanded ransom of Taka one lac. They threatened him of killing Saikat in case of failure in payment of the ransom. They arranged the money and went to the machine room situated in the field to the south of their house. But the kidnappers did not come to receive the money, but said over a phone call that they had guessed their plan to apprehend them. On the following day the kidnappers made another phone call and asked the informant to bring the money at the evening without hatching up any further plan. Accordingly, he went to the place as instructed and handed over the money to the kidnappers. At about 8:00 pm he came back home and disclosed that he had given the money to Sabuz, Tapash and Oli. Then he (PW 5) gave description of recovery of the dead body with injuries found thereon, arrival of police, making of inquest report and seizure of

the nylon cord in the similar manner as stated by PWs 1-4. He proved his signatures on the inquest report and seizure list.

17. In cross-examination PW 5 stated that they were five brothers including him. They lived in the same homestead having 15 separate rooms. At the time of occurrence Bazlu (PW 2) was staying at Netrokona. He denied the defence suggestion that the case was brought only for harassment of the accused persons.

18. PW 6 Idris Ali stated that the informant and he went to mosque together on 12.02.2010 at evening. The informant told him that Saikat was missing. On the next day at about 8:00/8:30 pm he (PW 6) went to the informant's house and came to know that some terrorists had kidnapped Saikat and demanded ransom. Then he narrated the prosecution case in similar line of PW 1. He further stated that after preparation of inquest report, police took his signature. The police arrested Anis and he confessed to have been involved in the occurrence. In cross-examination he (PW 6) denied that Anis did not confess his guilt or that he deposed as a tutored witness.

19. PW 7 Md. Hazrat Ali, a Constable of Police stated that on 15.02.2010 at about 10:30/11:00 pm they (he and another police personal) went to the informant's house at Panch Bagajan. Sub-Inspector Khayer (PW 12) held inquest on the dead body of the deceased, prepared a report and instructed him to take it to morgue. After conducting autopsy, he handed back the dead body. He proved the *chalan*, command certificate and his signature there.

20. PWs 8 and 10 Mofazzal Hossain and Golam Mostafa respectively were tendered by the prosecution and the defence declined to cross-examine them.

21. PW 9 Dr. A K M Abdur Rab stated that at the material time he was posted at Netrokona Sadar Hospital as a Medical Officer. He conducted autopsy on the dead body of Saikat, a boy of 7 years of age. He found one defuse swelling on the right of his head, ecchymosis at right cheek and right temporal region, loss of right cheek exposing teeth gum, one blackish ligature mark oblique in size on right side and middle of the neck measuring ½ inch breadth, ecchymosis on left shoulder, lacerated wounds on the dorsum and third and fourth toes. His (victim's) right eye ball was partially protruded and left eye was reddish with ecchymosis on the upper eye lid.

22. PW 9 opined that the death was due to asphyxia from strangulation resulted in the injury No.6 (ligature mark) as mentioned in the postmortem report. All the injuries were antemortem and homicidal in nature. He further stated that a medical board including him conducted the autopsy. He proved the autopsy report, his signature there and that of other members of the board.

23. In cross-examination PW 9 stated that he himself had no degree in forensic medicine. Except the ligature mark, the other injuries did not cause the death. There was no mention of age of those injuries. No burn injury was found on the dead body. He denied the defence suggestion that out of biting by dog and foxes, those injuries were caused or that the victim died of accidental wringing of rope on his neck.

24. PW 11 Md. Aminul Haque, Senior Judicial Magistrate stated that the offender Anis Miah was produced before him on 22.02.2010 and he (PW 11) recorded his confession

following the provisions of sections 164 and 364 of the CrPC. Before that the confessing accused was given three hours time for reflection. After recording the confession, its content was read over to him and as it was correctly recorded, he put his signature there. PW 11 identified the offender on dock, proved the confession, his signatures there and that of the juvenile offender.

25. In cross-examination PW 11 stated that he did not notice any mark of injury on the person of the confessing offender. His age was written 18 years on the document. The confession was true and voluntary. He (PW 11) denied the defence suggestion that the offender was much younger, but was shown older on the document. He further denied that the Investigating Officer (IO) had actually written the statement and supplied it to him.

26. PW 12 Abul Khayer, the first IO of the case stated that he was the Duty Officer at police station on the day of lodging the FIR. He went to the spot at about 11:00 pm under GD No.482 dated 15.02.2010 and held inquest on the dead body, prepared an inquest report, took signatures of local witnesses there and sent the dead body for conducting autopsy through Constable Hazrat Ali. He also seized the nylon cord under a seizure list and took signatures of the witnesses there. As he was in charge of the police station, he filled in the form of FIR and recorded it. He himself took up the case for investigation, visited the place of occurrence, prepared a sketch map with index, seized some dried leafs and recorded statements of nine witnesses under section 161 of the CrPC.

27. PW 12 further stated that during investigation he had collected eleven call lists, arrested Anis and recovered a silver coloured mobile phone set from his possession. Its IME number was 35492902730244 and SIM number was 01820843851. He seized the phone set under a seizure list. Anis made a confession under section 164 of the CrPC before the Magistrate. On transfer, he handed over the case docket. He proved the inquest report, seizure list, mobile call lists, his signatures on different documents and also proved the seized articles as material exhibits.

28. In cross-examination PW 12 corrected himself stating that the IME number of the seized phone number was 354929027302449. He did not seize the call lists under any seizure list and those were not bearing the signature or seal of the authority concern. He did not collect the call list of 12.02.2010 against the aforesaid phone number. No call was made on 13.02.2010 from that number to the informant. IME number of the phone set, wherefrom call was made to the informant, was 354929027302440. He denied the defence suggestion that he had extracted confession from Anis on threat and coercion.

29. PW 13 Md. Abdul Karim, the then Officer-in-charge of Kalmakanda police station and second IO of the case stated that he had received the case docket on 20.03.2010. He found the sketch map and index prepared by the first IO to be correct. He (PW 13) himself prepared another sketch map of the place, wherefrom the victim was kidnapped. During investigation, he seized a cut piece of half pant produced by Constable Hazrat Ali under a seizure list and recorded statements of 7/8 witnesses under section 161 of the CrPC. On completion of investigation, he found a prima-facie case against the accused and accordingly submitted the charge sheet.

30. In cross-examination PW 13 stated that he had not examined the offender's age by any doctor or collected his birth certificate. No phone call was made to the informant from his (Anis's) number. The last three digits of the IME number of Anis's phone set were 449,

but that of the set, wherefrom call was made to the informant, were 440. There was also no proof that Anis talked to the informant by his phone within 12-15.02.2010. He (PW 13) denied the defence suggestion that the offender Anis was not an adult.

31. After closing the prosecution evidence, learned trial Judge examined the appellant under section 342 of the CrPC, to which he did not make any explanation, or examine any witness in defence.

32. On conclusion of trial, learned Judge found the juvenile offender guilty and awarded him punishment by the impugned judgment and order as stated above, challenging which the appellant moved in this Court with the present criminal appeal, obtained bail and has been enjoying its privilege till today.

33. Mr. SM Shajahan, learned Advocate for the appellant at the very outset submits that the impugned judgment and order is without jurisdiction inasmuch as admittedly the appellant was a child under the age of 16 years at the time of commission of the occurrence as well as of framing of the charge and he could only be tried by a Juvenile Court constituted under the Act, 1974 that was in force at the material time. The Druto Bichar Tribunal No.4, Dhaka *suo motu* assumed the jurisdiction of Juvenile Court and proceeded with trial of the case, which was unknown to law.

34. Mr. Shajahan further submits that the confession made by a child purportedly under section 164 of the CrPC is also unknown to law and as such not admissible in evidence. More so, the confession was retracted by filing a written application, where it was clearly stated that it was extracted on physical torture and threat. It thus appears that the confession was not at all voluntary. Further, if the contents of the confession are critically analyzed, it would be found to be exculpatory in nature, upon which no conviction can be passed. The persons, who threatened and lured the juvenile offender, were rather liable to be prosecuted under section 34 of the Act, not the juvenile offender.

35. Mr. Shajahan lastly submits that the circumstantial witnesses and the witnesses of facts stated nothing, on which the appellant's involvement in the alleged occurrence could be factually inferred. It was rather established by the evidence of two Investigating Officers (PWs 12 and 13) that neither his SIM number nor the phone set allegedly recovered from him had been used to call the informant. The informant's call list was not collected, and the call lists (exhibit-15 series) which were collected by the IO had no signature of any employee and seal of the mobile phone operating company, and not seized under any seizure list. The employee of the phone operating company, who printed out the call lists or supplied it to the IO was also not examined to prove its authenticity. Being private documents, the call lists as such were not admissible in evidence. On all the counts, the impugned judgment and order is without jurisdiction, illegal, not based on legal evidence and as such liable to be set aside.

36. Mr. Md. Moniruzzaman, learned Deputy Attorney General appeared for the State and made submissions at length. Subsequently a new set of Law Officers have been appointed and entered into office. As a result Mr. Moniruzzaman is no more present before us to receive the judgment. However, the newly appointed Deputy Attorney Generals Mr. Md. Aminul Islam and Mr. Shafiquel Islam and other Law Officers have been present to receive the judgment.

37. Mr. Moniruzzaman, learned Deputy Attorney General submits that in view of sub-sections (2) and (5) of section 5 of the Act, 1974 a Sessions Judge is competent to exercise the power of a juvenile Court. Learned Judge of the Druto Bichar Tribunal being a Judicial Officer equivalent to a Sessions Judge is quite competent to assume the jurisdiction of the Juvenile Court. Besides, an overriding power is given to the Druto Bichar Tribunal by sections 2 and 5 of the Ain, 2002 to try all cases which are transferred to it. The present juvenile case originated from Kamlakanda Police Station Case No.12 dated 16.02.2010, which was notified under sections 5 and 6 of the Ain, 2002 and published in Bangladesh Gazette extra-ordinary dated 14.10.2010. It, therefore, cannot be said that the learned trial Judge *suo motu* and illegally assumed the jurisdiction of Juvenile Court.

38. Mr. Moniruzzaman further submits that it is a well settled principle of the law of evidence that a child is competent to record evidence. When he is competent to record evidence, there is no reason of being incompetent on his part to make a confession. There is no bar in recording confession of a child in the Act, 1974 and section 18 thereof makes the CrPC applicable in trial of a juvenile case except the procedures which are provided in the Act itself. The confession made by the juvenile offender is thus admissible in evidence. It was voluntarily recorded by the juvenile offender and the trial Court rightly used it against him as well as against the co-accused within the scope of section 30 of the Evidence Act. Mr. Moniruzzaman, referring to the evidence of PW 11, submits that the confession was reaffirmed on oath by the recording Magistrate, who deposed that no mark of injury was found on the person of the offender, he was given time for three hours for reflection and all legal procedures as mentioned in sections 164 and 364 of the CrPC were strictly observed. The content of the recorded confession was read over to the confessing offender, and on clear understanding of its correct reproduction, he put his signature there. The confession was thus true and voluntary. Such a flawless confession itself is sufficient to pass an order of conviction against its maker. The evidence of the prosecution witnesses especially that of PWs 1-6 read with the seizure of nylon cord and dried leafs from the place of occurrence, and phone set from the juvenile offender are corroborated by the confessional statements in material particulars. In *State vs Sukur Ali* 9 BLC 238, the High Court Division confirmed the death sentence of a child on the basis of his confession. It has also been held there that because of the non-obstante clause in section 3 of the Ain, 2000, the Tribunal constituted thereunder had jurisdiction to try a case where a child was charged with a criminal offence. The Appellate Division upheld the said decision by its judgment and order dated 23.02.2005 passed in Jail Petition No. 8 of 2004 (*Md. Shukur Ali vs The State*). Learned Judge of the Tribunal-cum-Juvenile Court did not commit any illegality in passing the impugned order of conviction and as such the criminal appeal is liable to be dismissed. Learned Deputy Attorney General also refers to the case of *Mona alias Zillur Rahman vs The State*, 23 BLD (AD) 187 to substantiate his submission that a child can be punished for more than ten years in cases of offences punishable with death or life term imprisonment.

39. Mr. Khandker Mahbub Hossain submits that although no specific provision of recording confessional statement of the Children is provided in the Act, 1974, confession of a child can be recorded under section 164 of the CrPC by virtue of section 18 of the Act. It has, however, been established by plethora of judicial decisions that extra care and cautions should be given in recording confessions of the children including presence of their parents, guardians or custodians. The evidentiary value of the confession of a child would depend on absolute truthfulness and voluntariness of it. In support of this part of his submissions, Mr. Hossain refers to the cases of *Jaibar Ali Fakir vs The State* 61 DLR 208=28 BLD 627 and

Bangladesh Legal Aid and Services Trust and another vs Bangladesh and others, 22 BLD 206.

40. Mr. Hossain on the next point submits that only a Juvenile Court established under the provisions of the Act, 1974 shall have the jurisdiction to try the juvenile cases. In absence of Juvenile Court constituted under section 3 of the Act, the Courts mentioned in section 4 and empowered by section 5 (2) thereof shall exercise the powers, but a Tribunal constituted under any special law for special purpose of trial of a particular type of cases is not a Court within the scope of section 4 of the Act. If the Tribunal other than a Court mentioned in section 4 of the Act is allowed to assume the jurisdiction of Juvenile Court, wisdom of the legislature would be seriously undermined. The Druto Bichar Tribunal constituted under the Ain, 2002 does not fall within the definition of Juvenile Court, nor can it assume the jurisdiction on its own motion. Mr. Hossain refers to the cases of *The State vs Md. Raushan Mondal alias Hashem*, 59 DLR 72= 18 MLR (HCD) 195 and *Rahmatullah (Md) and another vs State*, 59 DLR 520.

41. Mr. Hossain, on the point of maximum term of imprisonment to be imposed on a juvenile offender who crosses childhood during the trial or detention, lastly submits that the age old principle of criminal jurisprudence states that punishment should be imposed on an offender in proportionate to the gravity of offence, manner of occurrence, his mental condition and circumstances under which he committed the offence. Another most important basis of punishment is the date of occurrence, and the law that was in force on that date. Attaining majority during trial does not bear any relevance with the alleged offence and also with imposition of punishment.

42. Mr. M I Farooqui canvasses the development of law relating to juvenile justice system and the historical percepts of Juvenile Courts with reference to The Reformatory Schools Act, 1897; The Bengal Children Act, 1922; The Children Act, 1974 and The Shishu Ain, 2013 and submits that in view of the spirit and purpose of law to favour the children, any provision of the Act, 1974 should not be literally interpreted to the detriment of the children's interest. The literal meaning of words used in the Act must be read with its spirit and purpose. So, any provision thereof is to be interpreted in a manner consistent with its purpose, which is called 'the rule of purposive interpretation'. Most of the commonwealth countries traditionally follow the principle of common law or legal positivism in interpreting Constitutions. Bangladesh is also one of them. Of late Australia, Canada and South Africa along with Israel and Germany have switched over to 'purposive interpretation' while expounding Bills or Charters of Rights, or basic human rights. India has also joined this school. The purposive interpretation has its root in the Latin maxim '*falsa demonstratio*' meaning to keep the primary function intact in interpreting the Constitutions and ignore the rest as false demonstration with the change of time, situation and eventualities. This rule has virtually superseded the rule of 'literal interpretation'. In view of the development and spirit of the law, the purposive interpretation would require a child to be absolved of the ordeal of the process of confession under section 164 of the CrPC. For better appreciation of purposive interpretation, Mr. Farooqui refers to *Government of NCT of Delhi vs Union of India and another*, CDJ 2018 SC 705; *R v Ven Der Peet* (1996) 2 SCR 507 from Canadian jurisdiction and an article titled *Interpreting Constitution: A Comparative Study* by Professor S P Sathe published by Oxford University Press in 2013.

43. Referring to article 3 of the UN Convention on the Rights of the Child, 1990 Mr. Farooqui further submits that the best interests of the children shall be the primary consideration in undertaking any actions concerning the children by the Courts of law,

administrative authorities or legislative bodies. Bangladesh has ratified the above mentioned UN Convention and article 25 (1) of its Constitution casts an obligation to respect the International law and the principles enunciated in the UN Charter and Conventions. So, this is a constitutional mandate as well. Mr. Farooqui also refers to *Hussain Mohammad Ershad vs Bangladesh and others,* 21 BLD (AD) 69 and submits that our Courts should not ignore the international instruments and should draw upon the principles incorporated therein.

44. Regarding jurisdiction of the Juvenile Court, Mr. Farooqui submits that no Court or Tribunal established under any other law irrespective of the period of its enactment/enforcement other than a Juvenile Court can try any case, where a child is charged with a criminal offence. In the present case the Druto Bichar Tribunal assumed the jurisdiction of Juvenile Court presumably under section 4 of the Act, 1974 as a Court of Sessions Judge inasmuch as the alleged offence was triable by a Court of Session in accordance with the second schedule of the CrPC. But a Juvenile Court was already established in Dhaka under section 3 with powers under section 5 of the Act. The powers conferred on the Juvenile Courts are also exercisable by the High Court Division, Court of Session, Court of Additional Sessions Judge and Assistant Sessions Judge, and Magistrate of First Class under section 4 of the Act, but the Courts under sections 3 and 4 have no co-ordinate or concurrent jurisdiction to assume it alternatively and to override the exclusive jurisdiction of the Juvenile Court. It was, therefore, incumbent upon the Druto Bichar Tribunal to transfer the case to the Juvenile Court for trial. The trial held by the Druto Bichar Tribunal itself was without jurisdiction, Mr. Farooqui concludes.

45. Mr. Shahdeen Malik submits that the Juvenile Courts are established for the explicit purpose of creating a non-adversarial, non-intimidating and friendly settings and surroundings for trying the children in conflict with law. These are essential for ensuring and facilitating reform, reintegration and rehabilitation of the children, which in turn, stem from the general propositions of all spheres of law that a child is fundamentally unable to comprehend or understand the legal consequence of his acts or omissions. Law, be it contract, or property, civil and political rights, conferring licenses or permissions, do not generally recognize the children as their subject. Hence the law does not recognize or ascribe any consequence to any act done by a child. A child cannot be a subject of labour and service laws, except only as an apprentice or trainee in limited circumstances. Such example may be catalogued from several areas of laws. Therefore, a child cannot be subjected to the rigors of a formal and adversarial justice system in the settings of regular Court or Tribunal constituted under any general/special law other than the Children Act. A confession under section 164 of the CrPC and its use against an accused being part of the formal and adversarial structure of our criminal justice system is quite non-applicable for a child in conflict with law. The legally recognized immaturity and lack of proper understanding of the consequence of his purported confession cannot be taken into consideration in adjudicating his act or omission.

46. Mr. Malik further submits that after enactment of the Children Act and its coming into force all over the Country by the year 1980 through gazette notifications, trial of child below the age of 16 years (now 18) must be held by the Juvenile Court established under the Children Act not by a regular Criminal Court or Tribunal established by any other law. The non-obstante clauses, namely, section 3 of the Ain, 2000 or section 26 of the Special Powers Act, 1974 shall not oust the jurisdiction of Juvenile Court. The Druto Bichar Tribunal has jurisdiction to try only the cases, which are transferred to it through a notification published under sections 5 and 6 of the Ain, 2002. The Tribunal by itself cannot take up any case for adjudication. Apart from the legal point of exclusive jurisdiction of the Juvenile Court to try a

juvenile case, a Tribunal constituted under the Ain, 2002 cannot assume the jurisdiction of the Juvenile Court in any manner whatsoever.

47. Mr. Malik, referring to article 35 (1) of the Constitution, submits that the constitutional protection to a person in respect of trial is also to be complied with in awarding punishment on him. Punishment cannot be imposed on a person, which is greater than what was prescribed at the time of commission of the offence. There is no scope to award punishment upon a child more than what is prescribed in section 52 of the Act, 1974 or section 34 of the Ain, 2013.

48. We have considered the submissions of the learned Advocates of both the sides as well as of the Amici Curiae, examined the evidence and other materials on record, gone through the decisions cited and consulted the relevant laws.

49. It appears that the police arrested the juvenile offender on 21.02.2010 and produced him alone before the Senior Judicial Magistrate on the next day. The Magistrate recorded his confession purportedly under section 164 of the CrPC, where he narrated the entire prosecution case in similar line of FIR as well as of the evidence of PW 1 and confessed in brief that on 12.02.2010 at about 5:30 pm he was working in their agro field, when accused Oli and an unknown person called him at Oli's house, where some other persons asked him to be with them in a threatening tone and also lured him into a portion of the money, if any, they could realize from the informant. They kept his mobile phone and gave him another one. They asked him to go home and pass information therefrom. Subsequently he accompanied accused Farid, when he alerted the accused not to come to the machine room to receive the ransom. This was the material part of his confession, which involved him in the occurrence. The other part was huge and virtually it was the reproduction of the entire prosecution case.

50. The evidence of thirteen prosecution witnesses has already been discussed. Of them PW 1 Md. Siddikur Rahman was the star witness who directly implicated the accused except the juvenile offender. PW 2 was a hearsay witness and stated that the police had arrested Anis, who recorded a confession involving the accused persons. In cross-examination he denied the defence suggestion that out of jealousness to property, the appellant was falsely implicated. PWs 3-5 were circumstantial witnesses, who did not utter a single word against the juvenile offender. PW 6, another circumstantial witness also did not state anything against him, but in cross-examination denied the unnecessary defence suggestion that the juvenile offender did not confess the guilt. He was not a relevant witness in any way to prove or disprove the confession. PW 7 was a formal witness who carried the dead body of the victim for holding autopsy. PW 9 Dr. AKM Abdur Rab was an expert witness who conducted autopsy on the dead body. He gave description of injuries, opined about the cause of death and proved the autopsy report. The only prosecution witness deposed against the juvenile offender was PW 11 Md. Aminul Haque, the Senior Judicial Magistrate who had recorded his confession purportedly under section 164 of the CrPC. He stated that the confession was true and voluntary and affirmed the procedural correctness of recording the same.

51. PW 12 Abul Khayer, the first Investigating Officer stated that he had collected eleven call lists, arrested the juvenile offender and recovered a phone set from his possession. Its IME number was 35492902730244 and SIM number was 0182084385. He made a confession before the Magistrate under section 164 of the CrPC. PW 12 proved the seizure list and call lists, and also proved the seized phone set. In cross-examination he stated that he had not seized the call lists under any seizure list and those were not bearing any signature and seal.

He did not collect the list of calls made on 12.02.2010 against the said phone number and there was no call to the informant's number on 13.02.2010.

52. PW 13 Md. Abdul Karim, the second Investigating Officer who submitted charge sheet stated in cross-examination that there was no phone call from Anis's number to the informant. The last three digits of the IME number of his phone set were 449, but that of the set, wherefrom call was made to the informant were 440. There was no proof that any call was made to the informant through his phone within 12-15.02.2010.

53. The evidence of PWs 12 and 13 as referred to above, makes it clear that the phone set or the SIM recovered from the juvenile offender was not used to make phone call to the informant.

54. According to the FIR, there was enmity pending between the parties, accused Oli demanded Taka one lac prior to the kidnap and as the informant declined, he threatened him of facing dire consequences within twelve hours and on the following day of kidnap, he made a phone call to the informant at 7:35 am. It was quite natural that a strong suspicion against Oli would take place in the General Diary, which was recorded at some point of time on 13.02.2010, the next day of missing of the victim, but we do not find any such statement there. The inquest report prepared on 15.02.2010 at about 11:00 pm, when the informant was equipped with all material facts, was likely to contain a statement regarding involvement of the accused persons. The way the principal accused Oli demanded the ransom without hiding his identity is also against criminal psychology as well as natural course of human conduct. It is also questionable that when accused Oli already disclosed his identity in demanding the ransom and there was previous enmity between the parties, they would allow his full brother Farid to come to their house and leak information therefrom to the kidnappers. All these circumstances make the prosecution case seriously doubtful.

55. Let us discuss the issues on jurisdiction of Juvenile Court constituted under the Act, 1974 and that of the Druto Bichar Tribunal constituted under the Ain, 2002; maximum term of punishment that can be awarded on a child or a person who crossed childhood during trial or detention in offences punishable with death or life term imprisonment; and legal implication of confession made by a juvenile offender, upon which legal validity of the impugned judgment and order would finally depend.

56. The Children Act, 1974 in its definition clause of section 2 (f) defines a 'child' as a person under the age of sixteen years, and in the Shishu Ain, 2013 it is 18 years. Section 3 of the Act specifically provides with a non-obstante clause that the Government may establish one or more Juvenile Courts for any local area. Section 4 of the Act empowers the High Court Division, Court of Session, Court of Additional Sessions Judge or Assistant Sessions Judge, and Magistrate of First Class to exercise the powers in absence of any Juvenile Court and section 5 (1) thereof says that when a Juvenile Court has been established for any local area, such Court shall try all cases in which a child is charged with the commission of an offence. According to section 5 (2) of the Act when a Juvenile Court has not been established for any local area, no Court other than a Court empowered under section 4 shall have power to try any case where a child is charged with an offence. Joint trial of a child with an adult is strictly prohibited by section 6 of the Act while sections 7-18, 48, 51-63, 66, 69-71 and 73 provides the detail procedure of inquiry/investigation and conducting trial of a criminal case against the youthful offenders in a friendly and comfortable environment. It is quite impossible for any other Court except a Juvenile Court or the Courts empowered by section 4

of the Act to ensure the child friendly environment and other legal requirements of a child trial. All the learned Amici Curiae expressed their views in one voice that no Court or Tribunal constituted under any other law irrespective of the period of legislation other than the Juvenile Court constituted under the Act, 1974 now substituted by the Ain, 2013 has jurisdiction to try any case where a child is charged with an offence.

57. In the case of *State vs Md. Roushan Mondal alias Hashem* 59 DLR 72, the juvenile offender Roushan Mondal, a boy of fifteen years plus was tried by the Nari-o-Shishu Nirjatan Daman Bishesh Adalat and Additional Sessions Judge, Jhenaidah who assumed the role of Juvenile Court and awarded sentence of death upon the alleged offender. The same question of assuming jurisdiction, as in the present case, was raised there. In replying the question, Md. Imman Ali, J (as his lordship then was) speaking for a Division Bench of the High Court discussed almost all the cases of our jurisdiction including *State vs Sukur Ali,* 9 BLC 238 and finally held:

> "…. *When the Children Act came into force the Special Powers Act and the Arms Act, for example, were already in force. But the legislature did not exclude the jurisdiction of the Juvenile Court in respect of offences under these two enactments, as it did for exclusively Sessions triable cases in section 5(3), although the Special Powers Act contains a non-obstante clause in section 26. Hence, we are of the view that since the jurisdiction over the offences contained in the special laws are not specifically excluded by inclusion in section 5(3) of the Children Act, jurisdiction over offences committed by youthful offenders will be exercised by the Juvenile Court. Had the legislature intended otherwise an amendment could easily have been incorporated in section 5(3) giving jurisdiction over offences under the special laws to the respective Tribunals set up under those laws. This not having been done, we are of the view that the Children Act, being a special law in respect of, inter alia, trial of youthful offenders, preserves the jurisdiction over them in respect of all offences under any law, unless specifically excluded.* (paragraph 55)
>
> " … *We are, therefore, of the view that jurisdiction over the offence is a secondary consideration, the first consideration being the jurisdiction over the person of the accused. When jurisdiction over person is established then no other Court has power to try a child below the age of 16 years."* (paragraph 73)

58. In the above cited case of *Roushan Mondal* this Division held the trial by Nari-o-Shishu Nirjatan Daman Tribunal without jurisdiction and allowed his appeal rejecting the death reference. The High Court Division consistently held this view in the cases of *Bangladesh Legal Aid and Services Trust vs Bangladesh and others*, 57 DLR 11; *Shiplu and another vs State,* 49 DLR 53; *State vs Deputy Commissioner, Satkhira and others*, 45 DLR 643 and *Bangladesh Legal Aid and Services Trust and another vs Bangladesh and others*, 22 BLD 206 = XII BLT 334.

59. In *Sheela Barse and others vs Union of India and others*, AIR 1986 SC 1773, a well famed public interest litigant Sheela Barse along with others brought a *pro bono* writ petition, where the Indian Supreme Court held that "*the trial of Children must take place in the Juvenile Courts and not in the regular criminal courts"* and directed the State Governments to set up Juvenile Courts, one in each district, and appoint special cadre of Magistrates who would be suitably trained for dealing with cases against children.

60. In view of the foregoing discussions and the ratio decided in the above cited cases, it may be concluded without any further ambiguity that despite the Druto Bichar Tribunal Ain, 2002 was enacted after the Children Act, 1974 the overriding clause in section 2 of the Ain

shall not in any way take away the jurisdiction of the Juvenile Court and confer the same on the Druto Bichar Tribunal constituted under the Ain to try any notified case, where a youthful offender is charged with criminal offence. Even in absence of any Juvenile Court in any particular territorial jurisdiction, a Druto Bichar Tribunal has no jurisdiction to try any case where a child is charged.

61. According to section 66 of the Act, 1974 whenever a person, whether charged with an offence or not, is brought before a criminal Court otherwise than as a witness and he appears to be a child, it is incumbent upon the Judge to make an inquiry for determination of his age. In a cognizable offence, a person allegedly involved in commission of the offence, may be arrested on lodging of the FIR. The words "person … charged with an offence" as used in section 66 of the Act, therefore, includes a child as well against whom allegation of offence is brought in the FIR. This is not the mandate of law that the Court would wait till submission of charge sheet and framing of charge to determine his age on that day. Article 35 (1) of the Constitution says that punishment cannot be imposed on a person, which is greater than what was prescribed at the time of commission of the offence. The constitutional protection to a person that includes a child as well must be maintained in awarding punishment on him. Sections 5, 51 and 52 of the Act, 1974 are to be read with article 35 (1) of the Constitution and also with the whole scheme and purpose of the Act. Since on the day of occurrence, the juvenile offender was a boy of less than 16 years and imprisonment more than 10 years could not be imposed upon him on that day, we do not think that with the passage of time consumed for a protracted trial, he could be awarded more punishment. It would violate the constitutional protection regarding punishment as enshrined in article 35 (1) of the Constitution. In that view of the matter, we are in full agreement with the learned Advocate for the appellant and also with the learned Amici Curiae that there is no scope to award punishment upon a child more than what is prescribed in section 52 of the Act. So, a juvenile offender, if found guilty of offence on completion of trial, he cannot be simply put in prison except fulfillment of the conditions as mentioned in preceding section 51 thereof and punishment more than 10 years cannot be awarded on him.

62. In the case of *Mona alias Zillur Rahman vs The State*, 23 BLD (AD) 187, the Sessions Judge awarded life term imprisonment on the appellant, who claimed to be a child below the age of 16 years and was jointly tried with an adult violating the prohibition of section 6 of the Act. The Appellate Division affirmed the sentence on the ground that there was no material to show that the convict was a child below the age of 16 years at the time of framing charge. In that case, learned trial Judge, under section 66 of the Act, 1974 did not make any inquiry as to the age of the offender when he was brought to the Court. The reason of not holding the inquiry was not assigned in the judgment. However, in the event of failure of the learned Judge to make such inquiry, it was incumbent upon his parents or the learned Advocate who represented him in trial to take step for determination of his age, which they failed. Learned Advocate though raised the issue of his minor age at the appellate stage before the High Court Division, also failed to take step for determination of his age and argue the case on his protection under article 35 (1) of the Constitution.

63. In view of the distinguishable facts and circumstances of the above cited case of *Mona alias Zillur Rahman*, there is no scope to argue that despite proof of age of a juvenile offender, he can be punished for more than ten years' detention/imprisonment in case of offences punishable with death or life term imprisonment.

64. Recording of confession under section 164 of the CrPC is a part of adversarial trial system and formal part of the procedures of the mainstream Courts/Tribunals. Its use against

a juvenile offender is, therefore, contrary to the fundamental notion of juvenile justice system. Research on neuroscience and child psychology suggests that the juveniles/adolescents are not fully capable of comprehending the consequences of their acts and deeds. They can also not control their impulses. In fact, the part of brain that enables impulse control and improves the ability of making a reasoned decision does not fully develop in adolescent age.

65. Similarly, the children/juveniles are unable to comprehend the legal consequence of confessional statements. In many cases, they take the blame of crime they did not commit just to end the interrogation. It should be borne in mind that the children can easily be influenced and they have tendency to admit guilt for different purposes. Sometimes they falsely confess to have committed an offence if there is possibility of getting some benefits therefrom.

66. In the case of *Bangladesh Legal Aid and Services Trust and another vs Bangladesh and others*, 22 BLD 206, a Nari-o-Shishu Nirjatan Daman Bishesh Adalat imposed life term imprisonment on a juvenile offender on the basis of his confession. The High Court Division sitting in writ jurisdiction declared the trial without jurisdiction. Touching merit of the case, this Division further observed:

> *"The confession made by a child is of no legal effect. More so, when the child (convict hereof) in his written statement under section 342 Cr.P.C. categorically stated that the confessional statement was procured through coercion, threat and false promise to release him on giving the statement before the Magistrate as tutored by the police as evidenced by Annexure-A to the writ petition. The convict had no maturity to understand the consequences of such confessional statement. The Tribunal considered the confessional statement holding that the confessional statement was recorded on the date the convict was arrested, which is not correct and true. As per case record, statement of the convict under section 342 of the Cr.P.C. (Annexure-A), the convict was produced before the Magistrate for recording his confessional statement after two days of police remand and that confessional statement under no circumstances be voluntary since the accused is mere a child.* (emphasis supplied)

67. In the case of *Jaibar Ali Fakir vs The State,* 28 BLD 627 a child was found guilty under section 302/109 of the Penal Code solely on the basis of his confessional statement and was sentenced to life term imprisonment by the trial Court. In deciding an appeal preferred by him, the High Court Division observed:

> "*By their nature children are not mature in thought and cannot be expected to have the same level understanding of legal provisions and appreciation of the gravity of situations in which they find themselves. So much so that it is an accepted phenomenon that children will act impetuously and do not always appropriate the consequences of their actions, criminal or otherwise. In a situation when they are under apprehension they are liable to panic and say and do things which, in their estimation, are likely to gain their early release."* (paragraph 14)

68. In support of the above quoted view, the High Court Division quoted a passage from an Article titled "*But I didn't do it: Protecting the Rights of Juveniles during interrogation*" by Lisa M Krzewinski. We are tempted to quote the passage that runs as follows:

> *"Juveniles' susceptibility to suggestion, coupled with their inherent naiveties and immature thought processes, raise considerable doubt as to their ability to understand and exercise their Fifth Amendment right against self- incrimination. Furthermore, they are extremely vulnerable to overimplicating themselves in crimes or, even more unfortunate for all involved, confessing to crimes they did not even commit."*

69. The High Court Division referring to the child witness expert Richard Leo, further quoted:

"*… Police tactics, including the use of leading questions and the presentation of false evidence, can be extremely persuasive to children, who are naturally susceptible to suggestion. Additionally, false confessions and admissions to inaccurate statements are often a juvenile's reaction to a perceived threat. Children will take the blame for crimes they did not commit just to make the interrogation cease. Finally, inaccurate statements may be the result of comparatively "immature" juvenile thought process…"*

70. Despite making the observations and referring to the extracts of the Articles as quoted above, the High Court Division in *Jaibar Ali Fakir's* case arrived at the decision that "*when children are taken to record their confessional statements, they must be accompanied by a parent, guardian, custodian or legal representative".* This decision appears to be a deviation from the discussion and observations made in the judgment itself.

71. It has not been discussed in the above cited decision that if a child has no competency to enter into a contract or waive his right to remain silent on interrogation, how the presence of his parent, guardian or custodian makes him legally competent to do so. Certainly the parents, guardians or custodians present at the time of making confessions by the children will not dictate the statement or make it on behalf of their children from a mature level of understanding. Their presence will also not develop his mental condition or bring maturity in his thinking process. Then how can it be presumed that only because of presence of the parents, a child will make true and fearless statement? It, rather, may make him panicky and tensed about the freedom, safety and security of his parents or guardians and raise psychological pressure in his mind to make untrue statement to get them released. It is our experience from media that the police, in some sensitive cases arrests the parents of the accused to trace them out. The minor children living with their parents also read/watch those news in the media, and it certainly causes some psychological reactions in their minds.

72. Another ground of validating the confession of juvenile offender in *Jaibar Ali Fakir's* case is that in the United States of America and Australia, confessions of the children are permissible if those are recorded in presence of their parents, guardians or custodians. Although the mindset, psychology and thinking process of the children in all the Countries are almost similar, the quality of criminal investigation system, use of scientific evidence in criminal trial, level of governance, standard of policing and ability of the judiciary in the USA and Australia are far better than that of our country. Therefore, the reference of the USA and Australia cannot be mechanically relied on in taking decision related to the points in our country.

73. After publication of the *Jaibar Ali Fakir's* case and during pendency of the present appeal the Children Act, 1974 has been substituted by the Shishu Ain, 2013, section 47 (1) whereof provides that during investigation, a police-officer assigned to the child-desk may record statement of a juvenile offender, but in presence of his parents/legal guardians/any other member of his extended family and also a probation officer or social welfare officer. Section 25 of the Evidence Act says that no confession made to a police-officer shall be proved as against an accused and section 26 thereof further says that no confession made by any person in custody of police-officer shall be proved as against him. From a combined reading of the said provisions of law it can be inferred that in order to carry out investigation and find out the names of other offenders, if any, a child can be interrogated. But no

provision of making confession and using the same against him is provided within the subsequent enactment in 2013.

74. When the case of *Jaibar Ali Fakir* was already published and before that, the provisions of recording confessional statement by an accused were already there in different laws, the legislature, in the repealing law i.e in the Ain, 2013, could have easily incorporated the provision of recording such confession by a child in conflict with the law and awarding punishment on him on that basis, but it did not do so. It can be said thus the legislature deliberately omitted to make such law. Every word in a law has a definite meaning and similarly every intentional omission should be given a meaning. The omission in the Ain, 2013 of making confession by a child has also a meaning that a child is not supposed to make a confession. For a clear understanding of the legislative intent and for interpreting the scope of recording confessional statement of a child within the scope of Children Act we may also take recourse to the oft-quoted Latin doctrine, *expressum facit cessare tacitum* meaning express mention of one thing implies exclusion of other. Indian Supreme Court, in number of cases, has applied this doctrine to enunciate the principle that expression precludes implication.

75. The Act, 1974 in its section 2 (n) defined "youthful offender" as any child who has been found to have committed any offence. Section 71 of the Act prohibited the words "conviction" and "sentence" to be used in relation to the children or youthful offenders. The Act in its entire text did not use the word "accused" against a youthful offender. Similarly the Shishu Ain, 2013 in its definition clause [section 2 (3)] used the phrase 'children in conflict with the law' and prohibited the words 'guilty', 'convicted' and 'sentenced' to indicate any child in conflict with the law. On the other hand, section 164 read with section 364 of the CrPC speaks of confession of "accused" to be made before the Magistrate. In view of the discrepancies of the indicative words in the Children Act/Shishu Ain and the Code of Criminal Procedure, we find it difficult to accept that by virtue of section 18 of the Children Act or section 42 of the Shishu Ain, confession of a child under section 164 of the CrPC can be recorded and used against him.

76. We have also gone through the judgment passed by the Appellate Division in Jail Petition No. 8 of 2004 (*Md. Shukur Ali vs The State*) as referred to by the learned Deputy Attorney General. The question of recording confession of child or its evidentiary value was not decided even raised or debated there. It is, therefore, difficult to accept the contention of the learned Deputy Attorney General that the Appellate Division already approved the evidentiary value of confession made by a child.

77. In view of the development and spirit of the law, purpose of legislation of the Children Act, 1974 that was in force at the material time and the subsequent Shishu Ain, 2013, one's constitutional protection from self-incrimination as guaranteed under article 35 (4) and the incompetency of a child to waive this right given to him by the Constitution and also his right to remain silent, use of confession of a child recorded under section 164 of the CrPC against himself is beyond the scope of law.

78. Recently Bangladesh Institute for Law and International Affairs (BILIA) published a report titled "The Death Penalty Regime in Bangladesh". The said report was based on research study and interviewing a good number of retired District and Sessions Judges, where two of the key findings were:

"*Most former judges expressed their frustration with the current state of the criminal justice system. In their opinion, different agencies involved with the system- particularly*

police and prosecution lawyers- are largely inefficient and corrupt. These agencies are doing a great disservice to the criminal justice administration and are responsible for many unwarranted convictions and acquittals.

"*Almost all former judges categorically expressed that torture is routinely/regularly/frequently used by the police during investigation, primarily to ensure that the accused makes a confessional statement before a magistrate. It also emerged from the opinion of former judges that there is a lack of judicial vigilance in scrutinizing whether a confession has been extracted by torture. There is a high possibility of an innocent person being wrongfully convicted and facing the death penalty in a system where torture leads to confession and confession leads to a death sentence.*"

79. In a research based Article titled "*Torture under Police Remand in Bangladesh: A Culture of Impunity for Gross Violation of Human Rights*" published in Asia-Pacific Journal on Human Rights and the Law, 4 (2) two expatriated Bangladeshi Professors M Rafiqul Islam and S M Solaiman gave a picture of police atrocities on accused under remand in Bangladesh. For better appreciation, a part of the concluding paragraph of the said Article is quoted below:

"*In Bangladesh, the worst atrocities often take place under police remand. None of its laws admits involuntary confession in judicial proceedings. Yet law enforcement agencies have been arbitrarily arresting thousands of innocent citizens for decades, in most cases either for political end or for getting bribes. The empowering magistrates have been ordering remands indiscriminately for extracting confessions, where violence and torture are endemic.*" (page 26)

80. The Article was published in 2003. Since then more than 16 years have elapsed, but we cannot claim to have achieved any better magistratical administration, and the required standard of integrity and professionalism in our police department till today.

81. The Appellate Division in *Bangladesh vs Bangladesh Legal Aid and Services Trust (BLAST) and others*, 8 SCOB [2016] AD 1 referred to an uncontroverted survey report published by Ain O Shalish Kendro (ASK), a human rights organization showing alarming number of custodial death and torture in Bangladesh. In the same judgment the Appellate Division observed: *"...deaths in the hands of law enforcing agency, abusive exercise of them, torture and other violation of fundamental rights are increasing day by day*". In the concluding part, our apex Court further observed:

"*In our country we find no concern of the police administration about the abusive powers being exercised by its officers and personnel. This department has failed to maintain required standard of integrity and professionalism…"* (paragraph 216)

82. Nowadays we experience in some cases that after passing of conviction and awarding sentence even on an adult on the basis of his confession, subsequent reveal of facts proves him innocent. We can also cite the burning example of the case of mass killing by grenade attack in Dhaka on 21 August, 2004, where a person, not involved in the occurrence, named Juz Mian was arrested and was compelled to make confession for camouflaging the occurrence, but under changed administrative set up he revealed the truth by another statement, which was completely different from his earlier statement.

83. While these are the scenarios about police remand, custodial torture and confessional statement of the adults, situations of the children can easily be presumed as to how safe they are under police custody even in presence of their parents, guardians or custodians. When the recording Magistrates, who are responsible officers fully equipped with judicial powers,

cannot ensure voluntary confession of an adult without torture, how a helpless common parent or guardian shall ensure the voluntariness and truthfulness of the confession of her/his child.

84. We have already discussed that the Children Act, 1974 that was in force at the material time did not contain any legal provision of recording child confession. The law of confession was, however, incorporated in the Evidence Act, 1872 and the Code of Criminal Procedure, 1898, the Anti-Terrorism Act, 2009 and some other laws in general for the purpose of disclosure of the manner of offence and names of the offenders by a repenting accused. That is why recording of confession on allurement, false hope, pressure, coercion, physical torture etcetera are strictly prohibited and have no evidentiary value. It is a common attitude of all human beings that they conceal their involvement in any punishable offence. It is equally common that an offender after commission of an offence under whatever circumstances for whatever reasons, tries to escape the liability. So, voluntariness of confession is extremely exceptional in human nature. Only in rarest of the rare cases, an accused makes confession out of repentance and guilty feelings. In our criminal investigation system, the investigating agencies appear to be more interested in taking an accused on remand and extract confession from him rather than collecting reliable and scientific evidence regarding his involvement in the alleged occurrence. In such a position, if the children are brought within the scope of recording confession, the purpose of punishing the real offender may fail and there is every possibility that innocent children will be victimized. It will also keep the investigating agencies confined to remand, coercion, torture and confession based investigation and would narrow down the thorough investigation focusing on collection of better scientific evidence to bring the real offenders to book. Besides, children are the emotional centers of their parents. In our prevailing standard of policing, legalization of their confessions may also open up the scope of blackmailing their parents for extraction of illegal money. We, therefore, completely disapprove the making of confession by a child and use of the same against himself in a juvenile case.

85. In view of the discussions made above, our answers to the questions raised in this case are:

(1) Confession of a child in conflict with law recorded under section 164 of the Code of Criminal Procedure has no legal evidentiary value and, therefore, such confession cannot form the basis of finding of guilt against him.

(2) A Juvenile Court constituted under the Children Act, 1974 as was in force before and now under the Shishu Ain, 2013 has got exclusive jurisdiction to try the cases, where children in conflict with law are charged with criminal offences. No other Court or Tribunal constituted under any other special or general law irrespective of its age of legislation has jurisdiction to try such cases unless the jurisdiction of Juvenile Court is expressly excluded there. The Druto Bichar Tribunal constituted under the Druto Bichar Tribunal Ain, 2002 cannot assume the jurisdiction of Juvenile Court in any manner whatsoever.

(3) In imposing punishment for offences punishable with death or imprisonment of life, the maximum term of imprisonment against a juvenile offender, or a person who crossed childhood during trial or detention, cannot be more than 10 years.

86. In the result, the appeal is allowed and the impugned judgment and order is set aside. The appellant is discharged from his bail bond. Send down the records.

15 SCOB [2021] HCD 60

HIGH COURT DIVISION

(STATUTORY ORIGINAL JURISDICTION)
COMPANY MATTER NO. 08 OF 2019
(Judgment has been pronounced in virtual Court)

Engr. Md. Anwar Hossen
……..…Petitioner
-VERSUS-
Chittagong Club Ltd and others
……Respondents

Mr. Moudud Ahmed, Senior Advocate
Mr. Abdullah Al Mahmud Advocate
.....For the Petitioner

Mr. M.A. Hannan, Advocate
.....For the Respondent Nos. 1 - 3

Judgment on 31/05/2020

Present
Justice Muhammad Khurshid Alam Sarkar

Editor's note:
The petitioner approached the Company Court By invoking Section 43 of the Companies Act, 1994 for rectification of the Members' Register of the Chittagong Club Ltd, a private company limited by guarantee without having any share capital incorporated under the Companies Act towards restoration of the petitioner's name therein, through obtaining a declaration from the Court that the decision of the General Committee (GC) so far as it relates to suspension of the membership of the petitioner is illegal and not binding upon him. The High Court Division after elaborate discussion of the relevant provisions of the Companies Act, 1994 and rules framed under it, dismissed the petition on the ground of maintainability and held that the dispute being purely of civil nature, the petitioner's remedy lies in the civil Court. The Company court also imposed a cost of 100,000 taka upon the petitioner for wasting court's valuable time by pressing such meritless case before it.

Key Words:
Golden rule of statutory interpretation; Section 43 and 44 of Companies Act, 1994; Rule 8 of the Companies Rules, 2009; Section 2(1)(d), Section 3(1), Section 43 and Section 233 of the Companies Act, 1994

When the meaning of any word/terminology is simple and plain, a Court shall not indulge in carrying out an exercise of interpreting the said word for finding out a different meaning:
It is the consistent view of all the Apex Courts across the globe that when the meaning of any word/terminology is simple and plain, a Court shall not indulge in carrying out an exercise of interpreting the said word for finding out a different meaning, going against the rules of statutory interpretation; for, it is the well-established principles of statutory interpretation that normally the plain literal meaning of any word or expression shall be taken and applied by the Court unless the said meaning creates contradiction with the other provision of the same statute. And, if the interpretation of the word/terminology leads to such an alternative meaning which is likely to introduce a confusion hampering smooth functioning/working of the prevailing/existing system, then, it is incumbent upon the Court to reject the alternative meaning. ...(Para 20)

The golden rule of statutory interpretation:

The golden rule of statutory interpretation is that when any ambiguity appears in a provision of a statute, the first option for the Court is to find out its literal meaning. And, in the event that it becomes a complex task for the Court to go with the above rule, only then, the Court would endeavour to discover its meaning with the help of the preamble and other provisions of the concerned statute without making any of its provisions nugatory. ...(Para 21)

Section 43 and 44 of Companies Act, 1994:
In this case, if the meaning of the word 'omitted' is taken as 'suspended', then, it shall create a chaos and confusion for the persons who would approach this Court for striking down/deleting the name of a person from the Register of the Members of the company in that the respondent would have the scope to make out a case for suspending the name instead of omitting it, which this Court cannot do and, in fact, has never made any order in that direction making the operation, application and use of the provisions of Section 44 of the Companies Act nugatory. This Court, in the aforesaid type of scenario, either has rejected the petitioner's application for omitting a person's name from the Members' Register or has ordered the company for rectification of the Members' Register by omitting the name-in-question from the Members' Register. So, it is apparent that the facts and circumstances of the petitioner's case do not attract the provisions of Section 43 of the Companies Act. ...(Para 22)

Rule 8 of the Companies Rules, 2009:
After the Companies Rules came into force, the Hon'ble Judges of this Court started to show their inclination towards entertaining application for non-compliance/violation of any provision of the Companies Act, even though the said provisions of the Companies Act do not license an aggrieved person to take recourse to the Company Court. ... So, in order to avail the provisions of Rule 8 of the Companies Rules, a petitioner requires to show the Court that a provision or provisions of the Companies Act has or have been breached. ...(Para 28)

The plain and simple grievance of the petitioner is that the impugned decision taken by the club depriving him from enjoying the club's facilities for 1 (one) year is illegal and the said grievance being a dispute of purely civil nature, the petitioner is competent to seek declaration from the civil Court challenging the propriety and legality of the impugned order coupled with making other prayers, including seeking temporary injunction and/or mandatory injunction upon the club. ... (Para 31)

Section 2(1)(d), Section 3(1), Section 43 and Section 233 of the Companies Act, 1994:
Let it be known to all, if it is not already known, that civil Courts of our country are well-competent, and in fact better equipped, to deal with all the provisions of the Companies Act; it would be a misconstruction of Section 2(1)(d) and Section 3(1) of the Companies Act to hold that the civil Court's door would be available only for those cases for which the Companies Act does not specifically mandate the Company Court to entertain an application. The basis of the above proposition is that there is no expression in Sections 2(1)(d) and 3(1) of the Companies Act by which the jurisdiction of the civil Court has been taken away. And, that is why, this Court on some occasion, but not on regular basis, suggests a petitioner under Section 43 or Section 233 of the Companies Act to approach the civil Court where serious complicated question of facts are involved necessitating recording of testimonies of a number of witnesses. This Court very seldom adopts the aforesaid path only in the rarest of rare cases on the ground of

its overwhelmingly over-burdenness of cases; not on the ground that this Court is powerless/incompetent to record oral evidence. ...(Para 32)

Court cannot be adventurous for expansions of its jurisdiction going beyond the scope of the law:
Since this Court now-a-days shows its inclination to receive and dispose of a case wherein a complaint about dereliction/violation of any provisions of law is made, in spite of absence of an enabling provision permitting a petitioner to approach this Court, the present case could have been entertained by this Court had there been an apparent non-compliance/violation of any provision of the Companies Act. But the present case merely involves adjudication of a grievance as to non-compliance with the provisions of Memorandum of Association and Articles of Association of the club; no provision of the Companies Act directly is resorted to for disposal of the petitioner's case. It is for information of all the concerned that this Court is always in favour of remedying a petitioner ignoring the technical issues of a case even in a roundabout manner; but the Court cannot be adventurous for expansions of its jurisdiction going beyond the scope of the law. Therefore, when this Court finds that it has not been empowered to try a case/suit/proceedings, this Court becomes helpless to extend its hands to be petitioner.
...(Para 33)

JUDGMENT

Muhammad Khurshid Alam Sarkar, J.

1. By invoking Section 43 of the Companies Act, 1994 ('the Companies Act'), the petitioner approached this Court for rectification of the Members' Register of the Chittagong Club Ltd, a private company limited by guarantee without having any share capital incorporated under the Companies Act (hereinafter referred to either as the club or as respondent No. 1 or as the company) towards restoration of the petitioner's name therein, through obtaining a declaration from this Court that the decision of the General Committee (GC) taken in the club's/company's 28th meeting held on 04.12.2018, so far as it relates to suspension of the membership of the petitioner for one (01) year, as contained in the letter under ref: No. CCL/ADMIN/110/1087 dated 12.12.2018, is illegal and not binding upon the petitioner.

2. The fact of the case, briefly, as stated in this petition, is that the petitioner is an engineer by profession and a permanent member of the club with membership code No. H-0228; that the respondent company is a social club, which is established primarily for extending to its members and their families/friends certain privileges, advantages, conveniences and accommodation befitting a social club; that the petitioner, as a permanent member of the respondent club, has been enjoying the facilities of the club since long and there has been no allegation of misbehavior or misconduct whatsoever against the petitioner from any corner; that the petitioner received a letter purporting to be a show cause notice bearing ref: No. CCL/ADMIN/110/989 dated 23.10.2018 to be replied in writing within 72 hours of receiving the same and, in the event of non-receipt of the written response from the petitioner, the GC of the club shall proceed as per the rules of the club; that the aforesaid letter dated 23.10.2018 did not contain any specific allegation against the petitioner nor did it mention about any inquiry conducted in respect of the same and, in fact, no inquiry was held in respect of the alleged undesired behavior; that the petitioner was never called by the GC to explain his conduct against any allegation; there was no statement by the petitioner before the

GC admitting commission of an offence or of misbehavior; that the petitioner upon receipt of the said letter on 24.10.2018 gave a written reply on 25.10.2018 having clearly stated that it was a misunderstanding only and apologized if there was any unconscious conduct on his part; that thereafter the club issued the impugned letter under ref: No. CCL/ADMIN/101/1087 dated 12.12.2018 informing the petitioner that the reply of the petitioner was put up in the 28th meeting of the GC held on 04.12.2018 and in the said meeting the GC after threadbare discussion, unanimously decided for suspension of the petitioner's club membership for 1 (one) year to be effective from the next day of his receiving the said letter; that having been aggrieved by the aforesaid decision of the GC, the petitioner by a letter dated 13.12.2018 requested the Chairman of the club to rescind/cancel the aforesaid decision, so far as it relates to suspension of the petitioner's club membership, but the petitioner did not receive any response whatsoever in this regard. Hence, this application.

3. By filing an affidavit, on behalf of the respondent No. 1 (club), the respondent No. 3 states, *inter alia*, that the club appointed Bangladesh Industrial Development and Construction (BIDCO) as contractor for renovation and restoration of the main building of the club and for construction of a new sports complex. As per the decision taken in Extra Ordinary General Meeting (EGM) of the club held on 26.10.2017, a high-powered enquiry committee was formed to inquire into the difference of measurement and total expenditure incurred by the BIDCO. Accordingly, after conducting enquiry, an enquiry report was submitted on 14.06.2018 wherein it was found that excess amount was paid to BIDCO under different heads and the club incurred extra expenses on request of the BIDCO including payment to architect, payment on account of additional service charges on supplies and salaries, payment on account of tools & plan, electric design charge, additional service charges for dismantling and removal of debris etc. After the said report was accepted by the EGM of the club held on 28th June, 2018, the GC of the club had a meeting on 18.10.2018 with the petitioner who is a member of the club as well as a Managing Partner of BIDCO. In the said meeting, the petitioner behaved arrogantly and talked insolently in his bid to deny the report of the enquiry committee. Hence, the GC in its 23rd meeting held on 22.10.2018 discussed the matter and unanimously decided to issue a show cause notice upon the petitioner wherein the allegations brought against him have been clearly stated. The admitted position is that the petitioner, upon receiving the said show cause notice dated 23.10.2018, apologized for his conduct vide his reply dated 25.10.2018. Since the conduct of the petitioner, as admitted by himself, amounts to misconduct or misdemeanor being detrimental to discipline, good order and harmony, directly involving the members of the GC which they have experienced in person jointly as the committee members, the GC of the club, under authority of Article 41 of the MoA of the club unanimously passed an order on 12.12.2018 suspending the petitioner's membership for a period of 1 (one) year. Thereafter, the petitioner by letter dated 13.12.2018 requested the club's Chairman to rescind/cancel the said periodical suspension order and, in response of which, the Chairman vide letter dated 27.03.2019 bearing ref: No. CCL/ADMIN/110/156 disposed of the petitioner's prayer stating that the Chairman has no authority of his own under the said Article to cancel or withdraw the suspension order of the petitioner and the said reply was received by the petitioner by hand delivery and by registered post.

4. Mr. Moudud Ahmed, the learned Senior Advocate, appearing for the petitioner contends that admittedly the petitioner appeared in the meeting dated 18.10.2018 as the Managing Director of BIDCO, not as a member of the club and, thus, the dispute raised here is a dispute between BIDCO and the club, where the petitioner had no role as a member of

the club; rather he appeared in the meeting as a partner of BIDCO. He further contends that nowhere in the entire materials submitted before this Court by the club is there a single sentence containing any allegation of misbehavior, disobedience of the rules of the club etc against the petitioner as a member of the club. He argues that had the petitioner not been a partner of BIDCO, the club could not take any action against him and, therefore, the dispute between BIDCO and the club being merely a business dispute, such dispute could have been settled otherwise, or appropriate legal steps could have been taken if the club was satisfied that BIDCO was responsible for any irregularities or illegalities.

5. By taking this Court through the show cause notice dated 23.10.2018 and, side by side, by placing Article 41 of the AoA of the club, he submits that the purported show cause notice is not a show cause notice as contemplated in Article 41 of the AoA of the club. Further, as he continues to submit, under Article 41(b) of the AoA, the Chairman of the club ought to have constituted a committee within a reasonable time to facilitate a hearing for the petitioner as to his grievances against the decision of the General Committee, instead of evading his duty by saying that the Chairman has no authority to cancel or withdraw the order of suspension. He alleges that disposing of the petitioner's aforesaid application for cancellation of the suspension order after 3 (three) months of receiving the same by the club's Chairman on a vague/nebulous ground demonstrates the malafides of the action taken against the petitioner.

6. He forcefully submits that if the suspension or punishment is given effect to without exhausting the formal grievance proceedings, the decision is liable to be struck down on the ground of violation of the principle of natural justice. He argues that since, in this case, the General Committee without any evidence or reference most illegally found the petitioner guilty of breach of club discipline, as they did not specify exactly how the petitioner committed the misconduct which is detrimental to the discipline, good order and harmony of the club, the impugned suspension order is liable to be declared illegal and not binding upon the petitioner.

7. On the issue of maintainability of this application, the learned Senior Advocate for the petitioner submits that due to the suspension order, the petitioner's all rights as a permanent member of the club have been withdrawn. In a bid to elaborate his above submissions, he contends that the petitioner has been barred from entering and using club facilities, including exercising his voting right which amounts to withdrawal of his membership without any legal basis or ground and, therefore, suspension of the membership of the petitioner, having amounted to cessation of his membership from the Member's Register of the club for one year, attracts the jurisdiction of this Court under Section 43 of the Companies Act. In an endeavour to pursue this Court on the issue of maintainability of the instant application under Section 43 of the Companies Act, the learned Senior Advocate Mr. Moudud Ahmed places the meanings of the following terminologies: 'expel', 'expulsion', 'suspend', 'suspension', 'cease', 'rectification', 'rectification of register' and 'rectify' from Black's Law Dictionary and some other dictionaries and, side by side, the wordings engraved in Section 43 of the Companies Act together with the provisions of Articles 38 to 43 of the AoA of the club, and submits that since Article 41 of the club's AoA falls under the heading "Cessation of Membership", it can be concluded that 'termination', 'suspension' and 'expulsion' of membership of the club are essentially 'cessation of membership' of a member of the club, but in different form and, moreover, since the dictionary meaning of the word 'cease' includes 'to suspend' and 'cessation' includes 'suspension', therefore, an application under Section 43 of the Companies Act is the most appropriate course for the petitioner. He adds

further on this issue that though Section 43 of the Companies Act does not contain the word 'suspended' but the same contains the words 'omitted' and 'ceased' and since the words 'warn', 'suspend' and 'expel' as used in Article 41 of the AoA of the club are meant for punishment of different kind/s for any misconduct and misdemeanor committed by any member of the club, any person of ordinary prudence will regard it as an absurd and unreasonable proposition to say that an application under Section 43 of the Companies Act before the High Court Division is maintainable only by a member of the club who is expelled, not by a member who is suspended.

8. In his bid to profess further on the issue of maintainability, he submits that it is important to understand the meaning of the word/s 'rectify' and 'rectification' employed in Section 43 of the Companies Act in order to have an appropriate interpretation of the same. He submits that since both the words essentially mean to correct something which is wrong and erroneous, therefore, for bringing an application under Section 43 of the Companies Act, by a member of the club, his/her name need not be omitted/deleted/removed from the Members' Register of the club, rather if the membership of any member of the club is suspended for a certain period i.e. the name of the said member lying suspended in the Members' Register of the club, and that is done illegally/wrongly, the Court has the power under Section 43 of the Companies Act to pass an order for rectification of the Members' Register. In his further bid to make the words 'rectify' and 'rectification' applicable in a scenario of suspension, he submits that when the question of interpretation of a statutory provision arises, it is always imperative to take into account the intention of the Legislature and the purpose of the enactment of such statutory provision. In detailing his submissions on interpretation of the wordings employed in Section 43 of the Companies Act, he argues that the Legislature used the word 'rectify' which carries a wider meaning i.e. to correct anything which is wrong or erroneous. He continues to submit that had it been the intention of the Legislature in using the word 'omitted' that this provision can only be invoked by a member of any company, be it a company limited by guarantee, only when his name is deleted/removed/expelled permanently from the Members' Register of the company, then, the Legislature could have used the word 'restore' (ফিরিয়ে দেওয়া / পুনরুদ্ধার করা / প্রত্যর্পণ করা / পুনরানয়ন করা) instead of the word 'rectify' (সংশোধন). He submits that the word 'omitted' as used in Section 43 of the Companies Act should be given a wider meaning to include the word 'ceased' and thereby to include the word 'suspended' to attain the purpose of the provision and if the word 'omitted' is interpreted literally by excluding the words 'ceased' and 'suspended', such interpretation will produce some gross or manifest absurdity. He submits that there is always a presumption in favour of the more simple and literal interpretation of the words of a statute, but such construction cannot prevail if it is opposed to the intention of the Legislature as apparent by the statute and if the word/s are sufficiently flexible to admit of some other construction by the intention is better effectuated. He submits that it is a recognized rule of interpretation of statutes that expressions used in a statute should ordinarily be understood in a sense in which they best harmonize with the object of the statute. To substantiate his submissions on the interpretation of statute, he refers to a catena of case-laws of our jurisdiction, Indian jurisdiction and Privy Council.

9. Lastly, by placing Rule 8 of the Companies Rules, 2009 (shortly, the Companies Rules) and simultaneously by referring to the case of Abdul Wadud Vs Heaven Homes Pvt Ltd, 65 DLR 143, he submits that this Court has got inherent jurisdiction under Rule 8 of the Companies Rules to pass appropriate order for ends of justice in a case in which non-compliance with the provision of law comes to its notice.

10. Per contra, Mr. M.A Hannan, the learned Advocate appearing for the club, at the very outset raises the question of maintainability of the present application and submits that Section 43 of the Companies Act is about rectification of the Members' Register by this Court if the name of any person is without sufficient cause entered in or omitted from the Register of Members of a company or neglect is made or unnecessary delay takes place in entering names of any person as to becoming member or ceased to be a member of the company and, in the present case, since no alteration has taken place in the Register of Members of company, there is no cause of action under Section 43 of the Companies Act and, thus, the petitioner has no standing to file the present application. By taking this Court through the prayer portion of the instant application, Mr. Hannan submits that the petitioner has sought setting aside of the decision of the General Committee taken in the company's 28th meeting held on 04.12.2018, but under Section 43 of the Companies Act, there is no scope of setting aside a temporary suspension order imposed by the General Committee of the club upon one of its members for disciplinary grounds in summary proceedings. His second count of submission on the issue of maintainability is that although the petitioner had scope to take recourse to a grievance proceeding within seven (07) days from the date of receipt of the order to the Chairman under Article 41(a) of the AoA of the club, he did not do so, rather he, without asking the Chairman for constituting a committee for facing the grievance procedure, simply requested the club's Chairman to cancel the decision taken by the GC of the club; because he admitted his misconduct and misdemeanor with all members of the Executive Committee and as such he had no grievance to agitate.

11. With regard to the substantive issue, Mr. Hannan submits that the order of suspension passed by the General Committee is a valid and legal one inasmuch as the disciplinary action taken against the petitioner vide suspension letter dated 12.12.18 was passed by the General Committee of the club under authority of Articles 41 and 42 of the AoA of the club and without violating any other laws or Byelaws. He contends that in view of the findings by the enquiry committee as to the petitioner's arrogant interactions and insolent conversation with the Executive Committee, the club could have suspended the petitioner for more than 1 (one) year; But taking into consideration the petitioner's approach to the club to forgive him, the club, having taken a lenient view has, in fact, imposed a lesser punishment upon the petitioner in commensurate with the offence committed by the petitioner. He pinpoints to the fact that the victims of the offence of misconduct and misdemeanor committed by the petitioner are not outsiders; rather they are the members of the General Committee who have directly experienced the petitioner's misconduct in person. The learned Advocate for the club contends that a number of irregularities were found as apparent from the inquiry report against BIDCO wherein the petitioner is a Managing Partner who used his membership for obtaining illegal and unethical benefits from the construction project of BIDCO but the present action has not been taken for the said irregularities, rather for the cause that arose under Article 41 of the Articles of Association.

12. On the case-laws referred to by the learned Advocate for the petitioner, he submits that the unreported Judgment dated 03.05.2016 in Company Matter No.280 of 2015 (Kamrul Hasan Bacchu Vs RJSC and others) as referred to by the petitioner has no manner of application in the present case, as the petitioner in the aforesaid case was permanently expelled from the club resulting in omitting his name from the Members' Register and, in this case, the present petitioner's club membership has been suspended only for a limited period retaining his name in the Members' Register; secondly, in the case reported in 65 DLR 143, when the Company Court found that there is a violation of a provision of the Companies Act, the Court entertained the case invoking the Court's inherent jurisdiction under Rule 8 of the

Companies Rules, but in this case, no provision of the Companies Act has been violated by the Club and, thirdly, the facts of other Judgments and decisions relied upon by the petitioner being completely different, the *ratios* are not applicable in the present facts and circumstances of the case. Lastly, he submits that the petitioner has not come before this Court with clean hands inasmuch as although the petitioner has admitted the charge raised against him and apologized for his conduct, but the petitioner did not disclose the said facts to this Court and, therefore, the petitioner does not deserve any remedy from this Court.

13. By making the above submissions, the learned Advocate for the club prays for dismissing the application with cost.

14. Hearing of the learned Advocates for the petitioner and the Company (club), perusal of the petition, affidavits-in-opposition together with their annexures and reading of the relevant statutory laws, Byelaws and case-laws lead this Court to consider mainly two issues. Firstly, whether the impugned order of suspension of the petitioner's membership of the club is legal and, secondly, whether this Court has the jurisdiction to try this case.

15. In order to adjudicate upon the first issue, this Court would require to examine the following sub-issues: (i) whether the club is empowered to suspend membership of any of its members, (ii) if the club is found to have the power to suspend its member/s, then, on what ground a member can be suspended, (iii) whether there is any procedure to be followed for adjudging a member guilty, (iv) whether there is any provision of appeal or review against the decision/order passed by the club, (v) whether the Civil Court or this Court or any other competent Court of law is empowered to interfere with the decision/order passed by the club and (vi) if any Court is empowered to examine a club's decision/order, then, whether the Court would be competent to carry out scrutiny of the legality and propriety of the decision/order as a whole, or only to a limited aspect.

16. However, since the learned Advocate for the petitioner has raised the question of jurisdiction of this Court, therefore, without adjudicating upon the said issue at first, this Court cannot proceed to deal with the above-mentioned sub-issues towards trial of the instant case in its entirety.

17. In order to adjudicate upon the jurisdictional issue, it is imperative to look at the provisions under which the instant application has been filed. And the said provision being Section 43 of the Companies Act, the same is quoted below:

> 43. **Power of Court to rectify register:-** (1) If-
> (a) the name of any person is without sufficient cause entered in or omitted from the register of members of a company, or
> (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having become, or ceased to be, a member,
> (c) the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.
> (2) The Court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved and may also make such order as to costs as it may consider proper.
> (3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register whether the question arises between members or alleged members or between members or alleged members on the one

> hand and the company on the other hand and generally may decide any question necessary or expedient to be decided for rectification of the register and may also decide any issue involving any question of law. (underlined by me)

18. From a plain reading of the provisions of Section 43 of the Companies Act, it is abundantly clear that the power of this Court to rectify the Members' Register of a company can be exercised only when the name of any person (member) is omitted (বাদ দেওয়া হয়) from the Members' Register. From the Bengali text of the aforesaid provision, it is crystal clear that if the name of a member of a company is no more in the record of the company, then, there shall be an occasion for this Court to hear an application under Section 43 of the Companies Act towards disposal of the same, either rejecting it or directing the company to rectify the Members' Register of the company by inserting the name therein. There is, thus, no ambiguity in the above-quoted law so as to call for an interpretation of the word 'omitted' with reference to the meanings provided in the different dictionaries. When the Bengali version of the law employs the expression "বাদ দেওয়া হয়", there hardly remains any scope for extracting any meaning other than omitting or deleting; that is to say, if the company's Members' Register (record-book) does not contain the name of a member, only in that event the aggrieved person may invoke the provision of Section 43 of the Companies Act. Similarly, when any person's name is unduly/illegally recorded in the Members' Register and a member of the company becomes aggrieved by the aforesaid entry in the Members' Register, this Court, then, assumes its jurisdiction for rectification of the Register of Members of the company and, if the petitioner succeeds, this Court in that event directs the company that the disputed name/s must not be in the record; this Court does not, and has never in the past, order the company to suspend the name for a specific period. So, clearly the provision of Section 43 of the Companies Act is not about suspension of membership of any person in a company.

19. I may now, after being acquainted with the relevant provisions of law, conveniently revert to the scenario of this case. Evidently, the club is a private company without having any share capital and the liabilities of the members of this company are limited by guarantee. Since Section 34 of the Companies Act mandatorily requires that every company (be it a company with share or without share, or be it a private or public company) shall maintain Register of the Members of the company, the club is duty bound to maintain a Members' Register. And, while it is the claim of the petitioner that his name has been deleted from the Members' Register i.e. is not in the Members' Register in the guise of suspension, the contention of the club is that the petitioner's name has not been omitted from the Members' Register. The learned Advocate for the petitioner has desperately strived to give the meaning of the word 'suspended' as 'omitted' by showing the consequence of a suspension order; contending that since the petitioner shall be debarred from enjoying all the facilities of the club during the suspended period, it amounts to omitting the name form the Members' Register.

20. However, a company's order/decision depriving any of its member from enjoying certain facilities of the company, whether the company is with share capital or without share capital, can be in no way relevant/connected with retention of the aggrieved member's name in the Members' Register. For example, when a member of a company with share capital is made *persona non-grata* in attending the AGM depriving the said member from casting his vote or if he is ordered that he shall not be allotted the dividend for some obvious reason, he cannot relate the said grievance with the provisions of Section 43 of the Companies Act. Likewise, when a member of a company without having a share capital is ordered that he is

barred to cast his vote in the AGM or enjoying any other facilities for a specific period, it cannot be the subject matter of Section 43 of the Companies Act. Secondly, pursuant to allowing an application under Section 43 of the Companies Act, this Court is under an obligation under Section 44 of the Companies Act to direct the company to notify the Registrar of Joint Stock Companies and Firms (RJSC) about rectification of its Members' Register; because when a company omits the name of its member from, or includes in, the Members' Register, the company requires to inform the RJSC and, therefore, when the company's action as to inclusion or omitting is overturned by the Order of this Court, the RJSC accordingly again should be informed about the rectification of the Members' Register. But in the case of suspension of membership of a member of company, if an application is allowed by this Court, the aforesaid provision of Section 44 of the Companies Act becomes redundant. Thirdly, there is no scope for this Court to import a meaning for the word 'suspended' as 'omitted' in the backdrop of availability of its unambiguous literal meaning as found hereinbefore. It is the consistent view of all the Apex Courts across the globe that when the meaning of any word/terminology is simple and plain, a Court shall not indulge in carrying out an exercise of interpreting the said word for finding out a different meaning, going against the rules of statutory interpretation; for, it is the well-established principles of statutory interpretation that normally the plain literal meaning of any word or expression shall be taken and applied by the Court unless the said meaning creates contradiction with the other provision of the same statute. And, if the interpretation of the word/terminology leads to such an alternative meaning which is likely to introduce a confusion hampering smooth functioning/working of the prevailing/existing system, then, it is incumbent upon the Court to reject the alternative meaning. On the issue of statutory interpretation, this Court in the case of Ghulam Mohiuddin Vs Rokeya Din 71 DLR 577 (Para 29), made the following observations;

21. The golden rule of statutory interpretation is that when any ambiguity appears in a provision of a statute, the first option for the Court is to find out its literal meaning. And, in the event that it becomes a complex task for the Court to go with the above rule, only then, the Court would endeavour to discover its meaning with the help of the preamble and other provisions of the concerned statute without making any of its provisions nugatory.

22. In this case, if the meaning of the word 'omitted' is taken as 'suspended', then, it shall create a chaos and confusion for the persons who would approach this Court for striking down/deleting the name of a person from the Register of the Members of the company in that the respondent would have the scope to make out a case for suspending the name instead of omitting it, which this Court cannot do and, in fact, has never made any order in that direction making the operation, application and use of the provisions of Section 44 of the Companies Act nugatory. This Court, in the aforesaid type of scenario, either has rejected the petitioner's application for omitting a person's name from the Members' Register or has ordered the company for rectification of the Members' Register by omitting the name-in-question from the Members' Register. So, it is apparent that the facts and circumstances of the petitioner's case do not attract the provisions of Section 43 of the Companies Act.

23. The above resolution on the provisions of Section 43 of the Companies Act leads me to embark upon examination of the petitioner's submission that this Court by applying and invoking its inherent jurisdiction may entertain this application. Since the above submission has been made in reference to Rule 8 of the Companies Rules and also with reference to a case-law, I prefer to look at them sequentially.

24. Rule 8 of the Companies Rules: The Court shall have inherent jurisdiction while deciding a matter under the Act to pass any order or to follow any procedure including any of the provisions of the Code or the Original Side Rules framed under the erstwhile Letters Patent for ends of justice and to prevent abuse of the process of the Court.

25. Whenever I had an occasion to read the above-quoted Rule, every-time I found difficulties to have/pick up/garner the proper meaning of this law. Because, firstly, jurisdiction of any Court usually is not conferred upon the Court by incorporating a provision in the Rules framed under an Act of Parliament; provision as to jurisdiction of any Court is always engraved in the parent law. Secondly, even if the question as to the constitutionality of the Rule 8 is ignored and the said Rule is taken to be fine, the meaning that I can grasp from the said Rule is that in course of deciding a matter under the Companies Act, this Court has been bestowed with a power to pass any order upon adopting/applying any procedural law of the land. So, in that sense, Rule 8 of the Companies Rules is about inherent power of the Court; not about the inherent jurisdiction of the Court. But, since the Companies Rules specifically enshrine inherent power of the Court in Rule 263, it implies that Rule 8 is about inherent jurisdiction of the Court. Rule 263 of the Companies Rules is quoted below:

> **Saving of Inherent Power of Court**
>
> 263. Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or to give such directions as may be necessary for the ends of justice or to prevent the abuse of the process of law.

26. The wordings of the above provisions vividly express the inherent power of the Court. Since it does not become possible for the Legislature to incorporate a law covering all types of problems, disputes, grievances and lis, in their wisdom, they usually consider it prudent to keep a codified provision for the Courts to exercise Courts' inherent power. Because, if the said power is provided in the Act of Parliament, the Courts become in a position to carry out their duties/performances more smoothly and speedily.

27. Be that as it may, since as of now, Rule 8 of the Companies Rules is in operation as a valid piece of Legislation heralding that this Court shall have jurisdiction to deal with any provisions of the Companies Act, thus, to me, it is like one-step forward provision than the previous statutory provisions; for, before incorporation of the provisions of Rule 8 in the Companies Rules on 07.12.2009, the Company Bench and the Appellate Division had been encountering a dilemma with regard to entertainment of an application for direction upon the company to comply with certain provisions of the Companies Act, meaning that, if there was a non-compliance or violation of a particular provision of the Companies Act (for example, Section 95 of the Companies Act which stipulates that notice of the Board meeting must be given in writing at the director's Bangladesh address), the aggrieved person was not allowed to file a petition before this Court on the ground that unless a Section of the Companies Act specifically sets out provision for approaching this Court, this Court does not have jurisdiction to try the case. In many cases, despite finding apparent non-compliance/violation of a provision of the Companies Act by this Court, this Court used to decline hearing the petitioner's grievance and, it is in that context, as appears to me, that the provisions of Rule 8 in the Companies Rules might have been incorporated to supplement the relevant law of the Companies Act which provides the jurisdiction of the Court. The said relevant law, namely, Section 3 of the Companies Act is extracted below:

> 3. **Jurisdiction of the Court-** (1) The Court having jurisdiction under this Act shall be the High Court Division;

> Provided that the Government may by notification in the Official Gazette and, subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court, and in that case such District Court shall as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered office in the district.
>
> Explanation – For the purposes to wind up companies the expression "registered office" means the place where the registered office of the company, during the six months immediately preceding the presentation of the petition of winding up was situated.
>
> (2) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court. (underlined by me)

28. The Bengali text of the above-underlined provision is ''এই আইনের অধীন এখতিয়ার সম্পন্ন আদালত হইবে হাইকোর্ট বিভাগ''। And, Section 2(1)(d) of the Companies Act provides the definition of the word 'Court' as 'the Court having jurisdiction under this Act'. Let me, now, gather the meaning of the expressions "the Court having jurisdiction" (এখতিয়ার সম্পন্ন আদালত) as employed in Sections 2(1)(d) and 3(1) of both English and Bengali text of the Companies Act. Does it provide a meaning that the High Court Division is the Court to try all types of the cases under the Companies Act or it does mean that this Court may be petitioned for aspired remedy only under some particular provisions of the Companies Act, which have conferred jurisdiction upon the Court. In the case of Abdul Mohit Vs Social Investment Bank 61 DLR (AD) 82 (Judgment delivered on 3rd November 2002) and in other score of cases, which were disposed of before framing the Companies Rules, 2009, the consistent view of this Court was that the Company Court is competent to entertain only those grievances/lis for which the Companies Act specifically mandates the aggrieved person to approach the Court. However, after the Companies Rules came into force, the Hon'ble Judges of this Court started to show their inclination towards entertaining application for non-compliance/violation of any provision of the Companies Act, even though the said provisions of the Companies Act do not license an aggrieved person to take recourse to the Company Court. In the case of Abdul Wadud Vs Heaven Homes Pvt Ltd 65 DLR 143 referred to by the learned Advocate for the petitioner, when this Court found that there has been an infraction of compliance of a provision of the Companies Act, relief was granted invoking the inherent jurisdiction under Rule 8 of the Companies Rules. So, in order to avail the provisions of Rule 8 of the Companies Rules, a petitioner requires to show the Court that a provision or provisions of the Companies Act has or have been breached. With regard to jurisdiction of the Court, this Court, in the case of AKM Lutful Kabir Vs Neeshorgo Hotel 2019(3) 17 ALR 101, made the following observations:

> Similarly, in an application under Section 233 of the Companies Act this Court is empowered to pass any type of Order/Direction which the Court considers to be necessary for the betterment of the company. Although there are differences of opinion as to the jurisdiction of this Court that the jurisdiction of this Court is limited within the certain provisions of the Companies Act, where the said provisions prescribe the petitioner/aggrieved person for approaching the Company Court (such as Sections 12, 13, 14, 41, 43, 59, 71, 81, 82, 83, 85, 115, 151, 171, 175, 176, 191, 193, 228, 229, 233,

> 241, 245, 248, 249, 253, 255, 258, 259, 261, 262, 263, 264, 265, 267-286, 294, 296, 299, 300, 301, 302, 303, 305, 309, 311, 312, 314, 316, 326, 328, 331, 333, 338, 339, 340, 342, 346, 349, 395, 396), however, upon minute perusal of the Preamble and the entire provisions of the Companies Act, my view is that in the absence of any prohibitory provision in any Section of the Companies Act, in particular in Section 3 of the Companies Act which seeks to state about the jurisdiction of this Court, this Court is competent to deal with any issues/grievance relating to or arising out of or in connection with any provisions of the Companies Act. (Para 15)

29. Although the apparent expansion of the Company Court's jurisdiction by virtue of Rule 8 of the Companies Rules took place, however, in order to avoid any confusion or further debate on the issue, the Legislature should add a paragraph underneath Section 3(1) of the Companies Act codifying the above proposition of law, which may be in the following words *"without being inconsistent with or contradictory to any provisions of this Act, the Court shall have jurisdiction to try a case in connection with/arising out of/related to any provisions of the Companies Act"* or by incorporation of any other suitable and appropriate expressions/wordings.

30. Now, let me see whether there has been an infraction of any provision of the Companies Act in the case in hand. It has already been held by this Court hereinbefore that the petitioner's grievance does not fit in the provisions of Section 43 of the Companies Act. Apart from the aforesaid provision of the Companies Act, the petitioner has also sought to connect, albeit faintly, his grievance with the provisions of Sections 22 and 32 of the Companies Act stating that as per Section 22 of the Companies Act, the MoA and AoA of the company bind the company and the members to the same extent as if they respectively had been signed by each member and are bound to observe all the provisions of MoA and AoA subject to the provisions of the Companies Act; and as per Section 32 of the Companies Act, every subscriber of the MoA of a company shall be deemed to have agreed to become a member of the company and on its registration shall be entered as a member in the Register of Members.

31. With reference to the above two provisions of law, the petitioner feebly sought to connect his grievance by saying that as a member of the company, the petitioner's name must be in the Register of Members of the company. However, since the name of the petitioner is very much in the Members' Register, no question of violation of the above provisions of law arises. This Court, thus, finds that the Legislature has not made any provision in the Companies Act directly, or even impliedly, to provide remedy from the Company Court for the persons like the present petitioner. The plain and simple grievance of the petitioner is that the impugned decision taken by the club depriving him from enjoying the club's facilities for 1 (one) year is illegal and the said grievance being a dispute of purely civil nature, the petitioner is competent to seek declaration from the civil Court challenging the propriety and legality of the impugned order coupled with making other prayers, including seeking temporary injunction and/or mandatory injunction upon the club.

32. Let it be known to all, if it is not already known, that civil Courts of our country are well-competent, and in fact better equipped, to deal with all the provisions of the Companies Act; it would be a misconstruction of Section 2(1)(d) and Section 3(1) of the Companies Act to hold that the civil Court's door would be available only for those cases for which the Companies Act does not specifically mandate the Company Court to entertain an application.

The basis of the above proposition is that there is no expression in Sections 2(1)(d) and 3(1) of the Companies Act by which the jurisdiction of the civil Court has been taken away. And, that is why, this Court on some occasion, but not on regular basis, suggests a petitioner under Section 43 or Section 233 of the Companies Act to approach the civil Court where serious complicated question of facts are involved necessitating recording of testimonies of a number of witnesses. This Court very seldom adopts the aforesaid path only in the rarest of rare cases on the ground of its overwhelmingly over-burdenness of cases; not on the ground that this Court is powerless/incompetent to record oral evidence. The above view has been expressed by this Court in greater detail in the case of Md Delwar Khan Vs RJSC 2019(2)16 ALR 196.

33. However, since this Court now-a-days shows its inclination to receive and dispose of a case wherein a complaint about dereliction/violation of any provisions of law is made, in spite of absence of an enabling provision permitting a petitioner to approach this Court, the present case could have been entertained by this Court had there been an apparent non-compliance/violation of any provision of the Companies Act. But the present case merely involves adjudication of a grievance as to non-compliance with the provisions of Memorandum of Association and Articles of Association of the club; no provision of the Companies Act directly is resorted to for disposal of the petitioner's case. It is for information of all the concerned that this Court is always in favour of remedying a petitioner ignoring the technical issues of a case even in a roundabout manner; but the Court cannot be adventurous for expansions of its jurisdiction going beyond the scope of the law. Therefore, when this Court finds that it has not been empowered to try a case/suit/proceedings, this Court becomes helpless to extend its hands to be petitioner.

34. It follows that the petitioner's appropriate forum being the civil Court, this petition is liable to be dismissed only on the ground of maintainability of this case. This Court, thus, is not going to dwell on the issue No. 1, as framed by this Court hereinbefore, namely, whether the impugned order of suspension of the petitioner's membership of the club is legal or not.

35. Nonetheless, at least, one factual aspect deserves to be recorded here. The petitioner approached the Chairman of the club with a request to cancel the suspension order vide his letter dated 13.12.2018 invoking Article 41(a) of the Articles of Association of the club which empowers the club's Chairman to form a 5(five) member committee for giving a hearing to the delinquent member and, thereafter, he filed this case on 14.01.2019. Then, the Chairman of the club apparently opted not to form a committee for proceeding with the petitioner's grievance, rather on 27.03.2019 during pendency of the instant case, he simply disposed of the petitioner's aforesaid letter by saying something otherwise. Hence, in order to cover up that scenario, for ends of justice, this Court finds it proper to make an observation that if the Chairman of the club has disposed of the petitioner's aforesaid letter dated 13.12.2018 under a conception that during pendency of the petitioner's case in this Court, it might be a contemptuous step for him to form a committee to proceed with the petitioner's grievance letter, it is clarified here that the Chairman of the club must not be under an impression that because of dismissal of this case, he would be barred or he has become *functus officio* to proceed with the grievance procedure; rather he shall be at liberty to constitute a committee within a reasonable time, preferably within 1(one) month of receiving this Judgment, affording the petitioner an opportunity to place his explanations. But, if the Chairman of the club had disposed of the petitioner's grievance letter dated 13.12.2018 - not being based on the apprehension made by this Court in the penultimate line, then, the civil Court shall examine the legality and propriety of the impugned letter in its present form. And, if the Chairman of the club constitutes the committee under Article 41(a) of the AoA of the

club, in that event, the said committee shall be at liberty to keep the impugned decision intact or alter the same, whatever it may appear to them to be fit and proper upon consideration of the petitioner's explanations.

36. If the committee, after hearing the petitioner, decides to maintain the impugned order as it is, in that case, the civil Court shall try the suit on the touchtone of the following established principles of law governing the field; (1) whether the company/club has taken the decision within the purview of its Byelaws and (2), in absence of any provisions as to imposition of quantum of fine and penalty for a specific type of misdemeanors/misbehavior, whether the club has failed to exercise its discretionary power which otherwise amounts to commission of a glaring illegality. It is to be borne in mind by the learned Judge of the trial Court that the Court, in these types of cases, needs to strike a balance between maintaining the right of an individual and the right of a social entity to let it run with its own norms and etiquette. It is the trite law that the Courts would not interfere with the merits of a domestic tribunal, save and except in the rarest case where ex-facie a severe illegality has been committed by the domestic tribunal causing irreparable loss to the private individual. Because, since a domestic tribunal is not formed under any statutory provision, it is not legally obliged to follow the formal procedures - like a formal tribunal or Court in (i) summoning the delinquent, witness/es, (ii) in filing petitions/letters, (iii) in producing evidence etc and, thus, mere irregularities or defects in complying with some insignificant procedures is not capable of vitiating the decision of a private body. In other words, the rules governing tribunals and Courts cannot mutatis mutandis be applied to the private bodies like social club, workers' private union/organization etc. The jurisdiction of the Courts in regard to tribunals of a domestic nature has been discussed in many cases but, in my opinion, the observations which fairly apply in most of the cases, including the present case, are those contained in the Judgment of Maugham J., as he then was, in the case of Maclean v. The Workers' Union, 1929-1 Ch. 602: (98 L. J. Ch. 293). The Tribunal in that case was the executive committee of the Union and Maugham J. observed (at page 620 med,);

> "At the outset it may be expedient to point out that the question will not be whether the Court considers that the conduct of the defendants or their executive committee was fair and just: but the very different question whether the case is one in which the Court has power to interfere.
>
> The jurisdiction of the Courts in regard to domestic tribunals-a phrase which may conveniently be used to include the committees or the councils or the members of trade unions, of members' clubs, and of professional bodies established by statute or Royal Charter while acting in a quasi-judicial capacity -is clearly of a limited nature. Parenthetically I may observe that I am not confident that precisely the same principles will apply in all these cases; for it may be that a body entrusted with important duties by an Act of Parliament is not in the same position as, for example, the executive committee in the present case. Speaking generally, it is useful to bear in mind the very wide differences between the principles applicable to Courts of justice and those applicable to domestic tribunals. In the former the accused is entitled to be tried by the judge according to true evidence legally adduced and has a right to be represented by a skilled legal advocate. All the procedure of a

> modern trial including the examination and cross- examination of the witnesses and the summing up, if any, it based on these two circumstances. A domestic tribunal is in general a tribunal composed of laymen. It has no power to administer an oath and, a circumstance which is perhaps of greater importance, no party has the power to compel the attendance of its witnesses. It is not bound by the rules of evidence: it is indeed probably ignorant of them. It may act, and it sometimes must act, on mere hearsay, and in many cases the members present or some of them (like an English jury in ancient days) are themselves both the witnesses and the judges. Before such a tribunal counsels have no right of audience and there are no respective means for testing by cross-examination the truth of the statements that may be made. The members of the tribunal may have been discussing the matter for weeks with persons not present at the hearing, and there is no one even to warn them of the danger of rating on preconceived views.
>
> It is apparent and it is well settled by authority that the decision of such a tribunal cannot be attacked on the ground that it is against the weight of evidence, since evidence in the proper sense there is none, and since the decisions of the tribunal are not open to any sort of appeal unless the rules provide for one."

37. The purpose of outlining the guidelines for the civil Court, without delving into the factual aspects of the petitioner's case, is to assist the trial Court to expeditiously dispose of the suit upon applying the correct proposition of law governing this field, if the petitioner approaches the civil Court challenging the impugned decision of the club. And, in any event, since this Court had to frame issues on the petitioner's case hereinbefore, it would obviously help the petitioner to have a quick disposal of the suit. Additionally, the petitioner may also ask the Court to frame issues as to (a) whether there is any past instance of the club to forgive a delinquent for the infractions of similar magnitude or, at least, met with lesser penalties and (b) whether there has been any infraction on the part of the club's General Committee which can be said to have been fatal to the disciplinary exercise undertaken and the decision arrived at. But it would be beyond the power of the civil Court to examine as to whether the General Committee has acted too harshly instead of becoming a bit more generous to the petitioner given the unconditional apology made by the petitioner, as was attempted to plead before this Court.

38. Finally, the question comes up for consideration as to whether this application should be dismissed with cost or not. After hearing the learned Advocate for both the sides at length on the issue of maintainability of this case, when this Court found that there is no point of allowing the petitioner to harp on the jurisdictional issue any further at the cost of wasting invaluable time of this Court, this Court suggested the learned Advocate for the petitioner Mr. Abdullah Al Mahmud (the filing lawyer) to approach the civil Court with an assurance that the interim order of stay passed by this Court at the time of admission of this case shall be kept operative and will be continued till institution of the said suit and, accordingly, the learned Advocate for the petitioner was asked to consult with the petitioner. However, upon receiving instructions from the petitioner, the learned Advocate opted to receive a full-

fledged Judgment, even at the expense of the cost if slapped by this Court. At that juncture, the learned junior Advocate for the petitioner Mr. Abdullah Al Mahmud was asked to reminisce the benevolence and latitude shown by this Court to the learned Senior Advocate Mr. Moudud Ahmed at the time of admission of this case. It is worthwhile to record here that the learned filing lawyer Mr. Abdullah Al Mahmud initially approached this Court mentioning the instant application to be a case under Section 22 of the Companies Act and, upon summary hearing, this Court was about to reject the petitioner's present application *in limine* on the ground that no application lies under the said provisions of the Companies Act. However, when a Senior Advocate of high stature of this country, none less than Mr. Moudud Ahmed, was insisting upon this Court to admit the case, it was observed by this Court that he may try his luck by converting this application to be one under Section 43 of the Companies Act, although the chance would be very slim to succeed in the final hearing.

39. Thus, on top of the prayer made by the learned Advocate for the club to award cost, this Court is also of the view that it is a fit case where the petitioner should be slapped an exemplary cost for not conceding to this Court's suggestion to approach the civil Court to save this Court's valuable time, which requires to deliver a full-fledged Judgment. Ostensibly when the petitioner is not going to lose anything from this Court; rather is getting a very reasonable order conducive to his circumstance and overall a better opportunity to fight his cause in a well-equipped forum, it is apparently a whimsical craving of the petitioner to have a detailed Judgment from this Court by wasting its invaluable time, by ignoring that this Court everyday is struggling to cope with huge backlog of cases. In a series of cases, the latest of which is the case of ABB India Ltd Vs Power Grid Company of Bangladesh Ltd 2020 ALR Online (HCD) page 1, this Court, upon castigating the petitioners of the said cases for their stubbornness for receiving a full-fledged Judgment in meritless cases, has slapped exemplary cost upto Tk. 10,00000/- (ten lacs).

40. In this case, it was announced in the open-Court that there will be a cost of Tk. 5,00000/- (five lacs). However, considering the humble prayer made by the learned Senior Advocate Mr. Moudud Ahmed, this Court imposes only a token cost of Tk. 1,00000/- (one lac) upon the petitioner.

41. In the result, the petition is dismissed with a cost of Tk. 1,00000/- (one lac).

42. The petitioner is directed to pay the cost of Tk. 1,00000/- (one lac) in favour of the National Exchequer by way of submitting a Treasury Challan in the Sonali Bank, Supreme Court Branch, Dhaka. And, the Chittagong club Ltd is directed to donate an amount of Tk. 1,00000 (one lac) to Anujani Zami Masjid and Pathagar, Chatak, Sunamganj. This Judgment and Order shall be effective subject to compliance of the above direction as regards donations. On furnishings receipts of the payment, this Order may be drawn up, if so prayed for.

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HIGH COURT DIVISION

(CRIMINAL APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 1660 of 2016.

Uthpal Kumar Roy and three others.
...Accused-Appellants.
-Versus-
Meghnad Shaha and another.
...Respondents.

Mr. Md. Abdur Rashid, Advocate
... For the appellants.

Mr. Rehan Hossain, Advocate
…For respondent No. 1.

Dr. Md. Bashir Ullah DAG with
Mr. MMG Sarwar AAG and
Ms. Farzana Shampa AAG
.....For the State

Heard on: 20.08.2020, 27.08.2020, 03.09.2020
Judgment on: 10.09.2020.

Present:
Mr. Justice Jahangir Hossain
And
Mr. Justice Md. Badruzzaman

Editor's Note:
The main issue before the High Court Division in this case was whether in a case under section 11(Ga) of Nari O Shishu Nirjatan Daman Ain, 2000 charge can be framed against an accused for causing simple hurt to the wife by the husband or his relations for demand of dowry without any injury certificate upon medical examination of the victim wife under section 32 of the Ain, 2000. The court answered it in negative and held that during taking cognizance or framing of charge under section 11 (Ga) or 11(Ga)/30 of Nari-O-Shishu Nirjatan Daman Ain, 2000 the tribunal must satisfy itself that the prosecution has fulfilled two criteria to establish its case against the accused; Firstly, the victim wife, as per section 32 of the Ain, has been medically examined in the Government Hospital or in any private Hospital, recognized by the Government and; Secondly, in support of such examination there is a medical examination certificate before the tribunal issued by the Medical officer of the particular hospital showing therein that the victim wife has sign of simple hurt in her person.

Key Words:
Section 11 (Ga), 23 and 32 of the of Nari-O-Shishu Nirjatan Daman Ain 2000; Section 319 of Penal Code, 1860; Medical examination certificate;

Ingredients of Section 11(Ga) of Nari O Shishu Nirjatan Daman Ain, 2000:
To establish a case against the accused under section 11(Ga), the prosecution must prove two facts i.e the accused (a) demanded dowry to the wife and (b) caused simple hurt to the wife on failure of such demand. If the prosecution fails to establish a *prima facie* case against the accused to fulfill any of the two conditions, cognizance cannot be taken or charge cannot be framed against him under section 11(Ga) of the Ain 2000. Likewise, after framing of charge under section 11(Ga), upon a prima facie case, if the prosecution fails to prove one of the said two conditions by adducing evidence an

accused cannot be punished under section 11(Ga) of the Ain, 2000. Because, if the offence of demand of dowry is proved but the offence of causing 'simple hurt' for such demand is not proved, the offence will fall under section 3 of Joutuk Nirodh Ain, 2018. Likewise, if only offence of causing 'simple hurt' to the wife by the husband or any person stated in section 11(Ga) of the Ain 2000 is proved and demand of dowry is not proved, the offence must fall under the provision of Penal Code. ... (Para 14)

Section 319 of Penal Code, 1860:
By now it has been settled by judicial pronouncements that the term 'hurt' as defined in section 319 of the Penal Code is synonymous to the term 'simple hurt'. According to section 319 of the Penal Code, whoever causes bodily pain, disease or infirmity to any person is said to cause hurt. The expression 'bodily pain' means that the pain must be physical as opposed to any mental pain. So, emotionally or mentally hurting somebody will not be hurt within the meaning of section 319. ...(Para 17)

Section 23 of Nari O Shishu Nirjatan Daman Ain, 2000:
Under section 23 of the Ain, 2000 even medical examination report can be admitted into evidence during trial without any oral testimony of the concern Doctor who has prepared the same. ...(Para 18)

Section 11(Ga) of Nari O Shishu Nirjatan Daman Ain, 2000:
If the wife is allowed to proceed a case under sections 11(Ga)/30 of the Ain 2000 against the husband and his relations for the allegation of causing her simple hurt for dowry on the basis of only oral statements made in the petition of complaint or FIR, as the case may be, supported by oral statements of the witnesses before the inquiry officer or investigation officer, without having at least a medical examination certificate in support of the alleged simple hurt that would give the wife an opportunity to use the special law, under which all offences are non-compoundable, non-bailable and cognizable, as a sword of unnecessary harassment to husband and his relations.
...(Para 22)

Section 11 and 32 of Nari O Shishu Nirjatan Daman Ain, 2000:
In a case under section 11 of the Ain , the wife is, obviously the victim of the offence under the Ain, 2000. Accordingly, she must take treatment for the injury allegedly caused by the accused from the hospital specified in section 32 of the Ain for *prima facie* proving the nature of such injury i.e whether the same is simple or grievous hurt. Since the Ain is a special law, there is no scope on the part of the victim of the offence covered by the Ain to receive any treatment from any hospital other than the hospital specified in section 32 or use the medical examination certificate procured there from to prove the nature of injury. ...(Para 25)

Section 11 (Ga) or 11(Ga)/30 of Nari-O-Shishu Nirjatan Daman Ain, 2000 read with section 32 of the same Act:
Our considered view is that during taking cognizance or framing charge of an offence against an accused under section 11 (Ga) or 11(Ga)/30 of Nari-O-Shishu Nirjatan Daman Ain, 2000, apart from considering other prosecution materials, the tribunal must satisfy itself that the prosecution has fulfilled two criteria to establish its case against the accused; Firstly, the victim wife, as per section 32 of the Ain, has been medically examined in the Government Hospital or in any private Hospital, recognized by the Government for that purpose regarding the injury caused by the accused and; Secondly, in support of such examination there is a medical examination certificate

before the tribunal issued by the Medical officer on duty in the particular hospital showing therein that the victim wife has sign of simple hurt in her person. The tribunal shall not take cognizance or frame charge of an offence punishable under section 11 (Ga) or 11(Ga)/30 of the Ain, 2000 against an accused without having a medical examination certificate from Government Hospital or any private Hospital, recognized by the Government for that purpose in view of the provision under section 32 of the said Ain in support of simple hurt of the victim wife. ... (Para 26)

JUDGMENT

Md. Badruzzaman, J.

1. This appeal is directed against an order dated 31.01.2016 passed by learned Judge, Nari-O-Shishu Nirjatan Daman Tribunal No.2, Chapainawabgonj in Nari-O-Shishu Case No. 34 of 2015 corresponding to G.R No. 258 of 2014 (Shib) arising out of Shibgonj Police Station Case No. 4 dated 1.8.2014 framing charge against the appellants under sections 11(Ga)/30 of Nari-O-Shishu Nirjatan Daman Ain 2000, now pending before the said Tribunal.

2. At the time of admission of appeal, this Court vide ad-interim order dated 29.03.2016 stayed operation of the impugned order for a period of three months which, upon extension, is still continuing.

3. The prosecution story, in short, is that on 01.08.2014 respondent No.1 (Father of the victim), lodged First Informant Report with Shibgonj Police Station, Chapainawabgonj against the accused-appellants alleging, *inter alia*, that on 07.03.2011 marriage between his daughter, Dr. Tapashi Shanda (the alleged victim) and accused No. 01 (appellant No.1) was held as per Hindu Law and some furniture, ornaments, TV etc. were gifted to her daughter at the time of marriage and after marriage, while his daughter was living at Dhaka, accused No.1 demanded one flat, cash taka and ornaments as dowry at the instance of other accused (respondents No. 2-4) from his daughter. Upon her refusal, they physically and mentally tortured her and lastly on 27.07.2014 his daughter came to the house of accused No. 1. On 28.07.2014 at 14:00 hours the accused persons again demanded one flat, cash taka and ornaments as dowry from her and on her refusal, accused No. 1 beat her indiscriminately with lathi, iron rod etc. at the instance of other accused. She fell down on the floor and other accused kicked her causing serious bleeding injury. Hearing hue and cry, some neighbors came to the place of occurrence and all accused left the place. After getting the information, the informant went to the house of accused No. 1 and took the victim to Rajshahi where she was treated in a local private hospital. The case was registered as Shibgonj Police Station Case No. 4 dated 01.08.2014 under sections 11(Ga)/30 of Nari-O-Shishu Nirjaton Daman Ain, 2000 (herein after referred to as the Ain 2000).

4. After investigation, the police submitted charge sheet against the accused-appellants being charge sheet No. 373 dated 30.11.2014 under sections 11(Ga)/30 of the Ain 2000. The appellants obtained bail on different dates.

5. Being ready, the case was transferred to Nari-O-Shishu Nirjaton Daman Tribunal No. 2, Chapainawabgonj for trial and registered as Nari-O-Shishu Case No. 34 of 2015. Learned Judge then fixed the case for charge hearing. The accused appellants filed an application

under section 265C of the Code of Criminal Procedure for discharge on the ground that the prosecution has failed to establish a *prima facie* case to frame charge against them. Their contention was that they were not at all involved with the occurrence as alleged in the FIR; that the informant's daughter (victim) was a unruly and uncontrollable; that she had suicidal tendency and that earlier she attempted to commit suicide on several occasions for which accused-appellant No.1 was constrained to divorce her on 22.7.2014; and after receiving the divorce letter, the informant filed the instant case with concocted story; that though as per F.I.R, the victim was undertaking medical treatment after the alleged date of occurrence in a private clinic at Rajshahi, but no medical certificate has been submitted supporting the allegation of simple hurt which is the main ingredient under section 11(Ga) of the Ain 2000 and the investigation officer also failed to mention the name of the clinic where the victim was treated and failed to examine any doctor as witness to prove the allegation of causing simple hurt which is mandatory under section 32(1) of the Ain, 2000.

6. The Tribunal without considering the contentions of the appellants framed charge against them under sections 11(Ga)/30 of the Ain, 2000 upon rejecting their application for discharge vide the impugned order dated 31.01.2016.

7. Respondent No.1 has filed affidavit-in-reply and supplementary affidavit to oppose the appeal stating, inter alia, that the victim wife, after occurrence, was admitted to CDM Hospital, Rajshahi for treatment on 28.07.2014 and after receiving treatment, she was released on 30.07.2014 and a Discharge Certificate was issued on 30.07.2014 to that effect; that a Medical Officer of CDM Hospital, Rajshahi issued Injury Certificate which was sent through a forwarding letter to Shibgonj Police Station on 16.10.2014 as per the request of the police. But unfortunately, police did not mention those facts in the charge sheet; that CDM Hospital is a private hospital having trade license and registration from the Government.

8. Mr. Md. Abdur Rashid, learned Advocate appearing for the appellants submits that though as per F.I.R the victim received medical treatment after the alleged date of occurrence i.e. on 28.07.2014 in private clinic at Rajshahi but no medical certificate has been submitted before the tribunal to establish the allegation of simple hurt. Learned Advocate further submits that as per section 32(1) of the Ain 2000, the victim under the Ain shall be medically examined in Government Hospital or in any Hospital authorized by the Government for this purpose; but in the instant case, the victim was not taken to any Government or private Hospital authorized by the Government for that purpose and this vital issue should have been considered by the Court below at the time of framing charge and ought to have discharged the accused appellants. To support this contention he relied upon the case of Md. Alamgir Matubbar vs. The State reported in 38 BLD (2018) 422.

9. Learned Advocate further submits that since the FIR has been lodged after divorce, the case is not maintainable. Learned Advocate further submits that admittedly, the prosecution has failed to produce any medical certificate in support of the injury of the alleged victim before the IO or the trial Court before framing charge. Learned Advocate further submits that discharge certificate dated 30.07.2014, injury certificate dated 16.10.2014, trade license dated 29.09.2019 and other documents which have been filed in this appeal are procured subsequently for the purpose of filling up the *lacuna* of the prosecution case which should not be considered at this stage.

10. On the other hand, Mr. Rehan Hossain, learned advocate appearing for respondent No.1 by supporting the impugned order submits that non-disclosure of vital evidence was the

exclusive fault of the police who submitted the charge sheet for which the informant as well as the victim should not suffer. Learned Advocate further submits that, if permitted by this Court, there is scope to produce those medical documents for proving the prosecution case of causing simple injury to the victim and there is also scope on the part of the accused to raise objection regarding their genuineness during trial.

11. Learned Advocate further submits that apart from medical documents, there is specific allegation of assault upon the victim wife by the accused appellants for dowry in the FIR which has been supported by statements of the witnesses recorded under section 161 of the Cr.P.C which has been reflected in the charge sheet from which tribunal was of the opinion that there was ground for presuming that the accused have committed the offence and accordingly, framed charge against them. As such, the tribunal committed no illegality.

12. We have heard the learned Advocates and perused the records. The main issue before us is whether in a case under section 11(Ga) of Nari O Shishu Nirjatan Daman Ain, 2000 charge can be framed against an accused for causing **simple hurt** to the wife by the husband or his relations for demand of dowry without any injury certificate upon medical examination of the victim wife under section 32 of the Ain, 2000.

13. The Nari-O-Shishu Nirjatan Daman Ain, 2000 is a special law enacted to provide stringent provision for prevention of offences of oppression to women and children and to provide for adequate measure for effective punishment. As per section 3 of the Ain, this law has overriding effect over all other laws for the time being in force. Though at the relevant time there was provision for punishment for the offence of demanding dowry in the Dowry Prohibition Act 1980 but section 11(Ga) has been inserted in the Ain for causing "simple hurt" to the wife for demand of dowry. For better understanding section 11 of the Ain is quoted verbatim below:

> ''১১। যৌতুকের জন্য মৃত্যু ঘটানো, ইত্যাদির শাস্তি। -যদি কোন নারীর স্বামী অথবা স্বামীর পিতা, মাতা, অভিভাবক, আত্মীয় বা স্বামীর পক্ষে অন্য কোন ব্যক্তি যৌতুকের জন্য উক্ত নারীর মৃত্যু ঘটান বা মৃত্যু ঘটানোর চেষ্টা করেন, কিংবা উক্ত নারীকে মারাত্মক জখম (grievous hurt) করেন বা সাধারণ জখম (simple hurt) করেন তাহা হইলে উক্ত স্বামী, স্বামীর পিতা, মাতা, অভিভাবক, আত্মীয় বা ব্যক্তি-
>
> (ক) মৃত্যু ঘটানোর জন্য মৃত্যুদন্ডে বা মৃত্যু ঘটানোর চেষ্টার জন্য যাবজ্জীবন কারাদন্ডে দন্ডনীয় হইবেন এবং উভয় ক্ষেত্রে উক্ত দন্ডের অতিরিক্ত অর্থদন্ডেও দন্ডনীয় হইবেন;
>
> (খ) মারাত্মক জখম (grievous hurt) করার জন্য যাবজ্জীবন সশ্রম কারাদন্ডে অথবা অনধিক বার বৎসর কিন্তু অন্যূন পাঁচ বৎসর কারাদন্ডে দন্ডনীয় হইবেন এবং উক্ত দন্ডের অতিরিক্ত অর্থদন্ডেও দন্ডনীয় হইবেন;
>
> (গ) সাধারণ জখম (simple hurt) করার জন্য অনধিক তিন বৎসর কিন্তু অন্যূন এক বৎসর সশ্রম কারাদন্ডে দন্ডনীয় হইবেন এবং উক্ত দন্ডের অতিরিক্ত অর্থদন্ডেও দন্ডনীয় হইবেন।"

14. A plain reading of section 11 of the Ain, 2000 as a whole clearly suggests that causing *simple hurt* to the wife for demand of dowry by the husband or his father, mother, guardian, any relative or other person on his behalf is one of the main ingredients for constituting an offence under sub-section (Ga) of section 11 of the Ain. To establish a case against the accused under section 11(Ga), the prosecution must prove two facts i.e the accused (a) demanded dowry to the wife and (b) caused simple hurt to the wife on failure of such demand. If the prosecution fails to establish a *prima facie* case against the accused to fulfill any of the two conditions, cognizance cannot be taken or charge cannot be framed against him under section 11(Ga) of the Ain 2000. Likewise, after framing of charge under section 11(Ga), upon a prima facie case, if the prosecution fails to prove one of the said two conditions by adducing evidence an accused cannot be punished under section 11(Ga) of the Ain, 2000. Because, if the offence of demand of dowry is proved but the offence of causing

'simple hurt' for such demand is not proved, the offence will fall under section 3 of Joutuk Nirodh Ain, 2018. Likewise, if only offence of causing 'simple hurt' to the wife by the husband or any person stated in section 11(Ga) of the Ain 2000 is proved and demand of dowry is not proved, the offence must fall under the provision of Penal Code.

15. Now question arises as to how a *prima facie* case against the accused can be established for taking cognizance or framing charge against the accused under section 11(Ga) of the Ain 2000 ? In other words, what criteria should be followed by the tribunal during taking cognizance of the offence or framing charge against an accused in such a case?

16. It is settled principle that if the prosecution upon gathering prosecution materials, oral or documentary, can establish a prima facie case against the accused before the Court that there is ground to presume that the accused has committed an offence, the Court shall frame charge against the accused. To establish *a prima facie* case of the offence of demand of dowry by the accused to the wife may be established by making specific allegation in the petition of complaint or FIR, as the case may be, supported by oral testimony of the witnesses before the inquiry officer or the investigating officer. But question arises as to how a *prima facie* case of causing 'simple hurt' for demand of dowry can be established?

17. The term 'simple hurt' is used nowhere in Nari-O-Shishu Nirjatan Ain Ain, 2000 or in the Penal Code. Only in sections 319, 321 and 323 of the Penal Code the word 'hurt' has been used. Likewise, in some other sections of the Penal Code the term 'grievous hurt' has been used. By now it has been settled by judicial pronouncements that the term 'hurt' as defined in section 319 of the Penal Code is synonymous to the term 'simple hurt'. According to section 319 of the Penal Code, whoever causes bodily pain, disease or infirmity to any person is said to cause hurt. The expression 'bodily pain' means that the pain must be physical as opposed to any mental pain. So, emotionally or mentally hurting somebody will not be hurt within the meaning of section 319. 'Causing disease' means communicating a disease to another person. 'Infirmity' means inability of an organ of the body to perform its normal function which may either be temporary or permanent. Punishments for voluntarily causing hurt in different situation have been described in sections 321 and 323 of the Penal Code. To differentiate ordinary hurt covered by sections 319, 321 and 323, from that of grievous hurt, the expression 'simple hurt' has come into popular use.

18. In the cases involving manslaughter or causing hurt (simple or grievous) to the human body, usually doctors are invited to ascertain the cause of death or the cause of injuries, the effect of injuries, the probable weapon used and the nature of injuries. Their opinions are called opinions of experts (section 45 of the Evidence Act). Medical evidence proves that the injuries could have been caused in the manner alleged and the grievous or simple hurt, as the case may be, have been caused by such injuries. Under section 23 of the Ain, 2000 even medical examination report can be admitted into evidence during trial without any oral testimony of the concern Doctor who has prepared the same. The expert report is an important piece of evidence and, when corroborated by other evidence, can be the basis of conviction. These are considered useful evidence by the courts as it is accepted that documentation of facts during the course of treatment of a patient is genuine and unbiased, but subject to proof. Only a physician or surgeon can give opinion as to the nature and effect of the injuries on body, manner or instrument by which such injuries were caused or whether the injury or wounds are simple, grievous or fatal in nature. An ordinary man should not allow to ascertain whether the injury caused is 'simple' or 'grievous' in nature inasmuch as general opinion perception may quite differ from legal meaning. It is wrong to say that the

medical evidence is only opinion evidence, it is often direct evidence of the facts found upon the victim's person (Smt. Majindra Bala Mehra vs. Sulil Chandra, AIR 1960 SC 706). Though medical evidence is not always direct evidence as to how an injury in question was done, but it denotes on how that, in all probabilities, was caused. The allegation as to who has caused the injury to the victim can be proved by oral evidence but the nature of such injury i.e whether the same is grievous or simple, can be proved by medical evidence.

19. In MM Ishak vs State and another (56 DLR, 2004 page 516) a complaint case was filed by the wife against her husband and another under section 11(Kka)/30 of the Ain, 2000 on the allegation that her husband and other accused on different dates demanded dowry from her, which she paid. The accused husband used to mentally and physically torture her for dowry and lastly on the date of occurrence the husband demanded dowry of Tk. three lac and as she expressed her inability to meet such demand, the husband continued torture on her as before. The wife was not examined by any doctor. Upon entrusted with investigation, the police submitted final report but the tribunal, upon examination of the materials on records took cognizance against the accused under the aforesaid sections of law. The accused challenged the proceeding under section 561A of the Cr.P.C. The High Court Division quashed the proceeding by observing as follows:

> "There is vague and unspecific allegation of torture. Mental or physical torture and causing hurt or injury are not the same act. The allegation of torture does not mean causing hurt. Thus the vague and unspecific allegation of torture made in the First Information Report does not attract an offence under section 11(Kha) of the Ain. So, the allegations made in the first information report, even if are taken as true, do not constitute an offence punishable under section 11(Kha) or 11(Kha)/30 of the Ain. "

20. In Umme Kulsum @ Zinat Ara vs Shahidul Islam and others [19 BLC (2014) 17] the wife lodged FIR with police station against her husband and others under sections 11(Kha)/30 of the Ain, 2000 on the allegation that the accused persons for demand of dowry caused her bodily hurt. The police, after investigation, submitted final report. The informant filed Naraji Petition and the tribunal, accepted the final report and rejected the Naraji Petition which has been challenged in appeal before the High Court Division. The High Court Division expressed the same view as has been taken by their Lordships in the case reported in 56 DLR 516.

21. In Md. Alamgir Matubbar vs. The State reported in 38 BLD 2018 page 422, the victim wife filed a case under section 11(Ga) of Nari-O-Shaishu Nirjatan Daman Ain against the husband and others on the allegation of torture her physically and mentally for demand of dowry who took treatment in Rajoir Hospital and during investigation, the police could not procure any injury certificate because she did not take treatment from government hospital. Police filed final report but the tribunal took cognizance against the husband and others under sections 11(Ga)/30 of the Ain, 2000. The husband challenged the order before this Division in appeal and a Division Bench of this Court set aside the order of the tribunal observing as follows:

> "we find no reason to disbelieve or ignore the final report in the absence of any medical document or any kind of reliable evidence in support of the alleged beating for demand of dowry. The process of law must not be used as an engine of harassment".

22. The above decisions and discussion suggest that, if the wife is allowed to proceed a case under sections 11(Ga)/30 of the Ain 2000 against the husband and his relations for the allegation of causing her **simple hurt** for dowry on the basis of only oral statements made in

the petition of complaint or FIR, as the case may be, supported by oral statements of the witnesses before the inquiry officer or investigation officer, without having at least a medical examination certificate in support of the alleged simple hurt that would give the wife an opportunity to use the special law, under which all offences are non-compoundable, non-bailable and cognizable, as a sword of unnecessary harassment to husband and his relations. It would not be out of context to say that, if the victim wife is unable to be examined by doctor, in any way, in support of her injury for demand of dowry and cannot file a case under section 11(Ga) of the Ain 2000 for want of injury certificate she would not be remedy less because of the fact that in such situation, she would be at liberty to lodge petition of complaint in the Court or an FIR before the police station, as the case may be, against the accused for the offence of demand of dowry under section 3 of Joutuk Nirodh Ain, 2018 (Act No. XXXIX of 2018) without having a medical examination certificate. It is to be mentioned here that an offence under section 3 is also a cognizable and non-bailable offence under section 7 of the said Ain, 2018 containing the provision of maximum punishment of five years under section 3 thereof whereas, the maximum punishment under section 11(Ga) of the Ain 2000 is three years only.

23. Now another question arises in which hospital the medical examination of the victim wife shall be done and from where a certificate of such medical examination shall be obtained ?

24. The answer has been laid down in section 32 of the Ain, 2000 which is quoted below:

‘‘ ৩২। অপরাধের শিকার ব্যক্তির মেডিক্যাল পরীক্ষা।

(১) এই আইনের অধীন সংঘটিত অপরাধের শিকার ব্যক্তির মেডিক্যাল পরীক্ষা সরকারী হাসপাতালে কিংবা সরকার কর্তৃক এতদুদ্দেশ্যে স্বীকৃত কোন বেসরকারী হাসপাতালে সম্পন্ন করা যাইবে।

(২) উপ-ধারা (১) এ উল্লেখিত কোন হাসপাতালে এই আইনের অধীন সংঘটিত অপরাধের শিকার ব্যক্তির চিকিৎসার জন্য উপস্থিত করা হইলে, উক্ত হাসপাতালের কর্তব্যরত চিকিৎসক তাহার মেডিক্যাল পরীক্ষা অতিদ্রুত সম্পন্ন করিবে এবং উক্ত মেডিক্যাল পরীক্ষা সংক্রান্ত একটি সার্টিফিকেট সংশ্লিষ্ট ব্যক্তিকে প্রদান করিবে এবং এইরূপ অপরাধ সংঘটনের বিষয়টি স্থানীয় থানাকে অবহিত করিবে।

(৩) এই ধারার অধীন যুক্তিসঙ্গত সময়ের মধ্যে কোন মেডিক্যাল পরীক্ষা সম্পন্ন না করার ক্ষেত্রে, তৎসম্পর্কে ব্যাখ্যা সম্বলিত প্রতিবেদন পর্যালোচনার পর নিয়ন্ত্রণকারী কর্মকর্তা কিংবা, ক্ষেত্রমত, মেডিক্যাল পরীক্ষার আদেশ প্রদানকারী কর্তৃপক্ষ বা তাহার নিকট হইতে ক্ষমতাপ্রাপ্ত কর্মকর্তা, ম্যাজিস্ট্রেট, ট্রাইব্যুনাল বা সংশ্লিষ্ট অন্য কোন কর্তৃপক্ষ যদি এই সিদ্ধান্তে উপনীত হন যে, যুক্তিসঙ্গত সময়ের মধ্যে মেডিক্যাল পরীক্ষা সম্পন্ন না হওয়ার জন্য সংশ্লিষ্ট চিকিৎসকই দায়ী, তাহা হইলে উহা দায়ী ব্যক্তির অদক্ষতা বা অসদাচরণ বলিয়া বিবেচিত হইবে এবং এই অদক্ষতা ও অসদাচরণ তাহার বার্ষিক গোপনীয় প্রতিবেদনে লিপিবদ্ধ করা হইবে এবং উপযুক্ত ক্ষেত্রে চাকুরী বিধিমালা অনুযায়ী তাহার বিরুদ্ধে ব্যবস্থা গ্রহণ করা যাইবে, এবং সংশ্লিষ্ট চিকিৎসকের বিরুদ্ধে কর্তব্যে অবহেলার জন্য তাহার নিয়োগকারী কর্তৃপক্ষ বা ক্ষেত্রমত, যথাযথ কর্তৃপক্ষ কর্তৃক ব্যবস্থা গ্রহণের জন্য ট্রাইব্যুনাল নির্দেশ দিতে পারিবে।’’

25. The provisions under section 32 of Nari-O-Shishu Nirjatan Daman Ain, 2000 are clear and unambiguous. This section provides that the medical examination of the victim of the commission of offence under the Ain shall be done in the Government hospital or any other private hospital recognized by the Government for the purpose. The section also provides for quick medical examination of the victims and for providing medical examination certificate to the person concerned and for informing the local police station about the commission of offence. It also provides for punitive action against the medical officer or doctor guilty of negligence in doing medical examination within reasonable time. In a case under section 11 of the Ain , the wife is, obviously the victim of the offence under the Ain, 2000. Accordingly, she must take treatment for the injury allegedly caused by the accused

from the hospital specified in section 32 of the Ain for *prima facie* proving the nature of such injury i.e whether the same is simple or grievous hurt. Since the Ain is a special law, there is no scope on the part of the victim of the offence covered by the Ain to receive any treatment from any hospital other than the hospital specified in section 32 or use the medical examination certificate procured there from to prove the nature of injury.

26. Our considered view is that during taking cognizance or framing charge of an offence against an accused under section 11 (Ga) or 11(Ga)/30 of Nari-O-Shishu Nirjatan Daman Ain, 2000, apart from considering other prosecution materials, the tribunal must satisfy itself that the prosecution has fulfilled two criteria to establish its case against the accused; Firstly, the victim wife, as per section 32 of the Ain, has been medically examined in the Government Hospital or in any private Hospital, recognized by the Government for that purpose regarding the injury caused by the accused and; Secondly, in support of such examination there is a medical examination certificate before the tribunal issued by the Medical officer on duty in the particular hospital showing therein that the victim wife has sign of **simple hurt** in her person. The tribunal shall not take cognizance or frame charge of an offence punishable under section 11 (Ga) or 11(Ga)/30 of the Ain, 2000 against an accused without having a medical examination certificate from Government Hospital or any private Hospital, recognized by the Government for that purpose in view of the provision under section 32 of the said Ain in support of **simple hurt** of the victim wife.

27. Now, coming back to the instant case. Admittedly, the FIR has been lodged by the father of the alleged victim wife under sections 11(Ga)/30 of Nari-O-Shishu Nirjatan Daman Ain, 2000 against the husband (appellant No.1) and his three full brothers (appellants No. 2-4) on the allegation that on the date of occurrence the accused indiscriminately caused injury on different parts of the body of the victim wife with lathi and iron rod having failed to fulfill their demand of dowry and she had been treated in different clinics of Rajshahi. During investigation, the statements of five witnesses including the victim wife have been recorded by police under section 161 of the Cr.P.C. Except the victim, the others are not eye witnesses of the occurrence but they heard about the incident from the victim. Three witnesses including the victim stated that she had been treated by local doctor. The police without procuring any certificate of medical examination of the victim or without examining any doctor submitted charge sheet against the appellants under sections 11(Ga)/30 of the Ain, 2000 on the basis of the oral statements of the witnesses. It appears that the appellants in their discharge application, amongst other defense plea, categorically stated that they caused no injury to the victim for demand of dowry and the victim had not been examined in any Government Hospital or any private Hospital recognized by the Government for the alleged injury and prayed for their discharge. Admittedly, during framing charge, there was no medical certificate before the tribunal in support of injury or treatment of the victim.

28. On perusal of the impugned order it appears that the tribunal without addressing the issue regarding medical examination of the victim under section 32 of the Ain, mechanically

framed charge against the appellants under sections 11(Ga)/30 of the Ain. It appears that the prosecution could not establish a prima facie case against the accused appellants under the said sections of law from which it can be presumed that the accused appellants committed offence under sections 11(Ga)/30 of the Ain, 2000 so that the charge under the said section can be framed against them. In the facts and circumstances of the case, the tribunal ought to have held that, without examination of the victim wife in the Government hospital or any private hospital, recognized by the Government for that purpose, charge against the appellants could not be framed under sections 11)Ga)/30 of the Ain 2000 and accordingly, should have discharged the appellants. The tribunal without considering such aspect of the case most illegally framed charge against the appellants under sections 11(Ga)/30 of the Ain 2000. As such, the same is not sustainable under law.

29. During hearing of this appeal, learned Advocate for respondent No.1, informant produced some photostat copies of medical documents showing that the victim wife admitted into CDM Hospital, Rajshahi on 28.7.2014 and after receiving treatment, she was discharged from there on 30.7.2014 and the hospital authority issued discharge certificate and injury certificate and forwarded those to the concern police station. Learned Advocate submits that the IO, for the reasons best known to him, did not mention those facts in the charge sheet and accordingly, an opportunity should be given to the informant so that he could produce those medical documents to the trial Court for taking additional evidence. We have carefully perused the medical documents. Admittedly, those medical documents were issued by a private hospital having trade license issued by the city corporation and license for running private hospital issued by the Director General of Health Services. On perusal of those documents it appears that those are general licenses for running private hospital but are not the recognition of the Government for the purpose of medical examination of the victim of the commission of an offence under the Ain in view of the provision under section 32(1) of the Ain 2000. Those medical documents, being not obtained in accordance with law, would not help the prosecution to improve it's case. Accordingly, we are unable to accept the contention of the learned Advocate for respondent.

30. For the reasons stated above, we find merit in this appeal which should be allowed.

31. In the result, the appeal is allowed. The impugned order dated 31.1.2016 is set aside. The accused appellants are discharged from the allegation and released from their bail bonds.

32. As prayed, the learned Advocate for respondent No.1 is permitted to take back the original copy of Discharge Certificate (Annexure X-4 to the supplementary affidavit) by furnishing Photostat copy thereof.

33. Communicate a copy of this judgment to the Court concerned at once.

15 SCOB [2021] HCD 87

High Court Division

(Civil Revisional Jurisdiction)

Civil Revision Case No. 4400 of 2015

Md. Ahsan Ul Monir and others
..... *Petitioners*
-Versus-
Dr. Md. Fakhrul Islam and others
..... *Opposite Parties*

Mr. Md. Nurul Huda, Advocate
……..*For the Petitioners*

Mr. Abdus Salam Mondal, with
Mr. M.A. Muntakim and
Mr. Mohammad Whaiduzaman, Advocate
…….. *For the Opposite Parties*

Heard On: 01.10.19 and
Judgment On: 20.11.19

Present:
Mr. Justice Khizir Ahmed Choudhury, J

Editor's Note:
The father of a minor child, who was a physician by profession and was undergoing trial for abetting suicide of his wife (mother of the child), instituted a suit in the Family Court seeking custody of the boy. The Family Court decreed the suit and Appellate Court affirmed the decree in spite of the fact that the boy expressed his preference of staying with his maternal relations before the Appellate Court. On revision the High Court Division taking into consideration the age of the child at the material time, likelihood of influencing his opinion by the maternal relations, acquittal of the father in the criminal case, relative advantage of the contesting parties to ensure the best interest of the child, relevant provisions of Guardians and Wards Act 1890, section 357 of Mulla's Principles of Mahomedan Law and judicial pronouncements of our apex court concluded that no illegality was committed by the Courts below in decreeing the suit. Therefore, the Rule was discharged.

Key Words:
Custody of a minor boy; Section 17 of Guardian and Wards Act, 1890; Section 357 of Mulla's Principles of Mahomedan Law; Section 7 and 25 of the Guardian and Wards Act, 1890; best interest of the child

Section 17 of Guardian and Wards Act, 1890:
In deciding the custody of minor child, the best interest and wellbeing of the child is paramount consideration as mandated in Section 17 of Guardian and wards Act, 1890. It is stipulated therein that in considering the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. It is further stipulated that if the minor is old enough to form an intelligence preference, the Court may consider that preference. ...(Para 10)

Father and paternal male relation is entitled to custody of a boy of seven years of age:
Section 357 of Mulla's Principles of Mahomedan Law stipulates that, father and paternal male relation is entitled to custody of a boy of seven years of age....In the case in hand the minor boy now above seven years old and it is already found that his wellbeing and betterment will be protected at the hand of his father and grandparents and as such the findings and reasonings in deciding the custody of minor boy is sustainable for welfare of the minor boy. ...(Para 14 & 15)

It further appears that the minor boy was examined by the appellate Court wherein he disclosed that he is willing to live with his maternal grandparents and does not intend to go and live with his father. It is noticed that while the minor boy was examined, he was 6 ½ years old and after living with maternal grandparents for quite number of years, he was brought to the Court and naturally the statement made by him may not reflect true state of affairs as there is likelihood of influencing his opinion. In this context the findings of the appellate Court may not be out of context wherein the appellate court held that on perusal of the lower Courts records it is found that the minor boy was present during hearing of the Family Court Suit on some occasions but no unusual attitude of minor boy towards father was noticed. ...(Para 17)

Section 7 and 25 of the Guardian and Wards Act:
It appears that the trial Court granted custody of the minor boy to his father although the suit was filed for appointment of guardian of minor boy but since the father is natural guardian of child he need not make prayer for appointing him as guardian under section 7 of the Guardian and Wards Act, rather he can claim for custody of minor child which the Court rightly granted under the facts and circumstances of the case. In the plaint averments have been centered around seeking custody of the minor boy and as such the courts below rightly granted custody of the minor boy to the plaintiff under section 25 of the Guardian and Wards Act, 1890. ... (Para 19)

JUDGMENT

Khizir Ahmed Choudhury, J:

1. This rule has been issued calling upon the opposite party to show cause as to why the impugned judgment and decree dated 06.09.2015 passed by learned Additional District Judge and Deulia Court in Family Appeal No.15 of 2014 affirming the affirming the judgment and decree dated 24.10.2013 passed by learned Additional Assistant Judge and Family court, Dhaka in Family Case No. 597 of 2010 should not be set aside.

2. Opposite party No 1 as petitioner instituted family suit No. 597 of 2010 before the Assistant Judge and Family court, 6th Court, Dhaka impleading the petitioners hearing as defendant for appointing him guardian and custodian of his minor child.

3. The case of the plaintiff in brief is that he married Dr. Tamanna Haque Munira vide registered deed of marriage and out of their wedlock a male child was born on 10.01.2008 namely Tahmid Faysal Meher. The plaintiff lives in joint family but his wife provoked him to live separately which he declined, consequently his wife started unbecoming behavior with him and on 29.8.2009 she committed suicide hanging with the ceiling fan. Defendant No. 1 took away minor boy from the plaintiff and filed Nari O Shishu Nirjaton case being No.

100(08) 09 under section 9A of the said Act against the plaintiff and his parents whereupon the police submitted charge sheet under section 506 of the Penal Code. The plaintiff intended to get back his minor son as his well being and nourishment has not been ensured at the defendants home and hence the instant suit.

4. The defendant No. 1-4 contested the suit by filing Written statement admitting the marriage, born of male child out of the wedlock and contended inter alia that on 28.8.2009 plaintiff and his family members killed Dr. Tamanna and kept her hanging with ceiling fan and after 12 hours informed her Father at Barishal although her elder brother was residing at Mohammadpur. When the elder brother of Dr. Tamanna along with police force reached the spot, the plaintiff was found absent. The dead body of Dr. Tamanna was taken from the plaintiff's house while the parents of the plaintiff handed over minor boy to his maternal uncle. The security and well being of the minor boy is at stake at the residence of the plaintiff and as such the minor boy deserves to reside with his maternal grandparents and such they prayed for dismissal of the suit.

5. After framing of issues, the suit was posted for peremptory hearing, the plaintiff deposed as PW 1 and submitted papers which were marked as exhibits 1 and 2. The defendants did not examine any witness but cross examined PW 1. After hearing the family court decreed the suit finding that in granting custody of the minor paramount consideration is his welfare and the plaintiff being his father and also being a physician it is logical that he will take care of his minor son devotedly and sincerely. The minor's paternal grandfather is retired government employee and grandmother being the retired official of IFIC Bank, they will be able to take care of minor child as well. The trial court also observed that defendant No. 2 is a student and defendant No. 3 and 4 are doing job and as such minor's well being will not be protected by them but if he stays with his father's family his well being will be best served. The trial court also held that the allegation of killing of Dr. Tamanna Haque by the plaintiff is sub-judice matter for which no comment is called for.

6. The appellate Court concurred with the findings of the trial court and further held that the statement made by the minor boy before the appellate Court seems to be not spontaneous, rather it is tutored by the appellants and as such his statement cannot be relied upon.

7. This court with a view to appraise the mental faculty and intelligence preference of minor boy passed order to produce him in the court, wherein the learned lawyer for the petitioner also agreed, but due to change of the constitution of the Court that could not be done then, but when the matter is posted for hearing again another date was fixed for bringing the minor boy to the Court but the minor boy was not produced by the petitioner.

8. Mr. Nurul Huda, learned advocate appearing for the petitioner submits that the trial Court after closure of evidence did not fix date for compromise or reconciliation which is a mandatory provision under section 13(1) of the Family Court ordinance 1989 and as such the judgment and decree passed by the trial Court is not maintainable for violation of the mandatory provision of law. He next submits that the minor boy has been living with his maternal grandparents since 1 ½ years of age and the maternal grandparents as well as the minor's maternal uncle and niece have been looking after him as per their best ability wherein minor's welfare will be best protected and as such the trial Court as well as the appellate court committed error in passing custody of the minor boy to the father. He next submits that the minor boy was produced before the appellate Court and he disclosed that he intends to stay with his maternal grandparents and he will not be safe in father's custody. He argued that the welfare of the minor is of paramount importance while considering the

custody of a minor boy and it is established that the welfare of the minor will be best protected if he stays with his maternal grandparents. He argued that although criminal case has been disposed of with the acquittal of the plaintiff but never-the-less the petitioner side is taking step for taking legal action against the acquittal and as such the custody of the minor boy should be kept with his maternal grand parents.

9. Mr. Abdus Salam Mondal, along with Mr. M.A. Muntakim and Mohammad Whaiduzzaman, advocate appeared for the opposite parties. Mr. Abdus Salam Mondal learned advocate submits that the trial Court by elaborate judgment found that the custody of the minor boy will be best protected in the hand of the father which has been affirmed by the appellate court and as such it is not desirable to hand over the custody of the minor child to the maternal grandparents. He next submits that the plaintiff has been serving in the Dhaka Medical Collage who did not marry for second time considering the welfare of the minor child and he is eager to impart best education if the custody of the minor boy is retained with him. Learned advocate further submits that the paternal grandparents of the minor boy being retired from their jobs, they can take care of him and other relatives are also very caring to the minor and they are also ready to extend support. He next submits that the father is the natural guardian of the minor and as such the custody of the minor boy has rightly been passed by the Courts below. He contends that the criminal case filed by the petitioner against the plaintiff was found to be not true and the trial Court acquitted him from the charge and as such the apprehension as raised by the petitioner does not subsists. Mr. Abdus Salam Mondal further submits that the evidence of minor as recorded by the appellate Court has got no credence as he was then 6 ½ years old having no intelligence preference, and also it is outcome of tutoring. He lastly submits that according to the petitioner, the minor child is student of class six studying at Barisal but the petitioner failed to produce any documents evidencing his prosecuting study and as such for the welfare of the minor child, he is to be handed over to the custody of the father. In support of his contention the learned advocate referred the case of Nilufar Majid Vs Mokbul Ahmed 1984 BLD 79, Kaymat Ali Sakidar and others Vs Jainuddin Talukdar 14 DLR 657, Md. Abu Baker Siddique Vs S.M.A. Bakar and others 38 DLR AD 106, Major (Retd) Rafiq Hasan Farook Vs Zeenat Rahana and 3 others 4 MLR AD 273.

10. In deciding the custody of minor child, the best interest and well being of the child is paramount consideration as mandated in Section 17 of Guardian and wards Act, 1890. It is stipulated therein that in considering the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. It is further stipulated that if the minor is old enough to form an intelligence preference, the Court may consider that preference.

11. The trial Court while decreeing the suit by granting custody of the minor to the plaintiff-opposite party, considered the welfare and interest of the minor and upon analyses all pros and cons granted custody to the father of the minor boy. The trial Court considered that plaintiff himself is a physician and plaintiff's parents are retired from their respective jobs and as such it is possible for them to take care and look after the minor boy. The trial court also found that defendant No.2 is a student and defendant No.3 and 4 are doing their jobs and naturally they will be engaged in performing their duties and consequently minor boy's best interest and well being will be protected with plaintiff and his parents.

12. The trial Court specifically held that the plaintiff himself deposed as PW.1 and he by producing documents substantiated his claim of custody of minor boy while the defendant's side did not examine any witnesses in support of the statement made in the written statement. So in absence of examination of any witnesses on defendants side their statements made in the written statement remained unsubstantiated.

13. In the case of Md. Abu Baker Siddique Vs S.M.A. Bakar and others 38 DLR AD 106 it is held that:

"These decisions, while recognizing the principle of Islamic Law as to who is entitled to the custody of a minor son with reference to his or her age and sex, simultaneously took into consideration the welfare of the minor child in determining the question. Courts in all these case, seem reluctant to give automatic effect to the rules of Hizanat enunciated by Islamic jurists. If circumstances existed which justified the deprivation of a party of the custody of his child to whose custody he was entitled under Muslim Law, courts did not hesitate to do so. It may be argued, as the appellant's Counsel did, that the welfare of the child would be best served if his custody is given to a person who is entitled to such custody. Nevertheless, Courts power to determine the entitlement of a party to the Hizanat is not limited to mere observance of age rule so as to exclude the consideration of the interest of the child which would, however, depend on the facts and circumstances of a given case."

14. Apart from this section 357 of Mulla's Principles of Mahomedan Law stipulates that, father and paternal male relation is entitled to custody of a boy of seven years of age which is as follows:

"The father is entitled to the custody of a boy over seven years of age and of an unmarried girl who has attained puberty. Failing the father, the custody belongs to the paternal relations in the order given in 355 above, and subject to the provision to that section

If there be none of these, it is for the Court to appoint a guardian of the person of the minor."

15. In the case in hand the minor boy new above seven years old and it is already found that his well being and betterment will be protected at the hand of his father and grandparents and as such the findings and reasonings in deciding the custody of minor boy is sustainable for welfare of the minor boy.

16. So far the criminal case is concern, it appears that at the time of hearing of Family suit as well as appeal the criminal case was still pending for hearing and as such both the Courts below held that as the case is pending it is better to dispose of the Family Court suits on its own merits. But during pendency of this rule the criminal case being Sessions case No.936 of 2012 was disposed of vide judgment and order dated 03.03.2019 whereby the plaintiff opposite party and others got acquittal from the charge levelled against them which is evident from the certified copy of the judgment and order having filed by the opposite party by way of counter affidavit.

17. It further appears that the minor boy was examined by the appellate Court wherein he disclosed that he is willing to live with his maternal grandparents and does not intend to go and live with his father. It is noticed that while the minor boy was examined, he was 6 ½ years old and after living with maternal grandparents for quite number of years, he was brought to the Court and naturally the statement made by him may not reflect true state of

affairs as there is likelihood of influencing his opinion. In this context the findings of the appellate Court may not be out of context wherein the appellate court held that on perusal of the lower Courts records it is found that the minor boy was present during hearing of the Family Court Suit on some occasions but no unusual attitude of minor boy towards father was noticed.

18. Regarding not fixing date for post trial hearing it appears that after remitting the record from the appellate Court, the trial Court fixed a date for examining witnesses of the parties on 10.10.2013 but on that particular date the defendant side remained absent and consequently the trial Court after closing evidence fixed the date for argument on 24.10.2013 and on that date the defendant-petitioner also remained absent and the trial Court after hearing argument of the plaintiff-opposite party fixed date for judgment on 28.10.2013 and on that date judgment was pronounced. So the trial court committed no illegality in posting the suit for argument after closing evidence. Apart from this even after preferring appeal this point has not been raised before the appellate Court.

19. It appears that the trial Court granted custody of the minor boy to his father although the suit was filed for appointment of guardian of minor boy but since the father is natural guardian of child he need not make prayer for appointing him as guardian under section 7 of the Guardian and Wards Act, rather he can claim for custody of minor child which the Court rightly granted under the facts and circumstances of the case. In the plaint averments have been centered around seeking custody of the minor boy and as such the courts below rightly granted custody of the minor boy to the plaintiff under section 25 of the Guardian and Wards Act, 1890. In the case of Mrs. Nilufar Majid Vs Mokbul Ahmed 1984 BLD AD 79 it is held that;

> ***"Earlier it has been noted that apart from filing a written objection in the case the respondent also filed on 12.05.83 an application u/s 25 of the said act praying that the appellant be directed to return the minor girl Tahsina Yasmin to the custody of the respondent who was all along the custodian of the said minor. The learned District Judge by order No.9 dated 12.05.83 ordered that he said application be kept with the record for the present. While disposing of the case the learned District Judge treated the written objection filed by the respondent to be an application u/s 25 of the said Act. this was not necessary. The respondent had in fact filed a formal application u/s 25 of the said Act for disposal by the Court. The learned District Judge was probably unmindful of this application when he disposed of the case. He had full legal authority to pass an order concerning the custody of the child, as the respondent had already filed a formal application to the effect. The respondent need not have filed any application u/s 7 of the said Act because the father is the natural guardian of the minor child."***

20. In the case of Kayemat Ali Sakidar And others Vs Jainuddin Talukdar 14 DLR 657 it is held that:

"***Mr. M.H. Khondkar, Advocate, appearing on behalf of the respondents, has not directly opposed this contention urged by Mr. Rahman and merely expressed his doubt as to whether such a relief could be granted without amending the plaint suitably. In this connection, he has posted out that the relief that is now being sought is not quite consistent with the case made in the plaint and as such, it may not be according to him permissible to grant the same with the pleading remaining as it is. I am, however, not impressed with this argument inasmuch as in this particular instance the relief in question does not appear to be wholly inconsistent with the pleading and even if that were so, that cannot, I am afraid, stand in the way of a decree being rendered as contended on behalf of the appellants. There can be no dispute that it was perfectly open to the plaintiffs to make a case to the effect that in case they were found not to be holding direct under the landlord and the relief asked for by them on that basis were found untenable, they might be given a declaration of their under-raiyati right in the disputed lands under the contesting defendants to the extent such under-raiyati tenancy was determined. So, the only drawback in this case has been and omission on the part of the plaintiffs to make such an alternative case and seek such an alternative relief; but this omission can hardly be a sufficient justification for driving the parties to a separate suit for determination of the question that has actually been adjudicated upon and conclusively determined in this suit. In other words, they said omission cannot, in my opinion, operate as a bar to the grant of the relief prayed for on behalf of the appellants before me. "***

21. The revisional Court is to see whether the trial court as well as the appellate Court committed error or whether findings of the Courts below are the outcome of misreading, non reading and non consideration of material facts. On perusal of the judgments of the courts below there appears no misreading, non-reading and non consideration of the evidence therein.

22. In the above facts and circumstances I find no merit in the rule and accordingly the rule is discharged.

23. No order as to cost.

24. The order of stay granted at the time of issuance of the rule is hereby re-called and vacated.

25. The petitioners are directed to hand over the minor boy namely Tahmid Faysal Meher to the opposite party within 90 days from the date of judgment.

26. Office is directed to send copy of the judgment to the concern Court as expeditiously as possible.

15 SCOB [2021] HCD 94

HIGH COURT DIVISION

Death Reference No. 26 of 2015 with
Criminal Appeal No. 1695 of 2015
And
Jail Appeal No. 46 of 2015

The State and another
-Versus-
Md. Abdus Salam and another

Ms. Kazi Shahanara Yeasmin, Deputy Attorney General with Mr. Zahid Ahammad (Hero) and Ms. Sabina Perven, Assistant Attorney Generals.
.....for the State
(In the reference and respondents in both the appeals)

Mr. Md. Mozammel Haque with Sakib Mahbud, Advocates
.....for the condemned-prisoner-appellant
(In Crl. A. No.1695 of 2014 and Jail A. No. 46 of 2015)

Judgment on 25.01.2021

Bench:
Mr. Justice S.M. Emdadul Hoque
And
Mr. Justice Bhishmadev Chakrabortty

Editor's Note
This is a case under section 11 (Ka) of Nari-o-Shishu Nirjatan Daman Ain, 2000. There was no ocular witness in the case and among the 12 witnesses examined, PWs 1, 2 and 4 were declared hostile and PWs 3, 6, 7 and 8 were tendered. On sifting, assessing and appraising evidence of witnesses, High Court Division found that the prosecution failed to bring home the charge of making demand of dowry and committing murder for its nonpayment. The autopsy report and evidence of PW10 proved that at first the victim was strangulated to death and thereafter her body was set on fire as the burn was caused after the death of victim. The above fact was further corroborated by the confession of the condemned-prisoner. The High Court Division analyzing the confessional statement of the condemned prisoner found it to be true and made voluntarily. However, the High Court Division also found from the confessional statement that the act of wife killing was done by the condemned prisoner in exercise of his right to private defense. Consequently, the High Court Division found that the condemned prisoner was not guilty of murder, but he could have been awarded punishment under section 201 of the Penal Code. Considering the prison term already undergone by the condemned prisoner the High Court Division without sending the case in remand for trial of the condemned prisoner under section 201 of Penal Code, rejected the Death Reference and set aside the judgment and order of conviction and sentence of the tribunal.

Key Words:
Section 164 of Code of Criminal Procedure 1898; Section 11 (Ka) of Nari-o-Shishu Nirjatan Daman Ain, 2000; Section 100 of Penal Code, 1860; Right to private defence

Section 164 of Code of Criminal Procedure 1898:
We find that police arrested the convict at about 6.15 pm on 30.08.2008 and took him to the police station. They produced him before the Magistrate in the afternoon on 31.08.2008 to record his confession. The learned Magistrate had not enough time on that day to record the confession and consequently he sent the accused to jail *hajat*. On the next day, i.e., on 01.09.2008 he was produced again before the learned Magistrate. The Magistrate kept him under the custody of his peon and giving him enough time for reflection recorded the confession and sent the accused to jail. We find that the columns of the printed form were filled up according to law. The accused was asked every questions of column No.6 and answers were written thereto. In the bottom of the confession the Magistrate ascertained the truth and voluntariness of it by his own writing- "আসামীর শরীরে কোন মারপিটের চিহ্ন নাই। আসামী স্বেচ্ছায় দোষ স্বীকারোক্তি দিয়াছে মর্মে প্রতীয়মান হয়"। **PW 12, the recording Magistrate deposed supporting the correctness of the confession exhibit-8. He was cross-examined by the defence elaborately but nothing came out adverse. We find the confession made by the condemned-prisoner true and it was voluntary. ...(Para 30)**

A judicial confession of an accused must be considered as a whole and should be judged whether any part of it is contradictory:
It is well settled position of law that a judicial confession of an accused must be considered as a whole and should be judged whether any part of it is contradictory, if there are sufficient grounds for doing so. In the case of the State Vs. Lalu Miah 39 DLR (AD) 117 our appellate division has adopted the above view. We find no reason to depart from the *ratio* of above cited case in the absence of legal evidence to contradict the portion of the confession which supports the defence. We also do not find any cogent reason to reject outright the portion of the confession supporting defence plea in it on the ground of improbability. On a thorough reading of the entire confession it inspires us to believe that it is an honest statement which reveals the cause behind the incident and it can be accepted safely. ...(Para 33)

Section 100 of Penal Code, 1860:
Homicide in self-defence is justifiable only upon the plea on necessity and such necessity only arrived in the prevention of forcible and atrocious crime. A person who apprehends that his life is in danger or his body is in risk of grievous hurt, is entitled to defend it by killing his attacker. In order to justify his act, the apprehension must have to be reasonable and the violence used not more than what was necessary for self-defence. In the second clause it does not require as a condition precedent that grievous hurt must be caused by the aggressor. The accused may not even wait till the causing of grievous injury; apprehension of it that would be the consequence of the assault is enough for exercising the right. The right of private defence is available to a person who is suddenly confronted with immediate necessity of averting an impending danger of his life or property which is real or apparent but not of his creation. A person has the right to defend himself particularly when he has suffered a grievous injury or the apprehension of sustaining such injury in the event of taking recourse to such injury. This right subsists so long the apprehension of the aggressive attack continues.
...(Para 36)

In this particular case, we find that the victim grasped the genital organ of the convict tightly and compressed it by applying force. The appellant requested her to leave him but she did not release it, thereafter he pressed the throat of the victim to get rid of the attack and to release his scrotum. He had no intention or preplan to commit any offence. It was just an accident at the event of exercising his right of private defence to save him from his aggressive wife, the deceased. ...(Para 37)

In dealing with the question as to whether more harm has been caused than is necessary, or if that was justifiable under the prevailing circumstances, it would be so inappropriate to adopt test of detached objectively. That is why in some judicial decisions it has been observed that the means which a threatened person adopts or the force he uses should not be weighed in golden scales. ... (Para 38)

The burden of proof of self-defence rests on the accused but this burden is not an onerous as the unshifting burden which lies on the prosecution to establish every ingredients of the offence with which the accused is charged. ...(Para 39)

Section 100, 300 and 302 of Penal Code and Section 11 (Ka) of Nari-O- Shishu Nirjatan Daman Ain 2000:
We find that the defence version or explanation of the convict in the confession about victim's death is acceptable than that of the prosecution version. The condemned-prisoner has been able to substantiate his plea of self-defence and he has not exceeded the right, for which he is entitled to get benefit of section 100 of the Penal Code. The offence disclosed in this case in no way comes within the meaning of 'murder' defined under section 300 of the Penal Code and as such the convict cannot be punished under section 302 of the same Code or under 11(Ka) of the Ain. The Tribunal has totally ignored this aspect of the case and found the appellant guilty of the charge under section 11(Ka) of the Ain. In view of the above position, the judgment under challenge cannot be sustained in law and should be set aside. ...(Para 44)

JUDGMENT

Bhishmadev Chakrabortty, J:

1. Learned Judge of Nari-o-Shishu Nirjatan Daman Tribunal, Sirajgonj (the Tribunal) has made this reference under section 374 of the Code of Criminal Procedure (the Code) for confirmation of the sentence of death awarded upon condemned-prisoner Md. Abdus Salam son of Md. Sukur Ali alias Sukra in terms of the judgment and order dated 23.03.2015 passed in Nari-o-Shishu Nirjatan Daman Case No. 10 of 2009 finding him guilty of offence under section 11(Ka) of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (the Ain).

2. Against the aforesaid judgment and order of conviction and sentence the condemned-prisoner filed a jail appeal and subsequently a regular criminal appeal. Since the reference and the appeals have arisen out of the same judgment and order, these have been heard together and are being disposed of by this judgment.

3. Prosecution case as narrated by PW1 Md. Golbar Hossain, the maternal uncle (*mama*) of Fatema Khatun (the victim/deceased) in the first information report (FIR), in brief, is that the victim was given in marriage with accused Abdus Salam ten years ago. During

subsistence of their marriage she was blessed with two sons. After the marriage, the accused husband, his parents and other relations started demanding dowry from the victim. On two occasions they paid taka fifty thousand to them. The accused persons demanded further taka fifty thousand and were creating pressure upon the victim for it. They used to torture her both physically and mentally to meet up the abovesaid demand. A *salish* was held for it and the victim made a General Diary Entry (GDE) with the concerned police station for the same reason. Since the victim refused to pay the dowry, all the accused at night on 26.07.2008 throttled her to death in the house of accused No.1. Then they carried victim's dead body out of the house, tied it with a date tree, poured kerosene oil on it and set fire. The fire had dazed victim's ears, eyes and other parts of body and those became blackish. Having received the news from his nephew Ziaur Rahman (PW3) at about 6:00 am, he rushed to the occurrence house and found gathering there. He further found *alamots* of murder in the house and burnt dead body tied with a date tree. All the accused fled away from the house taking victim's two minor sons with them.

4. On the aforesaid allegation Ullapara Police Station Case No. 21 dated 27.07.2008 corresponding to GR No. 210 of 2008 under sections 11(Ka) and 30 of the Ain against the condemned-prisoner and 8 (eight) others was started.

5. PW11 Md. Sadequar Rahman, a Sub-Inspector (SI) of police who was posted to Ullapara police station at the material time investigated the case. In his turn, he visited the place of occurrence, held inquest of the corpse and prepared a report. He recorded statements of witnesses under section 161 of the Code, arrested the accused husband and forwarded him to the learned Magistrate for recording his confession. After investigation, he found offence only against the husband (condemned-prisoner) *prima facie* to be true and submitted a charge sheet on 09.11.2008 against him under section 11(Ka) of the Ain. However, in the charge sheet he did not send up other eight accused named in the FIR.

6. Eventually, record of the case came for trial to the Nari-o-Shishu Nirjatan Daman Tribunal, Sirajgonj. The informant filed a *naraji* therein against the police report. The Tribunal upon hearing rejected the *naraji* and accepted the charge sheet and framed charge against sole accused under section 11(Ka) of the Ain. The charge so framed was read over to him, to which he pleaded not guilty and claimed to be tried.

7. During trial, the prosecution examined 12 (twelve) witnesses out of 14 (fourteen) cited in the charge sheet; of them PW1 informant Md. Golbar Hossain stated that the occurrence took place at night on 26.07.2008. On the following morning his nephew Ziaur Rahman through a telephone call informed him about the victim's death. He rushed there and found the dead body lying under a date tree near the dwelling house of the accused. He then conveyed the said message to the police station. Police went to the house of the accused but did not find them there. In his presence police held inquest and prepared a report. He proved the FIR and inquest report exhibits-1 and 2 respectively and identified his signatures thereon. He proved the seizure of alamots through exhibit-3. He could not say how the victim died. At this stage he was declared hostile and cross-examined by the prosecution while he stated that he could not say whether the victim was throttled to death for dowry at the night on 26.07.2008. He could not say whether the accused tied the victim with a date tree, or kerosene oil/diesel was poured on her person and set it on fire. Due to the burn, the body of victim became blackish. He denied the suggestion of the prosecution that they had made a compromise with the accused and to save him he deposed falsely. In cross-examination by the defence he stated that the Officer-in-Charge (OC) of the police station wrote the *ejahar,*

but it was not read over to him. The inquest report and the seizure list were not read over to him also. He did not hear about any bitter relationship between the accused and the victim. He did not hear that the victim committed suicide due to bellyache. He did not find any mark of injury on the person of the victim. Learned Judge of the Tribunal then asked him why he had filed the case against the accused, but he did not give any reply. Subsequently, he stated that he did not see the accused at home and that is why he suspected him and made him accused in the case. On recall by the defence he stated that on the day of occurrence he did not see the accused in his house. He has no complaint against the accused.

8. PW2 Laily, mother of the victim stated that the occurrence took place at night on 11 Shraban, 1415 BS. She received news through Chowkidar Abdus Sattar (PW5) and rushed to the house of the accused. But she was not allowed to see her daughter's dead body. At this stage she was declared hostile and cross-examined by the prosecution, while she stated that she could not say whether the accused throttled her daughter to death for dowry, or thereafter tying the dead body with a date tree poured kerosene oil and set fire on it. At the time of occurrence she was at Dhaka. She denied the suggestion of the prosecution of deposing falsely to save the accused. In cross-examination by the defence she stated that she did not hear about any altercation of the accused with the victim. Previously, the victim tried to commit suicide due to abdominal pain. The men appeared there told that the victim committed suicide by setting fire on her person.

9. PW3 Ziaur Rahman, PW6 Mst. Anna Khatun, PW7 Joynab and PW8 Mst. Hazara Khatun were tendered by the prosecution and the defence declined to cross-examine them.

10. PW4 Md. Nur Islam, brother of the victim stated that the occurrence took place at a night about 6 (six) years ago. He was at Dhaka while he received the sad news over telephone call. He reached the occurrence house and found his sister lying dead. Police came and held inquest on the corpse. He proved the report exhibit-1 and identified his signature thereon-1/2. At this stage he was declared hostile and cross-examined by the prosecution while he denied that he was acquainted with the fact that the accused demanded dowry from his sister and for its nonpayment at the night on 26.07.2008 he fastened her with date tree and burnt her to death. He further denied the suggestion of the prosecution of deposing falsely to save the accused. In cross-examination by the defence he stated that his sister had been suffering from abdominal pain since long and for it she tried to commit suicide on several occasions. He heard that his sister committed suicide on the day of occurrence. The accused was not at home on that day.

11. PW5 Md. Abdus Sattar, a *dafadar* stated that the occurrence took place 5/6 years ago. Victim Fatema had been suffering from abdominal pain. He heard that she committed suicide. He went to the house of the accused and found the dead body lying under a tree. Police came, held inquest on the corpse, prepared a report and took his signature thereon. He proved his signature on the inquest report as exhibit-1/3. He was a witness to the seizure too. He proved the seizure exhibit-4 and identified his signature therein. In cross-examination by the defence he stated that the accused was not at home on the day of occurrence. The seizure list was not read over to him.

12. PW9 Md. Khabir Uddin, a neighbour stated that the occurrence took place 5/6 years ago. He heard that the victim committed suicide due to bellyache. In cross-examination he stated that the IO did not examine him.

13. PW10 Shariful Haque Siddiqui, a Medical Officer of Sadar Hospital, Sirajgonj stated that he was a member of the constituted board for conducting autopsy of the victim. In autopsy they found the following injures:

1. Faint bruise around the neck.
2. Extensive burn injury throughout the whole body extending from head to toe.

14. They opined that the death was due to asphyxia as a result of strangulation followed by *postmortem* burning, which was *antemortem* and *homicidal* in nature. He proved the autopsy report exhibit-5 and identified his signature thereon-5/1. In cross-examination he stated that he found *rigor mortis* present on the corpse and further found stomach of the victim empty. He failed to state the age of injury he found on the corpse. He did not find any scratch mark on the throat or neck of the victim. He denied the defence suggestion that the death was suicidal. He denied that the autopsy report having not been a scientific opinion. He further denied that he furnished an obligatory report at the request of the interested quarter.

15. PW11 Md. Sadequr Rahman, an SI of police and the IO stated that he visited the place of occurrence, prepared a sketch map with index exhibit-6 and 7 respectively. He held inquest on the corpse, prepared a report and sent the dead body to the morgue for holding autopsy. He seized alamots with two seizures exhibits-3 and 4. He arrested the accused and forwarded him to the Magistrate for recording his confession. He collected necessary materials for prosecution and submitted a charge sheet under section 11(Ka) of the Ain against the accused husband only. He identified fifteen items of *alamots* as material exhibits–I-XV. In cross-examination he stated that he found the dead body under a date tree. It was about 100 cubits away from the accused's house. There were nine houses near the occurrence house. He denied the defence suggestion that they extracted the confession applying third degree method. He denied that it was not made voluntarily. He denied that on the day of occurrence the accused was not at home, or the accused did not commit any offence. He denied that he did not record the statements of witnesses, or did not go to the place of occurrence. He further denied of not seizing the *alamots* correctly and of submitting a perfunctory report.

16. PW12 Md. Nure Alam, a Judicial Magistrate stated that he recorded the confession of the accused on 01.09.2008. He kept the accused under the custody of his office peon from 12:45 pm to 4:00 pm and thereafter recorded the confession complying with requirements of the law. He took signatures of the accused in the confession. He did not find any injury on the person of the confessor. The accused told him that he made the confession at his own wish. He put signatures in every sheet of the confession. He proved the confession exhibit-8 and identified his signatures thereon-8/1 series. In cross-examination he stated that in the first page of the confession he wrote that the accused was produced before him on 31.08.2008. In its second page he wrote further that the accused was arrested at about 6:25 pm on 30.08.2008 from Purnimagati. The accused was again brought to him at about 12:45 hours on 01.09.2008. In the confession he did not write that the accused was brought before him twice. He denied the defence suggestion that at the bottom of column No.3 he did not write that the accused was kept in the custody of his peon from 12:45 pm to 4:00 pm. He did not fill up column No.5, but he wrote the answers in column No.6 at page 3. He denied the defence suggestion that he did not ask questions to the accused prescribed in column No.5. He did not violate any provisions of the law in recording the confession. He denied the defence suggestion that there were marks of assault on the body of the accused and he showed it to him. He denied the defence suggestion of not complying with formalities of the law in recording the confession. He sent the accused to jail at about 5:10 pm on 01.09.2008. He

further denied of writing the statements in seven additional sheets according to the version of police.

17. On conclusion of recording evidence of the prosecution witnesses, the learned Judge of the Tribunal examined the accused under section 342 of the Code, while he reiterated his innocence and demanded justice but did not examine any witnesses as defence. However, in reply to the above examination he submitted a written statement in the Tribunal. He stated there that the victim failing to bear the pain of her abdomen committed suicide. The IO tortured him inhumanly and extracted the confession. The IO told him to make statement to the Magistrate as tutored by him, otherwise he would be put on crossfire and accordingly he made the statement.

18. The defence case as it transpires from the trend of cross-examining the prosecution witnesses and the statements made while the accused was examined under section 342 of the Code are that the victim committed suicide by setting fire on her person due to her unbearable abdominal pain and the confession was extracted from him applying third decree method.

19. The Tribunal considered the evidence and other materials on record, found the accused guilty of offence under section 11(Ka) of the Ain and sentenced him thereunder to death with a fine of taka twenty thousand, giving rise to this reference and the appeals.

20. Ms. Kazi Shahanara Yeasmin, learned Deputy Attorney General taking us through the evidence and other materials on record submits that this is a wife killing case. The condemned-prisoner in a preplanned way murdered his wife brutally while she was under his custody. He throttled her to death in his house and thereafter took the dead body outside. He then tied it with a date tree, poured kerosene oil on it and set fire. Under section 105 of the Evidence Act it is the duty of a husband to explain how his wife met death while they were under the same roof. But the condemned-prisoner hopelessly failed to explain it. Although, most of the prosecution witnesses were declared hostile but in cross-examination the fact came out that the condemned-prisoner demanded dowry to the victim and for its nonpayment he murdered her. The defence case, that the victim committed suicide for chronic abdominal pain, has been proved false by medical evidence. The prosecution has been able to prove the charge against the condemned-prisoner beyond any shadow of doubt. The judgment and order of conviction and sentence passed by the learned Tribunal is based on legal evidence and it should be upheld.

21. Mr. Md. Mozammel Haque, learned Advocate for the appellant, on the other hand submits that the burden of proving certain fact solely lies upon the prosecution. The prosecution failed to prove the charge against the appellant under section 11(Ka) of the Ain. To convict a person under the aforesaid section, the prosecution is to prove that dowry was demanded by the accused and the victim was murdered because of its nonpayment. In this case PWs 1, 2 and 4, the vital witnesses were declared hostile by the prosecution and PWs 3, 6-7 and 8 were tendered. Although, the prosecution cross-examined PWs 1, 2 and 4 but failed to make out any case of making demand of dowry by the convict and killing the victim for its consequence. In cross-examination of the prosecution witnesses, the defence case has come out that the victim committed suicide by setting fire on her person due to unbearable abdominal pain and it has been supported in medical evidence.

22. Mr. Haque then submits that in this case the autopsy report is confusing. It does not disclose that the victim was murdered as claimed by the prosecution. Where there is a doubt

about the cause of death, the accused will get its benefit. Taking us through the written reply of the accused submitted at the event of his examination under section 342 of the Code, Mr. Hoque adds that there he explained that the victim committed suicide and the confession he made was not voluntary. It was extracted on duress and coercion. The confession so made cannot be used to pass conviction against him.

23. Mr. Haque further submits that if the confession is taken as true and made voluntarily, it does not disclose that the accused murdered the victim in a preplanned way. The appellant to save him from the serious attack of his wife exercised his right of private defence and pressed on her throat and consequently she died. The offence disclosed in the confession do not come within the meaning of murder for dowry under section 11(Ka) of the Ain. The Tribunal did not apply its mind and without assessing the evidence passed the impugned judgment and order, and hence it would be set aside and the convict be acquitted of the charge levelled against him.

24. In reply to the above submissions, the learned Deputy Attorney General submits that the offence committed by the condemned-prisoner does not come within the meaning of section 100 of the Penal Code. According to the confession, firstly the convict attacked the victim. He pulled her by the neck and then the victim attacked him to save her. She adds that the convict in his confession suppressed the fact of demand of dowry to the victim very cunningly. To save him from the heinous offence, he made the confession admitting the occurrence taking the plea of self-defence. Since the prosecution proved the charge against the convict husband beyond any shadow of doubt and the offence is heinous and brutal, the sentence of death awarded by the trial Court is justified and it should be upheld.

25. We have considered the submissions of the learned Deputy Attorney General and the learned Advocate for the appellant and gone through the evidence and other materials on record.

26. The prosecution produced 12 (twelve) witnesses for examination; of them PW 1 is the *mama* of the victim, PW2 is her mother and PW4 is the brother. PWs 3 and 5-9 are the neighbours of the accused. PW10 is a doctor who conducted autopsy on the corpse, PW11 is IO and PW12 is the Magistrate who recorded the confession of the accused and they are formal witnesses. Among the witnesses examined PWs 1, 2 and 4 were declared hostile and both the prosecution and defence cross-examined them. PWs 3, 6, 7 and 8 were tendered and the defence declined to cross-examine them.

27. Admittedly, there is no ocular witness to the occurrence but the dead body of the victim was found about 100 cubits away from the house of the condemned-prisoner. There were blackish marks on the throat and neck of the victim and most of the organs of her body were dazed. On appraisal of evidence of PWs 1, 2 and 4, hostile witnesses, we find that although they were relations of the deceased victim but somehow they became biased by the defence. Probably they thought about the future of the two children of the deceased and as such deposed favouring the accused to save him. In cross-examination, the prosecution put suggestions to them that the accused murdered the victim for nonpayment of dowry he demanded but they replied that they did not know it. The Tribunal considered the above reply as admission of killing the victim for dowry and passed the conviction under section 11(ka) of the Ain. The Tribunal in deciding so, has gone wrong in fact and law in assessing oral evidence. Here, the hostile witnesses (PWs1,2 and 4) replied that they were not acquainted with the fact as suggested; it does not mean that the witnesses admitted of committing the

murder for dowry. On sifting, assessing and appraising evidence of witnesses, we find that the prosecution failed to bring home the charge of making demanded of dowry and committing murder for its nonpayment.

28. The explanation of the condemned-prisoner as suggested to some prosecution witnesses that the victim committed suicide by setting fire on her person due to abdominal pain, has been proved false in the inquest and autopsy reports. In the inquest (exhibit-1) the IO found the 'tongue protruded and bitten by teeth' and further found 'blackish marks' on victim's throat. In the autopsy (exhibit-5) the doctor (PW10) found the 'tongue beaten by teeth' also. He further found 'faint bruise around the neck' and 'extensive burn injury throughout the whole body extending from the head to toe'. According to the necropsy report the death was due to asphyxia as a result of strangulation followed by *postmortem* burning which was *antemortem* and *homicidal* in nature. The autopsy report and evidence of PW10 prove that firstly the victim was strangulated to death and thereafter her body was set on fire as the burn was *postmortem*, i.e., it was caused after the death of victim. The above fact has been further corroborated by the confession of the condemned-prisoner.

29. In this case there is no ocular evidence against the condemned-prisoner that he committed the offence. There is no evidence that the convict was at home in the fateful night. The only circumstance available in the record is that he absconded after the occurrence. He remained in hiding and subsequently police arrested him. There is nothing in the record against him except his confession exhibit-8. For convenient of discussion the confession is reproduced below:-

"আমি নাটোর বনপাড়ায় প্লাস্টিকের ব্যবসা করি। ১৯ দিন পর শনিবার বিকাল ৫.০০ টার সময় আমি বাড়ী আসি। তখন বাড়ীতে এসে মা, আমার স্ত্রী, তিন ভাবীকে পাই। মাকে জিজ্ঞাসা করি পান-সুপারী লাগবে কিনা। আমার স্ত্রী সাবিনাকে বলি কি কি লাগবে? সাবিনা বললো সব বাজারই লাগবে। বাজার করে বেলা ডুবার পর (সন্ধ্যার পর) বাড়ী আসি। রান্না করতে বলে আমি পাগলা বাজার মোবাইল করতে যাই। বলে যাই ভাইদের বলে আসি নাই, তাই মোবাইল করে আসি। আমি পাগলা বাজার শাহীন ডাক্তারের দোকানে যাই। এই দোকান থেকে ফোন করি জেল হক (পাইকার) এর কাছে। তার বাড়ী চর সাতবাড়ীয়া, উল্লাপাড়া, সিরাজগঞ্জ। সে বলে সে রাজশাহীতে আছে। আমি জেল হকের নিকট ৭.৩০ টার পরে ফোন করি। সে বলে বনবাড়ী এসে মিসকল দিবে তখন যেন আমি ফোন দেই। আমি শাহীন ডাক্তারের দোকানে বসে থাকি। শাহীন ডাক্তার ছিল। আমি ঘন্টা খানেক বসে থাকি। অনুমান ঘন্টাখানিক পর জেল হক মিস কল দিলে আমি কল করি ।. তখন তিন ভাই এর সঙ্গে কথা বলি। আমি বলি তোরা চিন্তা করিসনা। আমি বাড়ী এসেছি। প্রথমে ০২ টাকা বিল দেই। পরে ০৮ টাকা বিল দেই। জেল হকের নম্বর মনে নাই। কার্ডে নম্বর ছিল। ৮.৩০ টার পর আমি আমি বাড়ী চলে আসি। এসে দেখি সব ঘরে বাতি নেভানো। আমি ডাক দিলে সাবিনা বলে দরজা খোলা আছে। আমি অন্য কাউকে ডাকি নাই। ঘরে ঢুকলাম । আমার নিকট ম্যাচ লাইট ছিল তা দিয়ে বাতি ধরাই। বউ চকির উপর শুয়ে ছিল। আমি ভাত চাই। বউ বলল যার যার ভাত সেই সে পাক করে খাউক । আমি ঘাড় ধরে নীচে নামাই। বলি ভাত পাক করে আমাকে ভাত দিবি। তার আগে আমি শুবনা। আমি চকির পাশে দাড়ানো। অমনি আমার নুনু (পুরুষাংগ সহ অন্ডকোষ) ধরে চাপ দেয়। আমি বলি ছেড়ে দে মান-সম্মানের ব্যাপার আছে। জানাজানি হলে মান ইজ্জত যাবে। যখন ছাড়ে না তখন আমি আমার দুইহাত দিয়ে সাবিনার গলা চাইপা ধরি। আমার বউ সাবিনা (তার নাম ফাতেমা খাতুন কিন্তু আমার কাকীর নাম ফাতেমা থাকায় বিয়ের সময় বউ এর নাম পাল্টিয়ে সাবিনা খাতুন করা হয়। সাবিনা নামেই কাবিন করা হয় এবং পরবর্তীতে সবাই সাবিনা নামেই ডাকে) কোচ/নুনু অন্ডকোষসহ না ছাড়লে আমি তার গলা আরো জোরে চেপে ধরি। আমাকেও জোরে চেপে ধরে। আমিও জোরে চেপে ধরি। কিছুক্ষণ পর আস্তে করে সে কোচ ছেড়ে দেয়। আমিও তার গলা ছেড়ে দেই। আমি দেখি সে নীচে পরে গেছে। আমি ডাকলে কোন জবাব দেয় না। আমি চকির উপরে বসলাম। বাড়ীর কাউকে ডাকি নাই। বউ এর শরীরে পানি ঢালিনাই বা কিছু করি নাই। ঘন্টা দুয়েক চকির উপর বসে থাকি। অনুমান ১২.০০ টার পূর্বে টেনে তুলে দেখি বউ সাবিনা মরে গেছে। আমি পাজা কোলা করে আমার ঘর হতে বের করে (পশ্চিমে) অন্যান্য ঘরের পিছন দিয়ে গিয়ে নুর ইসলাম বাড়ীর কানি দিয়ে যাই। নুর ইসলামের বাড়ীর পূর্ব দিকে টিউবয়েলের পাশে আম গাছের পাশে নিয়ে মাটিতে লাশ রাখি। তারপর পুনরায় ঘরে এসে ক্যারোসিন তেলের ডোব নিয়ে যাই (পৌনে দুই লিটার তেল ছিল)। তেল নিয়ে সারা শরীরে ঢালি। তখন আকাশে তারা ছিল। ম্যাচ লাইট দিয়ে আগুন ধরিয়ে দেই। আমি ৮-১০ হাত দূরে এসে দাড়াই। এক মিনিট পর আমি বাড়ী ফিরে আসি। ঘরে বসে থাকি ।

প্রায় ১/২ ঘন্টা পরে লোকজন আসে। তখন আমি ছোট ছেলেকে ঘুম হতে তুলে আমার মাইঝা ভাবীর নিকট দেই । সে ঘরের দুয়ারে কান্না করিতেছিল। ছোট ছেলেকে মাইঝা ভাবীর নিকট দিয়ে বাড়ী থেকে আমি পালিয়ে যাই। পূর্ব দিক দিয়ে পালাই। বিভিন্ন বাড়ীর উপর দিয়া গিয়ে পূর্নিমাগাতী যাওয়ার রাস্তায় উঠি। আমাদের গ্রামের পূর্বে দোহাপাড়া গ্রামে বন্ধু হাশেমের বাড়ী যাই। তখন রাত্রি ০৩.০০ টা বাজে। খানকা ঘরে থাকি। ফজরের দিকে বের হয়ে পূর্ব দিকে উল্লাপাড়ায় যাই। ওখান থেকে সিরাজগঞ্জ রোডে এসে ঢাকায় যাই। গাবতলী গিয়ে বালুর কাজ করি। ওখানে পাশের গ্রামের লোকজন কাজ করে। তারা বলে তোর জন্য গ্রামে লোকজন যেতে পারে না। তাই আমি নিজে থেকে গ্রামে চলে আসি। আমি পূর্নিমাগাতীতে আসার পর চকিদার আমাকে ধরে ফেলে। ওখান থেকে থানায় নিয়ে যায়। পরে কোর্টে নিয়ে আসে। ” *(emphasis supplied)*

30. It is well settled by our Apex Court in numerous cases that a confession, if it is found to be true and made voluntarily can be the sole basis of conviction of its maker. In this case firstly we have to ascertain whether the confession made by the accused is true and made voluntarily. We find that police arrested the convict at about 6.15 pm on 30.08.2008 and took him to the police station. They produced him before the Magistrate in the afternoon on 31.08.2008 to record his confession. The learned Magistrate had not enough time on that day to record the confession and consequently he sent the accused to jail *hajat*. On the next day, i.e., on 01.09.2008 he was produced again before the learned Magistrate. The Magistrate kept him under the custody of his peon and giving him enough time for reflection recorded the confession and sent the accused to jail. We find that the columns of the printed form were filled up according to law. The accused was asked every questions of column No.6 and answers were written thereto. In the bottom of the confession the Magistrate ascertained the truth and voluntariness of it by his own writing- “আসামীর শরীরে কোন মারপিটের চিহ্ন নাই। আসামী স্বেচ্ছায় দোষ স্বীকারোক্তি দিয়াছে মর্মে প্রতীয়মান হয়”। PW 12, the recording Magistrate deposed supporting the correctness of the confession exhibit-8. He was cross-examined by the defence elaborately but nothing came out adverse. We find the confession made by the condemned-prisoner true and it was voluntary.

31. Let us examine whether the offence disclosed in the confession comes under section 11(Ka) of the Ain or any other sections of other laws existing in this Country. As per convict’s version, he committed two different types of offence. Firstly, he caused the death of victim and secondly he blazed the dead body by setting fire to screen the offence. The confession narrates that the condemned-prisoner did work far away from his dwelling house. After nineteen days he returned home in the afternoon on the day of occurrence. He did shopping as wanted by his mother and the victim and then went outside the house to make necessary telephone calls. He returned home at about 8:30 pm and found the lamp of the house put out. He asked the victim to provide him the meal but she told him to cook his own rice to have it. He then pulled her by the neck, brought her down from the cot and told to cook for him. At this stage the victim grasped his penis along with scrotum and put pressure to compress it. The accused requested her to release it because it was related to his prestige, but she did not do it. He then held her by the throat with two hands and pressed it. Even then the victim did not release her hand from the genital organ of the accused. He then using more force pressed the throat of the victim. After some time the victim’s hand became lax slowly and the convict’s penis and scrotum was released, consequently he also released the throat of the victim. He called the victim by the name but she did not make any response. Subsequently, he was confirmed that the victim died. The accused thereafter took the dead body to a date tree near his dwelling house at about 12.00 hours at night. He brought kerosene oil from the house, poured it on victim’s body and set it ablaze, and in the early morning he decamped.

32. A plain reading of the confession, we find that the appellant has explained there which led him to the incident. The confession reveals the situation he faced at the material time. It corroborates the injuries which were found on the person of the victim. In the confession, the condemned-prisoner admitted of causing death of his wife. The narration of the confession and the circumstances described therein do not speak that the condemned-prisoner has made the confession cunningly, or he introduced a story of his self-defence to save him. The fact stated therein that the convict and the deceased did not take any food at night is supported by the autopsy report where the doctor found the stomach of the victim 'empty'. The occurrence took place while the victim kneaded/compressed his genital organ leading him to an unbearable situation. He made candid and frank confession disclosing everything without suppressing any fact which would be apparent from the fact that he requested the victim to release his genital organ but she did not. He then caused death of the victim as described therein.

33. It is well settled position of law that a judicial confession of an accused must be considered as a whole and should be judged whether any part of it is contradictory, if there are sufficient grounds for doing so. In the case of the State Vs. Lalu Miah 39 DLR (AD) 117 our appellate division has adopted the above view. We find no reason to depart from the *ratio* of above cited case in the absence of legal evidence to contradict the portion of the confession which supports the defence. We also do not find any cogent reason to reject outright the portion of the confession supporting defence plea in it on the ground of improbability. On a thorough reading of the entire confession it inspires us to believe that it is an honest statement which reveals the cause behind the incident and it can be accepted safely.

34. The genital organ (penis and scrotum) is one of the most sensitive limb of a man and if a violence is caused there, the man will be naturally frightened. Here the victim caused the violence compressing the genital organ of the condemned-prisoner by using her force. He repeatedly requested her to release the organ but she did not pay any heed to it. Under such circumstances, such violence was sufficient in the mind of the convict a reasonable apprehension of danger to his life.

35. Homicide in self-defence is justifiable under section 100 of the Penal Code only to the restriction imposed in section 99. The relevant portion of the section is as under:

> "100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:-
>
> *First*-Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
> *Secondly*-Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
> *Thirdly* ---------
> *Fourthly* -------
> *Fifthly* ----------
> *Sixthly* ---------"

36. According to the above quoted law, a person upon whom a felonious attack is first made is not obliged to retreate, but may pursue the felon till he find himself out of danger. If

the felon is killed after he has been properly secured and when the apprehension of danger has ceased, such killing be murder. Homicide in self-defence is justifiable only upon the plea on necessity and such necessity only arrived in the prevention of forcible and atrocious crime. A person who apprehends that his life is in danger or his body is in risk of grievous hurt, is entitled to defend it by killing his attacker. In order to justify his act, the apprehension must have to be reasonable and the violence used not more than what was necessary for self-defence. In the second clause it does not require as a condition precedent that grievous hurt must be caused by the aggressor. The accused may not even wait till the causing of grievous injury; apprehension of it that would be the consequence of the assault is enough for exercising the right. The right of private defence is available to a person who is suddenly confronted with immediate necessity of averting an impending danger of his life or property which is real or apparent but not of his creation. A person has the right to defend himself particularly when he has suffered a grievous injury or the apprehension of sustaining such injury in the event of taking recourse to such injury. This right subsists so long the apprehension of the aggressive attack continues. [reliance placed on Hasan Rony Vs. the State, 56 DLR 580=24 BLD (HCD) 583].

37. In this particular case, we find that the victim grasped the genital organ of the convict tightly and compressed it by applying force. The appellant requested her to leave him but she did not release it, thereafter he pressed the throat of the victim to get rid of the attack and to release his scrotum. He had no intention or preplan to commit any offence. It was just an accident at the event of exercising his right of private defence to save him from his aggressive wife, the deceased. In the case of Karim Vs. the State, 12 DLR (WP) 92 it has been held-

> "The law relating to self-defence makes the accused the judge of his own danger, and permits him to repel the attack, even to the taking of life. The Courts are to judge him by placing themselves in the same position in which he was placed.''

38. In dealing with the question as to whether more harm has been caused than is necessary, or if that was justifiable under the prevailing circumstances, it would be so inappropriate to adopt test of detached objectively. That is why in some judicial decisions it has been observed that the means which a threatened person adopts or the force he uses should not be weighed in golden scales.

39. It is true that when an accused takes a plea of self-defence in view of the provisions of section 105 of the Evidence Act, it is his duty to introduce such evidence as will displace the presumption of absence of circumstances bringing his case within any exception and that will suffice to satisfy the Court that such circumstances may have existed. In criminal law, the onus of establishing all the ingredients, which could make a criminal offence, lies always on the prosecution and this burden never shifts upon the accused. [reliance placed on Muslimuddin and others Vs. the state 38 DLR (AD) 311 = 7 BLD (AD) 1]. The burden of proof of self-defence rests on the accused but this burden is not an onerous as the unshifting

burden which lies on the prosecution to establish every ingredients of the offence with which the accused is charged. (reliance placed on 56 DLR 580 = 24 BLD 583). In the case of Rukul Miah and another Vs. the State 8 MLR (HCD) 114 = 7 BLC 367 it has been held:

> ‘‘When the facts and circumstances of a case make out a case for the right of private defence, such a plea is clearly available to the accused even though it was not specifically pleaded or pleaded half heartedly.”

40. In the case in hand the defence case as suggested to the prosecution witnesses that the victim committed suicide for abdominal pain was taken by the convict’s Counsel half heartedly due to the lack of experience in conducting a criminal case like the present one. But the confession recorded under section 164 of the Code reveals the true version or actual defence in this case and considering the matter as a whole the defence version taken therein is accepted by us.

41. The act of the convict of catching hold of victim’s neck and pulling her from the cot and asking her to cook rice is generally the common character of a husband in our country of the status the convict belonged to. The above attack of the convict upon the victim was not so felonious for which she could have exercised the right of private defence. The submission made by the learned Deputy Attorney General on this point bears no substance.

42. In this case the FIR was lodged, statements of witness under section 161 of the Code was recorded, the charge sheet was submitted, charge was framed and trial was held all under section 11(Ka) of the Ain. On conclusion of trial, the Tribunal found the accused guilty of the offence under the aforesaid section of the Ain. The Tribunal without assessing the evidence and other materials on record upon misconception of fact and law held that the condemned-prisoner in a preplanned way committed the offence of murder for dowry. But such finding of the tribunal is beyond the materials on record and not tenable in the eye of law as we have observed earlier. The prosecution failed to prove the charge under section 11(Ka) of the Ain, or of murder under section 302 of the Penal Code, but the Tribunal convicted the accused under section 11(Ka) of the Ain and sentenced him thereunder to death. But considering the facts of the case, the confession and other materials on record the offence against the convict under section 201 of the Penal Code has been well proved.

43. In Asiman Begum’s case reported in 51 DLR (AD) 18, the accused was tried in the Tribunal under the relevant provisions of Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 but was sentenced under section 304 part I of the Penal Code. The High Court Division had set aside the judgment passed by the Tribunal and sent the case to the trial Court on remand to hold trial by the learned Sessions Judge. Against which the appellant went to the Appellate Division and our apex Court remanded it to this Division to dispose of the case on merit. In this case, we find that the condemned-prisoner committed offence under section 201 of the Penal Code for setting fire on victim’s dead body to screen the fact that he did earlier. Such

an offence could have been tried by general criminal Court constituted under the Code. His statement in the confession of setting fire on the dead body has been corroborated by the medical evidence. But no charge under section 201 of the Penal Code was framed against him. The Tribunal could have framed charge under the aforesaid section of Penal Code along with section 11(Ka) exercising its power under section 27(3) of the Ain, 2000. We find that if the accused was charged and tried under section 201 along with section 11(ka) of the Ain or any other law, he could have been found guilty under section 201 only and ought to have been sentenced by the Sessions Judge thereunder for 7(seven) years, i.e., the highest sentence provided under the section. But in this case, the condemned-prisoner has been in jail for more that 12 (twelve) years, out of which he is in the death cell more than 5 (five) years. If we send the case to the competent Court having jurisdiction to try the offence under section 201 of the Penal Code, in view of the *ratio* laid in the case of the State Vs. Nurul Amin Baitha (absconding) and another, [2019(1)] 15ALR (AD) 151, it will be a futile exercise of power and unnecessary harassment to the convict. The condemned prisoner will be seriously prejudiced by it. Moreover, the facts of the above cited case (*ibid*) do not match this case. So at this stage we are not inclined to send the case on remand for trial afresh, although, there is no bar in doing so.

44. We find that the defence version or explanation of the convict in the confession about victim's death is acceptable than that of the prosecution version. The condemned-prisoner has been able to substantiate his plea of self-defence and he has not exceeded the right, for which he is entitled to get benefit of section 100 of the Penal Code. The offence disclosed in this case in no way comes within the meaning of 'murder' defined under section 300 of the Penal Code and as such the convict cannot be punished under section 302 of the same Code or under 11(Ka) of the Ain. The Tribunal has totally ignored this aspect of the case and found the appellant guilty of the charge under section 11(Ka) of the Ain. In view of the above position, the judgment under challenge cannot be sustained in law and should be set aside. Accordingly, we find merit in the appeal.

45. In the result, the reference is rejected and the criminal appeal is allowed. The appellant is found not guilty under section 11(ka) of the Ain, 2000. The impugned judgment and order of conviction and sentence passed by the Tribunal is hereby set aside.

46. The concerned authority is directed to release the condemned-prisoner Md. Abdus Salam, son of Md. Sukur Ali alias Sukra of Village-Shreerampur Goyhatta, Police Station-Ullapara, District-Sirajgonj forthwith, if not wanted in any other cases. The jail appeal is accordingly disposed of.

47. Communicate the judgment and transmit the lower Court records.

15 SCOB [2021] HCD 108

HIGH COURT DIVISION

CIVIL REVISION NO.374 of 2009.

Kazi Sanaul Karim alias Nadim
..... Petitioner
-Versus-

Advocate Md. Mozammel Haque and others
...opposite parties

Mr. Golam Ahmed, Advocate
... For the petitioner.

Mr. Mohammad Ali Akanda, Adv with
Mr. Md. Golam Rabbani, Advocates
... for the opposite party Nos.1-8

Heard on:27.02.20, 05.03.20 & 08.09.2020.
Judgment on:10.09.2020.

Present:
Mr. Justice S M Kuddus Zaman

Editor's Note:
The predecessor of the opposite parties of this Civil Revision instituted S.C.C. Suit for a decree of ejectment against the defendant alleging, inter alia, that the defendant defaulted in paying rent and municipality taxes of the disputed premises, the disputed premises has become old and of dilapidated condition which requires immediate refurbishment and the plaintiff requires the disputed premises for starting a business by her youngest son. The trial court on the basis of a reply of D.W.1 to an extraneous question in cross-examination which was out of pleadings, held the defendant a defaulter in paying rent and decreed the suit. A single Bench of the High Court Division appreciating the evidence adduced by both parties came to the conclusion that finding of the trial court as to the admission of the DW-1 was erroneous and the plaintiff-opposite parties could not substantiate their claim in the suit. The High Court Division also pointed out that the House Rent Control Act, 1991 does not provide for eviction of a tenant on the ground that the premises is necessary for use of a son of the owner. Consequently, the judgment and order of the trial court was set aside.

Key Words:
Section 18 of the House Rent Control Act, 1991; monthly tenant; ejectment, admission, possession, Rent Controller;

Section 18 of the House Rent Control Act, 1991:
At the outset it may be mentioned that the House Rent Control Act, 1991 does not provide for eviction of a tenant on the ground that the premises is necessary for use of a son of the owner. ...(Para 14)

An admission must be in clear, consistent and unambiguous terms:
An admission is an acceptance or endorsement of a claim or statement of the opposite parties which is against the interest of the party making the admission. Admission is an important legal evidence which does not require further prove and can be used against its maker. As such, an admission must be in clear, consistent and unambiguous terms.

For making an admission there must have a specific claim or statement of the opposite party which can be admitted. ... (Para 18)

The learned Senior Assistant Judge on the basis of a reply of D.W.1 to an extraneous question in cross-examination which was out of pleadings erroneously held the defendant a defaulter in paying rent and decreed the suit which is not tenable in law. ...(Para 23)

JUDGMENT

S M Kuddus Zaman, J:

1. This Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 20.01.2009 passed by the learned Senior Assistant Judge, Sadar, Mymensingh in S.C.C. Suit No.13 of 2003 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 in short are that the predecessor of the opposite parties instituted S.C.C. Suit No.13 of 2003 in the Court of Senior Assistant Judge, Sadar, Mymensingh for a decree of ejectment against the defendant alleging that the defendant is a monthly tenant under the plaintiff. But since Chaitra, 1407 B.S. the defendant defaulted in paying rent and municipality taxes of the disputed premises. The disputed premises has become old and of dilapidated condition which requires immediate refurbishment. The youngest son of the plaintiff namely Md. Azharul Haque is sick and unemployed. The plaintiff requires the vacant possession of the disputed premises for starting a business by her above son. The plaintiff had served a notice under section 106 of the Transfer of Property Act, 1882 upon the defendant but the defendant did not handover vacant possession.

3. Defendant No.1 contested the suit by filing a written statement wherein he had denied all material claims and allegations made in the plaint. It was further alleged that the plaintiff had received the rent of Kartick, 1407 B.S. but the plaintiff refused to receive rent for the month of Chaitra, 1407 B.S. The defendant sent above rent by money order on 01.05.2001 which was returned undelivered on 09.05.2001. As such, within 15 days from above date of return of money order defendant deposited the rent to the Rent Controller. The disputed premises is strong enough and in good condition which needs no refurbishment. The youngest son of the plaintiff Md. Azharul Haque had a business in another shop of the plaintiff. But he has closed above business and rented out above shop. The false suit of the plaintiff is liable to be dismissed.

4. At trial plaintiff examined 5 witnesses and defendant examined one. Documents produced and proved by the plaintiff were marked Exhibit Nos.1,2-2(ka), 3-3(ka), 4-4(ka),5-5(ka),6-7,8-8(ka), 9-11 and those of the defendant were marked as Exhibit Nos.ka, kha and ga respectively.

5. On consideration of facts and circumstances of the case and materials on record the learned Senior Assistant Judge decreed the suit holding that the plaintiff is a habitual defaulter in paying rent and the disputed premises is needed for the use of the plaintiff.

6. Being aggrieved by the above judgment and decree the defendant has preferred this Civil Revision Case and obtained this Rule.

7. No one appears on behalf of the petitioner when the case is taken up for hearing.

8. Mr. Md. Golam Rabbani, the learned Advocate for the opposite parties submits that the defendant is a habitual defaulter in paying rent and this fact has been admitted by the defendant in his cross-examination as D.W.1. The learned Advocate further submits that at paragraph GA of the written statement defendant has admitted that he did not pay the rent of Chaitra 1407, B.S. within 7 days of the next month as per terms of the rental agreement, but sent the same by money order on 24 Baishak 1408 B.S. As such admittedly defendant is a defaulter in paying rent and liable to be evicted. In support of above submission the learned Advocate refers to the case law reported in 63 DLR(AD)84.

9. The learned Advocate submitted that since the disputed premises is required for the use of the youngest son of the plaintiff on this ground alone the defendant is liable to be evicted as well. In support of above submission the learned Advocate refers to the case law reported in 59 DLR(AD) at page 65.

10. Considered the submissions of the learned Advocate for the opposite parties, perused the impugned judgment and order and other materials on record.

11. It is admitted that the plaintiff is the owner of the disputed premises and the defendant is a monthly tenant of the same.

12. As mentioned above in this case plaintiff has examined as many as 5 witnesses. Plaintiff herself gave evidence as P.W.1. In her examination-in-chief P.W.1 stated that she has filed this case for eviction of the defendant from the disputed premises. P.W.1 did not corroborate the claims made in the plaint that the defendant is a habitual defaulter or the disputed premises is in a dilapidated condition and requires immediate refurbishment or reconstruction or the disputed premises is needed for her own use or for the use of the person for whose benefit the premises has been retained. Since the plaintiff did not support any claim or allegation against the defendant the whole plaint remains uncorroborated and plaintiff's initial onus to prove the case also remains unfulfilled.

13. As P.W.2 Md. Mozammel Haque, a son of the plaintiff has given evidence and he has tried to fill-up the deficiencies of the evidence of P.W.1 Jahanara Begum, which is not legally permissible. But he also merely stated that the defendant did not pay rent and monthly taxes of the disputed premises regularly and the defendant is a habitual defaulter. The witness did not make any specific claim as to how the defendant has become a defaulter in paying rent or for which month and year he failed to pay the rents. The further claim of the witness that the plaintiff also failed to pay the municipal taxes is also vague and not supported by any documentary or oral evidence.

14. At the outset it may be mentioned that the House Rent Control Act, 1991 does not provide for eviction of a tenant on the ground that the premises is necessary for use of a son of the owner. According to section 18(1) (P) of the above Act a tenant shall also be liable to eviction on any of the following grounds:

> (ঙ) বাড়ীর নির্মান বা পুনঃনির্মানের জন্য অথবা নিজ দখলের জন্য অথবা যাহার উপকারার্থে বাড়ীটি রাখা হইয়াছে তাহার দখলের জন্য বাড়ীটি বাড়ী-মালিকের প্রকৃতই প্রয়োজন হয় অথবা বাড়ী-মালিক এমন কোন কারণ দর্শাইতে পারেন যাহা আদালতের নিকট সন্তোষজনক বলিয়া গন্য হয়;

15. The plaintiff did not claim that the disputed premises is necessary of her own use. Plaintiff has three sons and there is no case that the disputed premises is retained for the benefit of her youngest son and the same is required for his use. The plaintiff has failed to prove that the disputed premises is required for her own use. As such the case law cited above by the learned Advocate for the opposite parties in this regard has no relevance to this case.

16. As far as dilapidated condition of the disputed premises is concerned the plaintiff did not substantiate this claim in her evidence as P.W.1. D.W.1 Kazi Sanaul Karim who is the tenant of the disputed premises stated that the disputed premise is strong and in good shape and not in a dilapidated condition. P.W.2 Md. Mozammel Haque has supported above claim of the defendant by stating that the plaintiff wants to construct a multi storied commercial building on the land of the disputed premises. Moreover, if the disputed premises is in a dilapidated condition then how the plaintiff wants her a youngest son to start a business in the same? As such plaintiff has failed to prove that the disputed premises is in a dilapidated condition and needs immediate refurbishment or reconstruction.

17. As far as the submission of the learned Advocate that the defendant is an admitted defaulter is concerned, defendant has examined one witness. As D.W.1 Kazi Sanaul Karim has stated that the plaintiff having refused to receive the rent of Choitra, 1407 B.S. and he sent the same by money order on 07.05.2001. Above money order was returned undelivered on 09.05.2001 and thereafter has deposited the rent to the Rent Controller. The witness was not cross-examined on above evidence nor any suggestion was put to him that he sent above rent after the expiry of the date for payment of rent as agreed upon in the tenancy agreement.

18. An admission is an acceptance or endorsement of a claim or statement of the opposite parties which is against the interest of the party making the admission. Admission is an important legal evidence which does not require further prove and can be used against its maker. As such, an admission must be in clear, consistent and unambiguous terms. For making an admission there must have a specific claim or statement of the opposite party which can be admitted. As mentioned above, the plaintiff did not make any specific claim against the defendant that he defaulted in paying rent.

19. The learned Advocate further stated that P.W.2 Md. Mozammel Haque is a son and authorized attorney of the plaintiff and in fact he gave evidence on behalf of the plaintiff. Since plaintiff herself gave evidence in this suit as P.W.1 there is no scope for her attorney to again give evidence on her behalf. Moreover, above mentioned Mozammel Haque gave evidence as P.W.2 and he did not claim that he was giving evidence on behalf of the plaintiff.

20. Moreover, P.Ws. 1-2 did not produce and prove any tenancy agreement between the plaintiff and defendant. But D.W.3 Mahfuz has in his evidence mentioned about two deeds of Rental agreements between the parties. The first agreement is of 13.06.1988 and the latter one was subsequently prepared on 11.09.1993. Above witness had produced and proved above mentioned two tenancy agreements and those were marked as exhibit-4 and 4(ka) respectively. P.W.2 Md. Mozammel Haque and P.W.3 Mamun Mahfuz have unanimously stated that the latter agreement was prepared on the basis of consent of both the parties but defendant abstained from executing the same. Above claim of P.Ws 2-3 shows that the plaintiff abandoned Exhibit-4 and defendant did not excuse Exhibit-4(ka) and there is no agreed deed of tenancy between the parties.

21. Moreover, the defendant has contested this suit claiming that he is not a defaulter in paying rent.

22. As such, the submission of the learned Advocate that the defendant has admitted to have sent the rent by money order beyond the agreed date of the tenancy agreement is devoid of any substance. The facts and circumstances of this case is distinguishable from that of the case of 63 DLR(AD)85, as such, above case law is not applicable in this suit.

23. The learned Senior Assistant Judge on the basis of a reply of D.W.1 to an extraneous question in cross-examination which was out of pleadings erroneously held the defendant a defaulter in paying rent and decreed the suit which is not tenable in law.

24. In the result, the Rule is made absolute without any order as to costs.

25. The impugned judgment and decree dated 20.01.2009 passed by the learned Senior Assistant Judge, Sadar, Mymensingh in S.C.C. Suit No.13 of 2003 is set aside.

26. The interim order passed at the time of issuance of the Rule stands vacated.

27. Let a copy of this judgment be transmitted down to the Court concerned at once.