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Justice Md. Zakir Hossain

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Supreme Court of Bangladesh

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1.	**Dr. Miah Md. Mohiuddin & ors** **Vs.** **The State & ors** *(Hasan Foez Siddique, CJ)* 17 SCOB [2023] AD 1 **Key words**: Circumstantial evidence; confessional statements; section 164 of the Code of Criminal Procedure; article 33 (2) of the Constitution; motive; Section 10 and 30 of Evidence Act 1872	This is a case where a renowned Professor of University of Rajshahi was brutally murdered by one of his colleagues. There were no eye witnesses. Based on the circumstantial evidence police arrested the caretaker of the house where the victim lived. The arrested accused confessed under section 164 of the Code of Criminal Procedure, 1898. Accordingly the investigation Officer arrested other co-accused and two of them confessed. But the mastermind of the killing, an Associate Professor of the same University declined giving any confessional statement. The Appellate Division found that the strong circumstantial evidence coupled with confessions of the co-accused and motive of killing proved by the prosecution point unmistakably to the guilt of the mastermind of the murder and confirmed the conviction and sentence awarded by the High Court Division. Appellate Division also discussed the effect of alleged prolonged police custody upon the acceptability of confessional statement of one of the convicts and discrepancy between confession and medical evidence.	**Section 164 of the Code of Criminal Procedure** **If a confessional statement does not pass the test of voluntariness, it cannot be taken into consideration even if it is true:** The Evidence Act does not define "confession". The courts adopted the definition of "confession" given in Stephen's Digest of the Law of Evidence. According to that definition, a confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime. The act of recording a confession is a very solemn act and section 164 of the Code of Criminal Procedure lays down certain precautionary rules to be followed by the Magistrate recording a confession to ensure the voluntariness of the confession. In such a case, the accused being placed in a situation free from the influence of the Police is expected to speak out the truth being remorseful of what he has committed. A confession can be acted upon if that passes two tests in the assessment of the court. The first test is its voluntariness. If a confessional statement fails to pass the first test, the second test is immaterial. If he does not disclose his complicity in an alleged crime voluntarily, court cannot take into consideration the confessional statement so recorded, no matter how truthful an accused is. (Para 41) **When a case against an accused rests completely on circumstantial evidence, the prosecution is required to prove the motive:** In a criminal case, motive assumes considerable significance. Where there is a clear proof of motive for the offence, that lends additional support to the finding of the Court that the accused is guilty. When a case against an accused rests completely on circumstantial evidence, the prosecution is required to prove the motive of the accused for committing the offence. (Para 52)
2.	**Terab Ali & ors** **Vs.** **Syed Ullah & ors** *(Md. Nuruzzaman, J)* 17 SCOB [2023] AD 34	The petitioner-judgment debtor filed an application for dismissal of an execution case as being time barred. The learned Senior Assistant Judge rejected the application relying on a synopsis of a decision of one of the High Courts of Pakistan passed in 1998 published in a D.L.R.	**Which precedents are applicable in our jurisdiction:** Regarding the binding effect of precedents of Supreme Court, Article 212 of the Government of India Act 1935; Article 163 of Constitution of Pakistan 1956 and Article 63 in Constitution of Pakistan of 1962 served the purposes of the present Article 111 of Bangladesh Constitution. By dint of the above

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	Key Words: Persuasive efficacy; interpretation of law; Article 111 read with Article 149 of the Constitution of Bangladesh, 1972	reference book which was affirmed by the High Court Division. The Appellate Division, however, found that the decision of the High Court of Pakistan is not applicable in our jurisdiction after 25th March 1971 and detailed as to which precedents of Dhaka High Court, Federal Court of Pakistan, Supreme Court of Pakistan, Calcutta High Court, Federal Court of India and the Privy Council are binding on us and which are not. Finally, finding that the execution proceeding was initiated after 3 years beyond the permissible period under Article 182 of the Limitation Act, dismissed the execution case.	mentioned constitutional provisions the case laws of the then higher courts namely Dhaka High Court, Federal Court of Pakistan (14 August 1947 of its independence to 1956); Supreme Court of Pakistan (1956 to 25 March 1971); Calcutta High Court, Federal Court of India (1935-1947 13th August) the Privy Council (till 13th August, 1947) is applicable with binding effect in our jurisdiction. (Paras 19 and 20)
3.	**The State** **Vs.** **Badal Kumar Paul** *(Obaidul Hassan, J)* 17 SCOB [2023] AD 43 **Key Words:** Section 19(1) Serial 3(Kha), 19(4) and 25 of the Narcotics Control Act, 1990; Phensedyl; Codeine Phosphate; Schedule III of the Drugs (Control) Ordinance, 1982	The Appellate Division answered two important questions in this criminal appeal clearing a cloud of confusion as to (i) whether 'Codeine' and a derivative of codeine i.e. 'Codeine Phosphate', are prohibited items as narcotics and whether its presence in any liquid i.e. phensedyl renders the total amount of phensedyl/liquid as narcotics and (ii) whether having possession or carrying phensedyl is a punishable offence under section 19(1) serial 3(Kha) of the Narcotics Control Act, 1990. The respondent was arrested for having possession of 250 bottles of Phensedyl each containing 100 ml. totaling 25 liters and 72 pieces of Indian woolen mufflers. The trial Court found the respondent guilty under section 19(1) serial 3(Kha) of the Narcotics Control Act, 1990 and sentenced him to suffer imprisonment for life. The High Court Division, however, acquitted him on the ground that "phensedyl" is not a contraband drug under the laws of the land. The Appellate Division taking into consideration the chemical examination report of 'phensedyl' and analyzing relevant laws and judicial pronouncements of the highest Courts of Bangladesh and India	**<u>Since codeine phosphate is a derivative of codeine, it thus also stands as a 'Ka' class narcotic under Schedule-I of the Narcotics Control Act, 1990:</u>** 'Codeine phosphate' is a derivative of codeine and codeine is a scheduled narcotic under Section 19(1) Serial 3 of the Narcotics Control Act, 1990, which is an opium derivative. In schedule-I of the Narcotics Control Act, 1990 three categories of narcotics have been enumerated. The derivatives of opium have been mentioned in serial 3 of 'Ka' class of narcotics, where codeine is one of the derivatives. So, indisputably according to the Narcotics Control Act, 1990 'codeine' is a scheduled narcotic and it is prohibited. Guidelines for evaluation of medical products proposed in Annexure–III of the Report of the Expert Committee for Drugs on the National Drug Policy of Bangladesh, 1982 strictly prohibits the use of codeine in any combination form as it causes addiction. Since codeine phosphate is a derivative of codeine, it thus also stands as a 'Ka' class narcotic under Schedule-I of the Act. (Para 13) **<u>For the purpose of imposing punishment the 'total amount of substances' with which the narcotic has been mixed requires to be considered as narcotic substances:</u>** Phensedyl is a liquid substance with which a solid substance i.e. codeine phosphate is found mixed. In this circumstance, we are of the view that when any kind of narcotic is found

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		came to the conclusion that phensedyl contains 'Codeine Phosphate' which is a derivative of codeine and its presence in the drug renders the total amount of phensedyl as narcotics and, therefore, possessing or carrying phensedyl is a punishable offence under section 19(1) serial 3(Kha) of the Narcotics Control Act, 1990. Thereafter, it set aside the judgment and order of the High Court Division and restored the same of the trial Court.	mixed with other substances whether it is liquid or solid, for the purpose of imposing punishment the 'total amount of substances' with which the narcotic has been mixed requires to be considered as narcotic substances and the accused will be punished accordingly. In this situation, if the substance with which the narcotic has been found mixed is liquid, the total amount of narcotic substance need to be counted based on volume or mass. (Para 15)
4.	**Dr. Zubaida Rahman Vs. The State & anr** *(Borhanuddin, J)* 17 SCOB [2023] AD 54 **Key Words:** Section 173, 190, 561A of the Code of Criminal procedure; 26(2), 27(1) of the Anti- Corruption Commission Act, 2004; Section 109 of the Penal Code; Fugitive;	In this case, the Anti-Corruption Commission submitted a charge sheet under section 109 of the Penal Code, 1860 against the petitioner along with section 26(2), 27(1) of the Anti-Corruption Commission Act, 2004 for concealing assets in the wealth statement and account of assets. The petitioner filed criminal miscellaneous case seeking quashment of the proceeding under section 561A of the Code of Criminal Procedure and obtained a rule with stay order. Thereafter, a Division Bench of the High Court Division discharged the rule upon hearing. The petitioner being aggrieved preferred this leave to appeal before the Appellate Division. The Court held that submission of charge sheet cannot be treated as finality of investigation until cognizance of the offence is taken by the concerned court. The Court also held that the High Court Division exceeded its jurisdiction by issuing the rule at a stage when the cognizance was not taken and even charge sheet was not produced. Moreover, a fugitive cannot seek justice. In the result, the Appellate Division dismissed the petition with modification of the impugned judgment and order.	**<u>Section 173 and 190 of the Code of Criminal procedure:</u>** It is settled Principal of law that initiation of a criminal proceedings starts after taking cognizance of offence. Submission of charge sheet cannot be treated as finality of investigation until cognizance of the offence is taken by the appropriate court. (Para 18) **<u>Section 561A of the Code of Criminal procedure:</u>** It is well settled that when a person seeks remedy from a court of law either in writ jurisdiction or criminal appellate, revisional or miscellaneous jurisdiction under section 561A of the Code of Criminal Procedure, he/she ought to submit to due process of justice. The Court would not Act in aid of an accused person who is a fugitive from law and justice. (Para 22)
5.	**Md. Khorshed Alam Vs. The State & anr** *(M. Enayetur Rahim, J)* 17 SCOB [2023] AD 61	The question came up for consideration in this case whether a fresh inquiry is required, when a complainant asserts with an affidavit before the Nari-O-Shishu Nirjatan Daman Tribunal that she went to	**<u>Section 27 (1 Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000:</u>** Enquiry must be made by any other person than police: We are of the view that the Tribunal did not commit any illegality in entertaining the complaint filed by respondent No. 2. Section 27

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Sl. No.	Name of the Parties, Citation and Key Words	Summary of the case	Key Ratio
	Key Words: Sections 11 (Ka), 11(Ga) and 27 of the Nari-O-Shishu Nirjatan Daman Ain, 2000;	the police station but police refused to accept her complaint, to ascertain if she actually went to the police station. The Appellate Division held that there is no legal necessity to make an inquiry whether the complainant went to the police station and he/she was refused by the police before submitting the complaint before the Tribunal, if the Tribunal is satisfied about the truthfulness of the claim. But the Tribunal can direct anybody other than a police officer to hold an enquiry to find out primarily whether the allegation of committing of offence made in the complaint is true. In such a situation if a police officer is directed to hold an enquiry, cognizance taken on the basis of such enquiry report vitiates entire proceeding. In the instant case the Tribunal convicted and sentenced the Appellant finding him guilty under section 11(Ga) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and the High Court Division affirmed the conviction but the Appellate Division found that the evidence adduced by the prosecution was not enough to convict the Appellant beyond reasonable doubt and thus acquitted him of the charge.	(1 Ka) clearly speaks that if the learned Judge of the Tribunal is satisfied as to the filing of the complaint he can direct the Magistrate or any other person to make an inquiry with regard to the allegation. The expression "অন্য কোন ব্যক্তি' (any other person) does not include any police officer but, it includes any public officer or any private individual or any other responsible person of the locality upon whom the Tribunal may have confidence to conduct the inquiry in respect of the complaint logged before it. In the instant case the learned Judge of the Tribunal acted illegally in directing the Officer-in-Charge of Pahartoli Police Station to make an inquiry in respect of the complaint and, thereafter, taking cognizance on the basis of such inquiry report has vitiated the entire proceeding. (Para 24 and 25)
6.	**Anowar Talukder** **Vs.** **The State** *(Md. Ashfaqul Islam, J)* 17 SCOB [2023] AD 69 **Key Words:** Commutation of death sentence; prolonged custody in condemned cell; Nari-O-Shishu Nirjatan Daman Ain, 2000; sections 4 and 10 of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995	The petitioner of the case was sentenced to death for murdering his wife. The sentence was confirmed by the High Court Division and was upheld by the Appellate Division. Learned Counsel on behalf of the petitioner submitted during review hearing that death penalty was imposed upon the petitioner based on circumstantial evidence where there were several missing links. Further submission of the Counsel was that the petitioner is in condemned cell for more than 18 years. Therefore, considering his prolonged custody in the condemned cell he should be	The law is well settled that there must be some circumstances of a compelling nature together with prolonged custody which would merit consideration for commutation. (Para 13) The condemned prisoner has been languishing with the agony of death in the condemned cell for almost 18 years not due to any fault of his own. That being the situation, the fact of prolonged incarceration together with the discussion that we made above fortified with the recently passed decision of this Division can be considered as a mitigating circumstances and for that reason we are inclined to modify the order of sentence and commute the sentence of

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		acquitted. The Appellate Division taking into consideration the prolonged custody in the condemned cell of the petitioner together with the fact that under the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 sentence of death was the only punishment for an offence committed by the petitioner but subsequently in the Nari-O-Shishu Nirjatan Daman Ain, 2000 imprisonment for life for the same offence was also included, commuted the sentence of the petitioner to imprisonment for life from death.	death to that of imprisonment for life. (Para 18, 19)
7.	**Govt. of Bangladesh & ors** **Vs.** **Md. Abdul Jalil & ors** *(Md. Abu Zafor Siddique, J)* 17 SCOB [2023] AD 74 **Key Words:** Section 5 of Limitation Act, 1908; Condonation of delay; delay made by the government; Section 115(1) of the Code of Civil Procedure	In this case the Government made a delay of 403 days in filing a revisional application before the High Court Division against the judgment and decree of the Appellate Court in which a bil (water body) recorded in Khas Khatian was decreed in favour of the respondents. The High Court Division, however, refused to condone the delay and discharged the Rule. The Government preferred this petition against the judgment and order of the High Court Division. Appellate Division held that the delay was made due to exhaustion of the official formalities which was beyond the control of the Government and it was not an inordinate delay which could not be condoned. Consequently, the Appellate Division set aside the judgment and order of the High Court Division and condoned the delay made by the Government.	**Section 5 of Limitation Act, 1908: The delay caused in filing the revisional application by the Government was due to the exhaustion of the official formalities which was beyond its control and it was not an inordinate one, so it should have been condoned:** The facts and circumstances clearly indicate that the different offices of the Government are so connected that one cannot work without co-operation and assistance from the other. In the instant case, it appears that the office of the Deputy Commissioner, Netrokona, initiated the proposal to file a revisional application before the High Court Division but it could not do so without obtaining the necessary papers and the opinion of the Government pleader and concerned authority. However, it appears that the record was sent to the office of the Solicitor and thereafter, the record was sent to the office of the learned Attorney General and then an Assistant Attorney General was entrusted to take all necessary steps regarding filing of the same in the High Court Division under section 115(1) of the Code of Civil Procedure. In these circumstances, the reasons for delay of 403 days in filing the revisional application as stated in the application under section 5 of the Limitation Act by the defendant petitioners cannot be disregarded and discarded simply because the individual would always be quick in taking the decision whether he

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			would pursue the application for condonation of delay since he is a person legally injured. Whereas, the state being impersonal machinery has to work through different offices or servants and from one table to another table in different offices. In view of the facts and circumstances of the case it appears that the delay caused in filing the revisional application was due to the exhaustion of the official formalities and as such, the same is beyond the control of the defendant petitioners and moreover, the aforesaid delay of 403 days is not an inordinate one and as such, if the same is not condoned the defendant leave petitioners shall be led to irreparable loss and injury. (Para 16, 17, 18)
8.	**Mst. Fatema** **Vs.** **The State & ors** *(Jahangir Hossain, J)* 17 SCOB [2023] AD 79 **Key Words:** Section 526 of the Code of Criminal Procedure; Witness protection	In the instant case the Appellate Division elaborated when police should be given direction to give protection to the witnesses so that they can adduce evidence in the Court without fear. An FIR was lodged by the petitioner following murder of her husband in which police submitted charge sheet and the Court framed charge against the accused persons. But due to continuous threat from the accused persons to the informant and witnesses no witness came forward to adduce evidence in the Court. Rather, they filed several General Diaries in the concerned police station. Thereafter, informant filed a case in the High Court Division under section 526 of the Code of Criminal Procedure for transferring the case from Narayanganj to Dhaka. The High Court Division did not allow the application. Appellate Division, however, considering the fact that witnesses lodged several GDs mentioning the threat from the accused persons opined that High Court Division ought to have directed the law enforcing agency to take necessary steps for ensuring security of the informant and the witnesses of the case so that they could	Security of the informant and the witnesses has to be ensured: On perusal of the impugned judgment it reveals that the High Court Division came to a finding that both the parties forced each other to give false testimony or give testimony in favour of either of the parties. And as such the High Court Division ought to have directed the law enforcing agency to take necessary steps for ensuring security of the informant and the witnesses of the case so that they could adduce their evidence in court without any fear. (Para 11) We are of the view that justice would be best served if we direct the Superintendent of Police, Narayangonj to take all necessary steps for ensuring security of the informant and witnesses of the case, so that they may adduce their evidence in the Court without any fear and interruption from any corner. Accordingly, the Superintendent of Police, Narayangonj is directed to take necessary steps in ensuring security of the informant [petitioner] and witnesses of the case so that they may adduce their evidence in the Court in accordance with law. (Para 13 and 14)

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		adduce their evidence in the court without any fear and accordingly, directed the police for ensuring the security of the witnesses.	

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Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
1.	**Mohammed Faruk ul Azam** **Vs.** **The Election Commission** *(Farah Mahbub, J)* 17 SCOB [2023] HCD 1 **Key Words**: Union Parishad Election; Affidavit and Declaration in Election Application; Loan Defaulter; Guarantor to a Defaulted Loan.	The petitioner, who planned on running for office in the Union Parishad, submitted his nomination for the chairmanship before the pertaining Upazilla Returning Officer with all the required documents, including a declaration asserting that his candidacy was valid in accordance with the provisions enshrined in sections 26(1) and 26 (2) of the স্থানীয় সরকার (ইউনিয়ন পরিষদ) আইন, ২০০৯. After scrutinizing the petitioner's nomination paper, the concerned Upazilla Returning Officer annulled his candidacy solely on the premise that his name was enlisted in the list of the Bangladesh Bank's CIB (Credit Information Bureau) as a guarantor of a loan amount that had been defaulted upon. The petitioner being aggrieved by such a decision brought an appeal before the appropriate appellate authority in conformity with Rule 15 of the স্থানীয় সরকার (ইউনিয়ন পরিষদ) বিধিমালা, ২০১০. The aforesaid authority dismissed the appeal upon hearing it on the same grounds, upholding the findings of the Upazilla Returning Officer. The petitioner then preferred this application to challenge that appellate decision. After hearing from both sides, the court held that "a guarantor to a defaulted loan amount is not disqualified to contest the respective election". The court further observed that unlike Paurashava election, Upazilla Parishad, City Corporation, and Parliamentary elections, an aspiring candidate is not required to disclose the necessary information by providing 'হলফনামা' in a prescribed form along with a declaration (ঘোষণা) when submitting a nomination paper (as per section 26(3) of the Ain, 2009 read with Rule 12 of the Rules, 2010). Hence, the only condition the candidate must meet to contest in the election of the Union Parishad is to make a declaration (ঘোষণা) that he is competent to serve as Chairman under the applicable laws. Giving 'হলফনামা' in a prescribed manner is not thus mandated by law for this election.	Affidavit and declaration in the local government elections: It is, however, the mandate of law that while submitting nomination paper for contesting Paurashava election, Upazilla Parishad election, City Corporation election and Parliamentary election the candidate is required to submit affidavit 'হলফনামা'in a prescribed from along with the nomination paper containing detail information on his/her educational qualification, his/her implication in any criminal case, if there be any, occupation, source of income, description of property owned by him/her, including family members and loan liability, if there be any, with declaration that all information of the respective documents so provided are correct and true to the best of his knowledge. Conversely, in Union Parishad election the candidate is relieved from making such disclosure. The only requirement is that vide Rule 12 of the স্থানীয় সরকার (ইউনিয়ন পরিষদ) নির্বাচন বিধিমালা, ২০১০ (as amended in 2016) the candidate is to give certificate "প্রত্যয়নপত্র" although vide Section 26(3) of the Ain, 2009 the candidate is required to submit an affidavit 'হলফনামা' along with the nomination paper declaring that he is not disqualified vide Section 26(2) to contest the respective election. (Para-15, 16)

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2.	**Civil Miscellaneous No. 11 of 2022 (Reference)** *(Sheikh Hassan Arif, J)* 17 SCOB [2023] HCD 8 **Key Words:** Reference under Section 113 read with Order XLVI, rule 1 of the Code of Civil Procedure, 1908; Chittagong Hill Tracts Regulation, 1900; Chittagong Hill-Tracts Regulation (Amendment) Act, 2003; Civil Jurisdiction	Reference was sent to the High Court Division by the Court of Additional District Judge, Bandarban Hill District in view of the provisions under Section 113 read with Order XLVI, rule 1 of the Code of Civil Procedure, 1908 seeking opinion of the High Court Division of the Supreme Court of Bangladesh on two legal questions as regards interpretation of Section 6 of the Chittagong Hill-Tracts Regulation (Amendment) Act, 2003 (Act No. 38 of 2003), namely, whether the civil appeal cases pending before the Divisional Commissioner, prior to the said amending Act coming into force should be transferred to the Court of District Judge of the respective Hill Districts, and, if the same are so transferred, whether the District Judge or the Additional District Judge of the respective districts, as the case may be, should dispose of the same. Examining the relevant provisions of the Chittagong Hill Tracts Regulation, 1900 (Regulation No. I of 1900) and the Chittagong Hill-Tracts Regulation (Amendment) Act, 2003 (Act No. 38 of 2003) and considering the historic perspective of the Hill Tracts Districts and opinions of the *amici curiae* the High Court Division held that it is clear from the text of the 'special provision' under Section 6 of the amending Act of 2003 that the Legislature deliberately did not mention anything about the pending civil appeals and the proceedings of civil nature as was pending before the Divisional Commissioner of Chattogram before the said amending Act came into force and according to amended section 8 of the Regulation the District Judges have been given appellate jurisdiction only against the orders, judgments and decrees of the Joint District Judges of the respective districts and not against any order of the Deputy Commissioner of the district concerned or any other officer. Therefore, the High Court Division decided the answers to both the aforesaid legal questions to be "IN THE NEGETIVE" and ordered civil appeals and the proceedings of civil nature pending before the Divisional Commissioner and Additional	**<u>Applicability of the customary law of the land in Chittagong Hill Tracts:</u>** Historically Chittagong Hill Tracts area was governed by distinctive law and administrative procedure. Particularly, in matters of civil disputes, the customary law of the land in Chittagong Hill Tracts area has always been made applicable. Such historic recognition of customary law and non-application of Code of Civil Procedure has again been recognized by the Legislature by inserting sub-section (4) in Section 8 of the said Regulation providing, thereby, that the Joint District Judge, as Court of original jurisdiction, shall try all civil cases in accordance with the existing laws, customs and usages of the district concerned. Not only that, the Legislature, by this amending Act, has also kept the cases arising out of family laws and other customary laws of the tribes out of the jurisdiction of the Joint District Judges and, in respect of those matters, the jurisdiction of the Mouza Headmen and Chief Circles concerned of the triable people have been recognized....(Para 4.15) **<u>Presumption as to awareness of the Legislature:</u>** While interpreting an amending law enacted by parliament, it cannot be presumed that the Legislature was unaware of the existing law or that the Legislature has committed any mistake by not mentioning a particular matter in the amending law. ...(Para 4.17) **<u>Chittagong Hill-Tracts Regulation (Amendment) Act, 2003, Section 6 and 8:</u>** Therefore, if we read this added sub-section (5) of Section 8 along with the said special provision under Section 6 of the amending Act, we have no option but to hold that it is the Legislature, which does not want those pending civil appeals and proceedings of civil nature to be transferred to the District Judge of the respective districts and, because of that, the Legislature remained silent in respect of the said pending civil appeals and proceedings. ...(Para 4.19)

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		Commissioners of Chattogram not to be transferred to the District Judges of the respective hill districts and, if the same have in the meantime been transferred to the District Judges concerned, the same should be returned back immediately if the same have not been disposed of yet. However, the High Court Division excepted any such proceeding disposed of by the District Judges and Additional District Judges from the order treating those as past and closed matters.	
3.	**Md. Jahirul Hoque Vs. Judge, Artha Rin Adalat, Chattogram & ors** *(J.B.M. Hassan, J)* 17 SCOB [2023] HCD 20 **Key Words**: Section 2, 4, 5, 6(1), 6(5), 34, 41 and 44 of the Artha Rin Adalat Ain, 2003; Section 35 of the Code of Criminal Procedure,1898; Liability of principal borrower and guarantor	The petitioner, a guarantor to the loan in question, filed this writ petition without surrendering before the court, when the learned Judge of the Artha Rin Adalat, in an execution case, awarded civil detention against him under section 34 (1) of the Artha Rin Adalat Ain, 2003. The petitioner claimed that the decree holder bank had not filed the application as per requirement of section 34 of the act and the adalat had issued the impugned order of detention without exhausting all process against the principal borrower for realizing decretal dues. On the other hand, the respondent no 3-decree holder bank claimed that being fugitive from justice the petitioner couldn't claim relief. Moreover, he has alternative remedy of appeal and so the writ is not maintainable. The High Court Division held that the writ petition is maintainable on the ground that a Judgment Debtor cannot be treated as a fugitive accused and the order of detention being an interlocutory order, appeal cannot be preferred against the same. On the claim of the petitioner the Court held that the execution case can proceed against all the judgment debtors simultaneously and privilege of a guarantor to become liable to repay after borrower's default remains valid only before instituting the suit. The Court has made the rule absolute on the ground that decree holder bank has not filed the application, with verification or affidavit, under section 34 of the Artha Rin Adalat	**Difference between "the Accused" and "the Judgment Debtor:** In this case, a fundamental difference exists between two classes of justice seekers i.e "the Accused" and "the Judgment Debtor". The term "Accused" has not been specifically defined in the Code of Criminal Procedure (Cr.PC). But the common parlance of 'Accused' is, a person who is charged with the commission of 'Offence'. On the other hand, an 'Offence' is defined in the Code of Criminal Procedure as an act or omission made punishable by any law for the time being in force. On the other hand, under the Act, 2003 the term "Judgment Debtor" means a person against whom a decree has been passed ordering him to repay the decretal dues and it remains unsatisfied. In this particular case, the warrant of arrest was issued against a person who is, admittedly not an Accused person but a Judgment Debtor. The impugned order was passed against the Judgment Debtor (petitioner) awarding him civil detention under section 34 of the Act, 2003. (Para -21, 22) **Ratio requiring to surrender as laid down by our apex Court, is applicable only for the accused or convict in criminal proceeding not for a judgment debtor:** We consider that the petitioner's civil liability was adjudicated by a civil Court under the Artha Rin Adalat Ain and the Code of Civil Procedure. Thereby he is determined as a Judgment Debtor and not an Accused or convict for criminal offence. According to section 34 of the Act, 2003, the civil detention has been awarded only for the purpose of compelling the judgment debtor to repay the decretal dues. As such, he

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		Ain, 2003 in accordance with law.	does not require to surrender inasmuch as referred ratio requiring to surrender as laid down by our apex Court, is applicable only for the accused or convict in criminal proceeding. (Para-27)
4.	**Chattogram Port Authority Vs. Md. Mehedi Hasan** *(Md. Ruhul Quddus, J)* 17 SCOB [2023] HCD 34 **Key Words**: Section 49 of the Chittagong Port Ordinance,1976; Order VII, Rule 2;Order XIV, Rule 2; Order XV, Rule 3 and Section 151 of the Code Of Civil Procedure; Rejection of plaint, Service of Notice	The question came up for consideration in the instant petition is whether a suit can be brought against the Chittagong Port Authority without service of a prior notice under section 49 of the Chittagong Port Ordinance,1976 and whether issue of maintainability for non service of aforesaid notice can be realized after joining the issue. The High Court Division held that after joining the issue and on completion of the hearing plaint cannot be rejected. The Court also held that as there is no alternative remedy in the Chittagong Port Ordinance,1976 regarding land dispute between the authority and the private individual the service of summon along with a copy of plaint upon the authority will be deemed as sufficient. In the result, the High Court Division discharged the rule.	**Purpose of serving notice prior to the institution of the suit under section 49 of the Chittagong Port Ordinance, 1976:** Service of notice under Section 49 thereof prior to institution of any suit against the Chattogram Port authority has been incorporated for its smooth functioning and discharging its regular routine activities. Another purpose of such notice is to save public time and litigants' expenditure in the cases where any person aggrieved serves notice upon the port authority and the authority by itself addresses his grievance realizing the right course of action before going to the court. In such view of the matter, if a person already institutes a suit under whatever notion and the summon with a copy of the plaint is served upon the port authority, the purpose of notice under Section 49 of the Ordinance would be sufficiently served inasmuch as no alternative remedy is provided in the Ordinance for dissolving any land dispute between the Port Authority and a private individual. (Para-24)
5.	**The State Vs. ACC and ors** *(Md. Nazrul Islam Talukder, J)* 17 SCOB [2023] HCD 40 **Key Words**: Article 39 of the Constitution of the People's Republic of Bangladesh; The Press Council Act,1974; The Public-interest Information Disclosure Act (Provide Protection), 2011 and Rules, 2017; The Anti-Corruption Commission Act, 2004; Disclosure of	In the instant *suo motu* rule questions came up for consideration whether court can punish journalists for the publication of defamatory, false and fabricated news report touching the Anti-Corruption Commission and whether the journalists are protected by the laws in not disclosing the sources of information. The High Court Division held that the Media and the Journalist are authorized to publish news report on corruption and if anyone is aggrieved by the report, they can lodge complaint before the Press council for redress. Analyzing various provisions of laws like the Constitution, the Press Council Act 1974, the Public-interest Information Disclosure Act (Provide Protection), 2011 etc. the High Court Division also held that laws have given protection to the	**The media and the journalists are constitutionally and legally authorised to publish news reports on corruption and corrupted practices:** Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. Under the aforesaid discussions, our considered view is that the media and the journalists are constitutionally and legally authorised to publish news reports on corruption and corrupted practices along with money laundering if any including other important news on the matters of public interest. (Para-38)

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	the source of information; fourth pillar of democracy;	Journalists in not disclosing the sources of information.	So, under the above facts and circumstances and the propositions of law, we have no hesitation to hold the view that the laws have given protection to the journalists in not disclosing the source of information. (Para-48)
6.	**বিগ বস কর্পোরেশন লিমিটেড** Vs. **আর্মি ওয়েলফেয়ার ট্রাস্ট** (*বিচারপতি মোঃ আশরাফুল কামাল*) 17 SCOB [2023] HCD 57 **Key Words**: সালিশ আইন, ২০০১ এর ৪২ ধারা; তামাদি আইন ১৯০৮ এর ৫ ও ২৯ ধারা;	এই মোকদ্দমায় প্রতিবাদীপক্ষ ১৮৮ দিন বিলম্ব মওকুফের প্রার্থণাসহ জেলা জজ আদালতে সালিশ আইনের ৪২ ধারা অনুসারে সালিশী রোয়েদাদ বাতিলের আবেদন করেন। আদালত তামাদি মওকুফ করে শুনানির জন্য দিন ধার্য করে। আদালতের আদেশে সংক্ষুব্ধ হয়ে দরখাস্তকারীপক্ষ হাইকোর্ট বিভাগে অত্র সিভিল রিভিশন মোকদ্দমাটি দায়ের করলে আদালতের সামনে প্রশ্ন উত্থাপিত হয় যে, সালিস আইন ২০০১ এর ৪২ ধারায় উল্লিখিত ৬০ (ষাট) দিন সময়সীমা অতিক্রান্ত হওয়ার পর কোন পক্ষ বিলম্ব মওকুফের আবেদনসহ সালিশী রোয়েদাদ বাতিলের আবেদন করলে আদালত কর্তৃক তা মঞ্জুরের আইনগত কোনো সুযোগ রয়েছে কি না? হাইকোর্ট বিভাগ সালিস আইনের ৪২ ধারা এবং তামাদি আইনের ৫ ও ২৯ ধারা বিশ্লেষণ করে এই সিদ্ধান্তে উপনীত হয় যে, বিশেষ আইনে ভিন্নতর তামাদির মেয়াদের বিধান সুনির্দিষ্ট থাকলে তামাদি আইনের ২৯(২) ধারা মোতাবেক তামাদি আইনের ৫ ধারা সেক্ষেত্রে প্রযোজ্য হবে না। পরিণামে হাইকোর্ট বিভাগ রুলটি চূড়ান্ত করে জেলা জজ আদালতের আদেশ বাতিল করে।	**<u>সালিশ আইন, ২০০১ এর ধারা ৪২ ও তামাদী আইনের ৫, ২৯(২) ধারাঃ</u>** ধারা ৪২ সহজ সরল পাঠে এটি কাঁচের মত স্পষ্ট যে, সালিশী রোয়েদাদ প্রাপ্তির ৬০ (ষাট) দিনের মধ্যে সংক্ষুব্ধ পক্ষকে বাংলাদেশে অনুষ্ঠিত আন্তর্জাতিক বাণিজ্যিক সালিশী রোয়েদাদ বাতিলের ক্ষেত্রে হাইকোর্ট বিভাগে এবং আন্তর্জাতিক বাণিজ্যিক সালিশে প্রদত্ত রোয়েদাদ ব্যতীত সালিশী আইন, ২০০১ এর অধীন প্রদত্ত সালিশী রোয়েদাদ বাতিলের ক্ষেত্রে জেলা জজ আদালতে আবেদন দাখিল করতে হবে। যেহেতু সালিশী আইন, ২০০১ এর ৪২ ধারার দরখাস্ত দায়েরে ৬০ (ষাট) দিন সময় প্রদত্ত হয়েছে সেহেতু তামাদী আইনের ২৯(২) ধারার বিধান মোতাবেক তামাদি আইনের ৫ ধারা প্রযোজ্য নয়। ফলে সালিশী আইন, ২০০১ এর ৪২ ধারায় বর্ণিত ৬০ (ষাট) দিন অতিবাহিত হওয়ার পর রোয়েদাদ বাতিলের দরখাস্ত আইন দ্বারা বারিত। (প্যারা ২৩, ২৪)
7.	**Chattogram Dry Dock Ltd** **Vs.** **M.T. Fadl-E-Rabbi & ors** *(Muhammad Khurshid Alam Sarkar, J)* 17 SCOB [2023] HCD 82 **Key Words**: Estoppel; Customs Duty; Bill of Entry; Imported goods; Section 115 of the Evidence Act, 1872; Section 18,	The plaintiff (the applicant-auction purchaser) was the highest bidder of the auction-sold vessel who prayed for an order from the High Court Division for a direction to the Marshall of the Court to deliver the auction-sold vessel to him without payment of any customs duties and VAT. He claimed that previously the Assistant Commissioner of Customs of Chattogram had informed that there was no scope for assessing custom duties against the said vessel and, as such he is now barred by estoppel to demand any custom duties. Moreover, for claiming custom duties on a foreign vessel ordered by the Court to be sold as	**<u>Sections 18, 23, 43, 44, 45, 51, 52, 53 and 79 of Customs Act 1969:</u>** From a careful examination of the relevant provisions of the Customs Act, namely, Sections 18, 23, 43, 44, 45, 51, 52, 53 and 79 and relevant provisions of the Import and Export Act, it leads me to hold that when any foreign thing, object, goods, which would include a foreign vessel, is brought into or comes in Bangladesh, be it without or with Bills of Entry, it is dutiable, as per the prevailing rate prescribed in the Bangladesh Customs Tariff, if the same is picked up/collected/arrested for the purpose of home consumption, warehousing, selling to local or foreign national/country or for any other

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	23, 43, 44, 45, 51, 52, 53 and 79 of the Customs Act, 1969; Section 2(c), 3(1) and 3(2) of the Imports and Exports (Control) Act, 1950	scarp, Bill of Entry is required. The High Court Division, however, analyzing sections 18, 23, 43, 44, 45, 51, 52, 53 and 79 of Customs Act and relevant provisions of the Import and Export Act held that when a foreign vessel is brought into or comes in Bangladesh, with or without Bills of Entry, it is dutiable. Consequently, the rule is discharged with the direction to take delivery of the vessel upon payment of the customs duties and other Government dues.	lawful purpose. (Para-28)
8.	**Abul Kasem & anr Vs. Asfaque Ahmed & anr** *(Md. Badruzzaman, J)* 17 SCOB [2023] HCD 93 **Key Words**: Section 31, 32, 34, 35, 41, 43, 52, 58, 59, 60, 69, 75, 77, 88, 89 of the Registration Act, 1908; Section 115(1) of the Code of Civil Procedure; Suit for declaration; Maintainability of suit; Proof of title and possession; Onus of proof; Execution and registration of deed;	This is a suit for declaration that the impugned registered sale deed was forged, illegal, inoperative and not binding upon the plaintiff. The trial court decreed the suit but the appellate court allowing the appeal reversed the judgment and decree of the trial court. The plaintiffs as petitioners preferred civil revision before the High Court Division. The High Court Division on assessment of the relevant provisions of law held that from the endorsement of the sub-registrar the document achieved strong presumptive evidence of its due registration and thus, the burden of proof was upon the plaintiff which he failed to discharge. Moreover, the defendant has proved the execution of the deed and possession both by oral and documentary evidence. The High Court Division found that the trial court tried to establish plaintiff's case through the weakness of the defendant which is against the settled principle of law that the plaintiff must prove his case in order to get a decree. Further, the High Court Division held that as the plaintiff's title was also in question, the plaintiff should have filed suit for a decree of declaration of title as principal relief along with other consequential relief regarding the forged deed. In the result, the High Court Division discharged the rule.	The plaintiffs filed the present suit for mere declaration that impugned registered kabala deed was collusively made and obtained by forgery and not binding upon them. The plaintiffs filed the suit as the disputed kabala cast cloud upon title of the plaintiffs to the suit land and on the basis of the deed in question, the defendant claimed title to the suit land. Since, before filing of the suit, a cloud has been cast upon the plaintiffs' title to the suit land and that the defendant denied their title therein by dint of a registered kabala, the plaintiffs should have filed the suit for a decree of declaration of title to the suit land as principal relief along with other consequential relief that impugned registered kabala deed was collusively made and obtained by forgery and not binding upon them, as provided under section 42 of the Specific Relief Act. Accordingly, this suit as framed is not maintainable. (Para-28) It appears that the whole proceeding in regards execution and registration of the deed in question and endorsement of the Sub-Registrar therein as provided under sections 31, 32, 34, 35, 52, 58, 59 and 60 of the Registration Act, as stated above, were done in accordance with those provisions of the Act and the document achieved strong presumptive evidence as to its due registration. Accordingly, burden was upon the plaintiffs to rebut such evidence by adducing strong evidence to prove that the deed in question was a product of forgery. But the plaintiffs failed to discharge the onus. (Para-40)

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9.	**Md. Mominul Islam Vs. Bangladesh & ors** *(Zafar Ahmed, J)* 17 SCOB [2023] HCD 108 **Key Words**: Rule 5(Ka) of "বাংলাদেশ বিমান কর্পোরেশন কর্মচারী (অবসরভাতা ও আনুতোষিক) বিধিমালা, ১৯৮৮; Bangladesh Biman Corporation Ordinance, 1977; principle of approbation and reprobation ; Section 114 of the Evidence Act, 1872	In the instant case the petitioner challenged his retirement from service by the CEO of Biman Bangladesh Airlines Ltd on the ground of malafide. The respondent argued that the CEO and Managing Director has the power and authority to pass the order of retirement and the allegation of malafide is baseless. Further submission of the respondent was that illustration (e) to Section 114 of the Evidence Act presumes that official acts are done rightly and regularly in accordance with law and the petitioner failed to rebut the presumption contained in illustration (e). The High Court Division, however, analyzing applicable laws and examining materials on record found that for retiring any person from office a resolution from board of directors of Biman Bangladesh Airlines is required and without having such board resolution and delegated authority the order of the CEO was without jurisdiction, arbitrary and malafide.	**Articles of Association are to be followed mandatorily if they are not in conflict with the company law:** It is settled principle of law that memorandum and articles of association being the constitution of the company regulate the affairs of the company including the powers of the board of directors and others and thus, articles are mandatory to be followed if they are not in conflict with the company law. (Para 26) **In absence of delegated authority and without any decision of the board of directors the Managing Director and CEO of the Biman has no power to retire anyone from service:** In the case in hand, the Managing Director and CEO of the Biman issued the impugned order retiring the petitioner from service without any decision of the board of directors. No power was delegated to him to take the decision. Therefore, he was not competent authority to retire the petitioner. For this reason coupled with the attending facts and circumstances of the case, the unauthorised exercise of power by the Managing Director and CEO of the Biman is also without jurisdiction, arbitrary and malafide. Accordingly, we find merit in the Rule. (Para 40)
10.	**Anamika Corp. Ltd. & ors Vs. Humayun M. Chowdhury & ors** *(Kashefa Hussain, J)* 17 SCOB [2023] HCD 119 **Key Words**: Order 7 Rule 11 of the Code of Civil Procedure,1908 ; Section 45 of the Evidence Act, 1872 ; Section 2, 7A, 10, 17(ka), 19(1)(4), and 32 of the Arbitration Act, 2001; Expert opinion; Valid arbitration agreement; Ad-interim injunction	In the instant Civil Revision question arose whether the learned District Judge while entertaining an application under section 7ক of the Arbitration Act 2001 can pass an order under section 45 of the Evidence Act, 1872. The petitioner Anamika Corporation Ltd. filed an Arbitration Miscellaneous Case under section 7ক of the Arbitration Act, 2001 before the court of learned District Judge praying for an order to restrain the opposite parties from transferring or entering into deed of agreement or otherwise disposing of the scheduled property to any third party until disposal of the arbitration proceedings under section 7A(a)(b) and section 7A(1)(c) of the same Act. The opposite parties denying the existence of an agreement made an application under Section 45 of the Evidence Act, 1872 for examination of the signature of the opposite	7K (1) of the Arbitration Act, 2001: The substantive prayer in the Arbitration Miscellaneous case No. 7 of 2019 under section 7K (1) of the Arbitration Act, 2001 is basically a prayer for an order of restraint till arbitration proceedings are initiated and nothing else. Further I am also of the considered view that section 7K (1) sub-section Uma including other sections only contemplate the passing of an ad-interim order in case of urgency to address certain circumstances or situations either during an arbitration proceeding or before an arbitration case is initiated. (Para-32) **The legislature has conferred the power to decide as to whether a valid arbitration agreement is in existence upon the tribunal only:** Section 19(2)(c) of the Act of 2001also contemplates a situation on the existence of an arbitration agreement when the arbitration agreement alleged by one party is not denied by the other.

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Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
		parties by hand writing expert. The Court of the learned District Judge allowed, in part, the application for examining the signature of the opposite parties by hand writing expert against which the petitioner filed this Civil Revision. The High Court Division held that the power to issue an order for examination of a signature by hand writing expert has been conferred upon the Arbitral Tribunal only under the provisions of section 17(ka) of the Arbitration Act, 2001. While issuing an order of ad-interim restraint or injunction whatsoever, the learned District Judge is not empowered to pass an order under section 45 of the Evidence Act. Civil court cannot travel beyond the limited powers of passing ad-interim orders in a situation of urgency conferred upon it under Section 7ক of the Act. In the result, the rule was made absolute.	Therefore it is clear that to constitute a valid arbitration agreement within the meaning of the Act of 2001 the existence of the agreement must be agreed upon by both parties. In this case it is clear that the opposite parties denies the existence of the agreement itself. Therefore under the provisions of Section 17(ka) of the Arbitration Act, 2001 read with other provisions of the Act it is my considered view that the legislature has conferred the power to decide as to whether a valid arbitration agreement is in existence upon the tribunal only. (Para 49)
11.	**Unilever Bd Ltd.** **Vs.** **Chairman, National Board of Revenue & ors** *(Md. Shohrowardi, J)* 17 SCOB [2023] HCD 137 **Key Words**: Section 15, 17 of the Customs Act, 1969; Section 96 of the Trademarks Act, 2009; Article 102 of the Constitution of Bangladesh; **বাংলাদেশ আমদানি নীতি আদেশ, ২০২১-২০২৪**; Importation of parallel goods; equally efficacious remedy	The writ petitioner being a registered trademark holder of the goods in question namely Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe and/or empty branded packing materials such as bottles, tubes, containers, wrappers, packets, labels etc. of Unilevers PLC (which are locally produced, packaged and marketed by the petitioner) prayed for a direction in the form of writ of mandamus upon the respondents Nos. 1 to 6 so that they cannot import or release the goods in Bangladesh and sought further direction upon the respondents Nos. 7 to 57 for not allowing opening of letter of credit by any importer to import the above goods. For disposal of the rule a larger Bench of the High Court Division was constituted. The High Court Division examined whether the importation of parallel goods in question into Bangladesh is barred under section 15 of the Customs Act, 1969 without prior permission of the petitioner and whether the instant writ petition is maintainable in law. The court analysing various provisions of different laws held that there is no bar in the law in importing parallel goods and any person can import parallel goods in compliance with the procedure mentioned in section 15 of the Customs Act. So,	**<u>Section 15 and 17 of the Customs Act, 1969:</u>** On a bare reading of Section 15 of the Customs Act, 1969 it reveals that there is neither absolute bar in importing parallel goods nor said section gives any unfettered right to the importers to import parallel goods. Section 15 of the said Act is balanced legislation. Section 15(d)(e)(g) and (h) of the said Act authorized the importers to import parallel goods subject to compliance with the procedure/conditions as mentioned in the said provision. Nothing has been stated in said section regarding prior permission of the petitioner in importing parallel goods. Therefore the submission of the learned Advocate for the petitioner that without prior permission of the petitioner no one is legally entitled to import the parallel goods of Unilever Bangladesh is misconceived and fallacious. If any importer fails to satisfy the conditions laid down in Section 15(d)(e)(g) and (h) of said Act the customs authority is empowered under section 17 of the Customs Act, 1969 to detain and confiscate the

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Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
		there is no obligation on the part of the respondents to restrain any person from importing parallel goods or to restrain any person from opening letter of credit for importation of parallel goods of Unilever Bangladesh Ltd. Moreover, there is alternative and equally efficacious remedy to the petitioner for violation of any condition laid down in section 15 of the Customs Act, 1969 regarding importation of parallel goods and the petitioner at any time can file an application to the customs authority for redress. Consequently the Rule was discharged.	imported goods. Therefore we are of the view that there is no wholesale restriction in section 15 of the said Act in importing parallel goods. (Para-19)
12.	**Probir Kumar Dey @ Saiful & anr Vs. Shipra Rani Dey & ors** *(Fatema Najib, J)* 17 SCOB [2023] HCD 154 **Key Words**: The Hindu Succession Act, 1956; The Hindu Women's Rights to Property Act,1937; Conversion to Muslim; Partition; Caste Disability Removal Act, 1850; The Bangladesh Laws (Revision and Declaration Act, 1973 (Act No. VIII of 1973); share on partition	One Rabindra Kumar Dey was the owner and possessor of 4.81 decimals of land. He died in 1978 leaving behind his wife, two sons and four daughters. One of his sons, namely, Prodip died and the other son Probir converted to Islam before Rabindra's wife Arati Bala Dey filed the instant suit for partition claiming saham. During the pendency of the suit plaintiff died and Rabindra's unmarried daughter Shipra Rani was substituted as plaintiff. Question arose as per Daya Bhaga school of law whether the plaintiff Arati Bala Dey inherited from her deceased husband; whether the substituted plaintiff Sipra Rani Dey is entitled to inherit from her deceased father and mother; and whether the plaintiffs are entitled to a decree for partition as prayed for? The High Court Division analyzing the relevant laws, particularly, the Hindu Women's Rights to Property Act 1937, Caste Disability Removal Act, 1850 and the Bangladesh Laws (Revision and Declaration) Act, 1973 held that when a Hindu governed by the Daya Bagha School of Hindu Law dies intestate leaving any property, his widow becomes complete owner and co-sharer of the property during her life time and she is entitled to be in the same position as a son in the matter of claiming partition. The Court further held that after conversion to the faith of Islam son Probir has lost his right to his father's property and, as such, the substituted plaintiff Sipra Rani Dey, the unmarried daughter of Rabindra Kumar Dey, is entitled to get the property on partition.	**<u>Section 3 of the Hindu Women's Rights to Property Act, 1937:</u>** Let us now consider whether a Hindu widow is entitled to get the same share as a son. In this connection reference may be made to section 3 of the Hindu Women's Rights to Property Act, 1937 (XVIII of 1937). Sub section (1) of section 3 of the said Act says that when a Hindu governed by the Daya Bagha School of Hindu Law dies intestate leaving any property dies, his widow, shall, subject to the provisions of sub-section(3), be entitled to the same share as a sons. Sub-section (3) of section 3 of the said Act further says that any interest devolving on a Hindu widow shall be the limited interest known as a Hindu Woman's estate, but she shall have the same right of claiming partition as a male owner. Further sub-section (2) of section 1 of the said Act stipulates that it extends to the whole of Bangladesh. Thus from reading of the aforesaid provisions of sub-sections (1) and (3) of the Hindu Women's Rights to Property Act, 1937 it is clear that the widow during the period of her life time she became complete owner and co-sharer of the property and this sub-section 3(3) has the effect of putting the widow in the same position as a son in the matter of claiming partition. (Para 18 and 19)

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Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
13.	**Prof. Muhammad Yunus** **Vs.** **The State** *(SM Kuddus Zaman, J)* 17 SCOB [2023] HCD 162 **Key Words**: Sections 303 (Uma), 307, 117, 314 of Bangladesh Labor Act, 2006; Labor Welfare Foundation Law, 2006; Section 28 of the Companies Act; Bangladesh Labor Rules, 2015	Opposite Party No.2, an Inspector of Labor, in course of inspection of the GTC detected some violations of the labor law and submitted a complaint under Bangladesh Labor Act, 2006 in the Court of learned third Labor Court, Dhaka. The alleged violations of Labor Law by the GTC are- (i) on completion of probationary period job of the labors and employees are not made permanent, (ii) the labors and employees are not granted annual leave with pay or encashment of leave or money in lieu of annual leave and (iii) the company did not constitute Labor Participation Fund and Labor Welfare Fund nor deposited 5% of net profit in above fund under the Sramik Kollan Foundation Ain, 2006. On behalf of the petitioner it was submitted that there is no date of occurrence of this case and this case is barred by the law of limitation for not having filed within 6 months as provided in Section 314 of Bangladesh Labor Ain, 2006; even if all the averments made in the complaint are taken as true in its entirety even then no complicity of the petitioner can be established; the petitioner is a Nobel laureate and an internationally acclaimed personality who had no role in the management of financial or administrative affairs of the GTC; the GTC is a nonprofit organization registered under Section 28 of the Companies Act, 1991 therefore does not require to constitute a Labor Participation Fund; and the GTC works in the telecommunication sector on the basis of its contract with other companies and as such its labors and employees are also appointed on contractual basis for which the proceeding in Labor Court is an abuse of the process of the Court. The High Court Division analyzing relevant laws and rules and considering admitted facts found the above contentions of the petitioner are not tenable in law as because the question of limitation is a mixed question of law and facts which cannot be determined without taking evidence; section 28 of the Companies Act does not exempt any Company from making contribution	**Section 28 of Companies Act:** **There is nothing in Section 28 of the Companies Act which exempts any Company registered under above provision from making contribution to the Labor Welfare Fund:** The learned Advocate for the petitioner repeatedly submits that the GTC is a nonprofit company and registered under Section 28 of Companies Act. As such GTC is not liable to contribute 5% of the net profit to the Labor Welfare Fund. In support of above submission the learned Advocate produced the Memorandum and Articles and Association of the GTC. But there is no mention in above Memorandum that the GTC is a nonprofit company. On the contrary Article 71 of above Memorandum shows that GTC may earn profit but the profit shall be utilized for the advancement of the objectives as stated in the above Memorandum. Since the GTC is a profit earning company it is not understandable as to why the company will not contribute a very insignificant part of its net profit for the welfare of its labors. There is nothing in Section 28 of the Companies Act which exempts any Company registered under above provision from making above contribution to the Labor Welfare Fund. (Para 28, 29) **Section 314 of Bangladesh Labor Ain, 2006:** The alleged violations were first detected by the complainant on 09.02.2020. He issued a letter to the GTC for taking remedial measures. No satisfactory reply having received a second inspection was held on 16.08.2021 and again the same violations were discovered. This Complaint was filed in the concerned labor court on 28.08.2021. As such, it prima facie appears that this case has a date of occurrence and the same has been filed within six months from the date of occurrence as provided in Section 314 of Bangladesh Labor Ain, 2006. Moreover it is well settled that a question of limitation is a mixed question of law and facts which can be determined on consideration of

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		to the Labor Welfare Fund and article 33 and 34 of the Memorandum and Articles and Association of the GTC mentions that the Board of Directors exercises full managerial and financial control over the GTC and is responsible for the management and administration of the affairs of GTC and as such it cannot be said at this stage of the proceedings that the petitioner has no role in the financial management and administration of the GTC. Consequently, the Rule was discharged.	evidence to be adduced at trial. (Para 34)
14.	**Md. Shahin Ikbal Vs. General Certificate Officer & ors** *(Md. Zakir Hossain, J)* 17 SCOB [2023] HCD 168 **Key Words**: Section 4, 6, 16 of the Public Demands Recovery Act, 1913; Section 5(5) of the Artha Rin Adalat Ain, 2003; Certificate proceeding; Certificate Officer; Writ of certiorari; Calculation of interest	For a defaulted loan of 250,000/- taka a certificate case was instituted against the petitioner-certificate-debtor and he was ordered to pay Tk. 5000/- per month as repayment of loan on 05.02.2008. Thereafter, as per order of the Certificate Officer, the certificate debtor deposited entire amount of the certificate in deferent installments. The Certificate Officer on 01.02.2016 wanted to know from the certificate holder about the outstanding dues of the certificate debtor. The certificate holder informed in reply that till then Tk. 5,07,766.00 was outstanding. In the above backdrop, challenging the legality and propriety of the certificate proceeding, the petitioner rushed to the High Court Division and obtained the Rule and stay. High Court Division found that as per section 5(5) of the Artha Rin Adalat Ain 2003 the certificate proceeding does not suffer from jurisdictional defect raised by the petitioner but the Certificate Officer without any objective satisfaction and only on the basis of improperly filed requisition letter and without considering as to whether the entire outstanding dues as claimed by the respondent-Bank is actually due at the relevant time, started certificate proceeding which is illegal. Consequently, the Court quashed the certificate proceeding.	**Section 5(5) of the Artha Rin Adalat Ain, 2003:** On meticulous and meaningful reading of the aforesaid provision of the Ain, 2003, it is as clear as day light that the legislature has consciously given option for shopping the forum either to file Artha Rin Suit or Certificate Case for speedy realization of the outstanding amount which does not exceed Tk. 5 lacs. The jurisdiction of the Certificate Officer is in addition but not in derogation to the jurisdiction of the Artha Rin Adalat; therefore, the certificate proceeding does not suffer from jurisdictional defect raised by the petitioner. Consequently, the issue stands decided in the negative. (Para 16) **Section 16 of the Public Demands Recovery Act, 1913:** By and large after filing the Certificate Case, the calculation of interest has to be made in accordance with section 16 of the PDR Act. If the contention of the respondent-Bank is accepted that the interest and charges are recoverable on the certificate amount upto the date of realization as per the mandate of section 16 of the PDR Act, then it would be safely concluded that the interest imposed during the pendency of the Certificate Case was also unlawful and unjustified. (Para 25)

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Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
15.	**Samia Rahman Vs. Bangladesh and others** *(Md. Akhtaruzzaman, J)* 17 SCOB [2023] HCD 182 **Key Words**: Plagiarism; Regulation 7(a) of the Enquiry Committee and Tribunal (Teachers and Officers) Regulations,1980; Article 52 of the Dhaka University Order,1973; Section 38(5), 45(5) of the First Statutes of the University of Dhaka	This writ petition was filed by one Associate Professor of the department of Mass Communication and Journalism of Dhaka University when the University Syndicate demoted her to the post of Assistant Professor for a period of two years on the basis of report of the tribunal formed to enquire the allegations of plagiarism against her. The tribunal did not categorically find the petitioner to have adopted plagiarism, but found that the published article lacks quality. The tribunal did not recommend to award her relegation. But the syndicate arriving at the decision that the petitioner resorted to plagiarism handed her the above punishment. The petitioner claimed that without following the due process of law and violating natural justice most illegally she was punished. On the other hand, respondent claimed that the petition was not maintainable as it involved resolution of disputed questions of facts and the petitioner failed to exhaust the alternative remedy of appeal before the Hon'ble Chancellor of the University. The High Court Division held that the matter of copying being a question of fact cannot be decided in the Writ Jurisdiction but the authority concerned should have acted in accordance with law giving the petitioner adequate opportunity of being heard before awarding punishment. Moreover, considering plagiarism as intellectual crime the court has expressed frustration and held that the tendency of plagiarism among the University teacher is alarming and shocking for the nation. Finally, the High Court Division declared the decision of the Syndicate demoting the petitioner as illegal.	**Mandatory requirements to initiate a departmental proceeding:** It appears that framing charge as well as specification of penalty proposed to be imposed by the Syndicate upon the petitioner are mandatory requirements to initiate a departmental proceeding. Upon receiving the reference from the Syndicate the Enquiry Committee shall communicate the charge to the concerned accused together with the statements of allegations and request him/her to submit, within 7(seven) days from the day the charge is communicated to him/her, a written statement of his/her defense and to show cause at the same time why the penalty proposed should not be imposed on him/her and also states whether he/she desires to be heard in person or not. After framing the charge by the Syndicate the Tribunal shall take into consideration of the charges framed, the evidence on record, both oral and documentary, including the additional evidence, if any, accepted by it and recommend such action against the accused as it may deem fit. In the case in hand, admittedly no formal charge was framed which is sine quo non to start a formal departmental proceeding. (Paras 26 and 27) The observance of the principles of natural justice is not an idle formality. A meaningful opportunity to defend oneself must be given under any circumstances to its truest sense and, in the instant case, the respondents sought to show ceremonial observance of the principles of the natural justice as an eye wash for an ulterior purpose without affording any real opportunity to the petitioner to defend herself by not furnishing the enquiry report as well as the report of the Tribunal. It appears that the impugned decision of the Syndicate is vitiated by bias and malafide inasmuch as while the petitioner was awarded with a major punishment with the stigma of plagiarism but despite repeated requests, she was not given a copy of the enquiry report. The Syndicate did not care to consider the long delay in completing the enquiry. (Para 32)

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Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
16.	**Sirajul Haque Howlader and ors Vs. Zulekha Begum & ors** *(Md. Ali Reza, J)* 17 SCOB [2023] HCD 199 **Key Words**: Rule 46, 48 of the Registration Rules, 1973 and section 69 of the Registration Act, 1908; Sections 101 and 103 of the Evidence Act; Section 3 of the Transfer of Property Act and Section 68 of the Evidence Act; Section 114(g) of the Evidence Act; Order 3 Rule 2 of the Code of Civil Procedure; Section 85 of the Evidence Act; Section 120 of the Evidence Act; Husband instead of wife or wife instead of husband shall be competent witness; Article 120 of the Limitation Act, 1908;	The respondent Nos. 1-4 as plaintiffs filed a Title Suit for declaration that the documents mentioned in the schedule Nos. 1-6 to the plaint are forged. They claimed that Rustom Howlader, who was their father, and the father of the defendant Nos. 1 and 6 also, died at the age of 110. From 20 years before his death he was completely unable to walk or move because of his dire sickness along with blindness and was completely bed ridden. He lived with the defendants in a mess till his death and taking such advantage of his illness those impugned documents were obtained. On the other hand defendants claimed that Rustom Howlader was never sick or bed ridden or blind and was always healthy and performed his own work by himself before his death. The trial Court decreed the suit mainly on the finding that Rustom Howlader was sick from 1980 till his death and he had no normal sense or consciousness. The High Court Division assessing the evidence on record found that the plaintiff had failed to prove that Rustom Howlader was completely sick and bed ridden. It also found that plaintiffs had failed to discharge their onus under sections 101 and 103 of the Evidence Act to prove that the signatures given by Rustom Howlader in all the documents are false. Finally, the Court found that the suit was barred by limitation and consequently set aside the judgment and decree of the trial Court.	**<u>Sections 101 and 103 of the Evidence Act:</u>** According to the provisions laid down in sections 101 and 103 of the Evidence Act, the entire onus was upon the plaintiffs to prove that the signatures given by Rustom Howlader in all the documents are false because it is their specific case that Rustom Howlader never appeared in public due to his serious ailment and indisposition and blindness and even he was to be taken to the toilet by somebody else and remained bed ridden from 1980 until his death. Plaintiffs had to take resort to expert opinion in order to discharge their initial onus under section 101 of the Evidence Act to prove that those impugned documents were executed not by Rustom Howlader but by an imposter with a scheme to grab the property and Rustom Howlader was completely unable to perform his own affairs due to his serious illness. Law says when the initial onus is discharged by the plaintiff the onus then shifts upon the defendants to show the contrary. (Para 19) **<u>Article 120 of the Limitation Act, 1908:</u>** According to paragraph No. 7 of the plaint, cause of action arose on 14.07.2002 after having knowledge from the sub-registry office. But on perusal of the records it appears that the certified copies of exhibit-2 and 2(ka) were obtained on 17.07.1995. The certified copies of exhibit-2(Ga) and exhibit-2(Gha) were obtained after filing of the suit on 05.07.2003 and 03.07.2003 respectively. Thus it can be held that the cause of action of the suit is definitely false and the suit is barred by law of limitation. The beneficiaries of exhibit-2(Gha) dated 19.12.1982 being defendant Nos. 4-5 are the sons of plaintiff No. 3 Sahaton and the husband of plaintiff No. 2 Rahaton was the identifier to exhibit-Gha dated 15.09.1994. So it raises serious doubt on the story of cause of action and as such it is held that the suit is barred by limitation under Article 120 of the Limitation Act. (Para 27)

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APPELLATE DIVISION

PRESENT:
Mr. Justice Hasan Foez Siddique
Chief Justice
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim
Ms. Justice Krishna Debnath

Criminal Appeal No.90 of 2013 with Criminal Appeal No.108 of 2013 with Criminal Petition Nos.257, 260 of 2022 and 322-323 of 2019 and Jail PetitionNos.27-28 of 2014.

(From the judgment and order dated 15.04.2013, 16.04.2013, 17.04.2013, 18.04.2013 and 21.04.2013 passed by the High Court Division in Death Reference No.57 of 2008 with Criminal Appeal Nos.3455 & 4058 of 2008 and Jail Appeal Nos.631-634 of 2008)

Dr. Miah Md. Mohiuddin	**Appellant** **(In Crl.A.90 of 2013)**
Md. Zahangir Alam	**Appellant** **(In Crl. A. 108 of 2013)** **Petitioner** **(In Jail Petition No.27 of 2014)**
Md. Nazmul	**Petitioner** **(In Crl. P.No.257 0f 2022 & Jail P. No.28 of 14)**
Md. Abdus Salam	**Petitioner** **(In Crl. Petition No.260 of 2022)**
The State	**Petitioner** **(In Crl. P.Nos.322-323 of 2019)**

-Versus-

The State	**Respondent** **(In Crl. Appeal No.90 & 108 of 2013, Crl.P.No.257 & 260 of 2022 & Jail P. No.27 & 28 of 2014)**
Md. Nazmul	**Respondent** **(In Crl. P. 322 of 2019)**
Md.Abdus Salam	**Respondent** **(In Crl. P. 323 of 2019)**

For the Appellant: (In Crl.A.90 of 2013)	**Mr. Khandakar Mahbub Hossain, Senior Advocate with S.M. Shahjahan, Senior Advocate and Mr. Emran-A-Siddiq, Advocate, instructed by Ms. Shirin Afroz, Advocate-on-Record.**
For the Appellant: (In Crl.A.108 of 2013)	**Mr.Emran-A-Siddiq, Advocate, instructed by Md. Zainul Abedin, Advocate-on-Record.**
For the petitioner: (In Crl.P.257/2022)	**Mr.Shamsur Rahman, Advocate, instructed by Ms. Madhu Malati Chowdhury Barua, Advocate-on-Record.**
For the petitioner: (In Crl.P.260/2022)	**Mr.Emran-A-Siddiq, Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record.**
For the petitioner: (In Crl.P.322-323/19)	**Mr. Biswajit Debnath, Deputy Attorney General (with Ms. Abanti Nurul, Assistant Attorney General) instructed by Ms. Sufia Khatun, Advocate-on-Record.**
For the petitioner: (In Jail P. Nos. 27-28/14)	**Not represented.**
For the respondent: (In Crl.A.90 & 108 of 2013)	**Mr. A.M. Amin Uddin, Attorney General, (with Mr. Biswajit Debnath, Deputy Attorney General, Ms. Abanti Nurul and Mr. Saiful Alam, Assistant Attorney General) instructed by Ms. Madhu Malati Chowdhury Barua, Advocate-on-Record.**
For the respondent: (In Crl.P.257 of 2022)	**Mr. Biswajit Debnath, Deputy Attorney General, instructed by Ms. Shirin Afroz, Advocate-on-Record.**
For the respondent: (In Crl.P.260 of 2022)	**Not represented**
For the respondent: (In Crl. Petition Nos. 322-323 of 2019)	**Not represented**
For the respondent: (In Jail P. 27-28 of 2014)	**Not represented**
Date of hearing :	**22.02.2022, 23.02.2022, 01.03.2022, 02.03.2022, 08.03.2022, 9.03.2022, 15.03.2022and 16.03.2022.**
Date of judgment :	**05.04.2022**

Editors' Note

This is a case where a renowned Professor of University of Rajshahi was brutally murdered by one of his colleagues. There were no eye witnesses. Based on the circumstantial evidence police arrested the caretaker of the house where the victim

lived. The arrested accused confessed under section 164 of the Code of Criminal Procedure, 1898. Accordingly the investigation Officer arrested other co-accused and two of them confessed. But the mastermind of the killing, an Associate Professor of the same University declined giving any confessional statement. The Appellate Division found that the strong circumstantial evidence coupled with confessions of the co-accused and motive of killing proved by the prosecution point unmistakably to the guilt of the mastermind of the murder and confirmed the conviction and sentence awarded by the High Court Division. Appellate Division also discussed the effect of alleged prolonged police custody upon the acceptability of confessional statement of one of the convicts and discrepancy between confession and medical evidence.

Key Words
Circumstantial evidence; confessional statements; section 164 of the Code of Criminal Procedure; article 33 (2) of the Constitution; circumstantial evidence; motive; Section 10 and 30 of Evidence Act 1872

Section 164 of the Code of Criminal Procedure
If a confessional statement does not pass the test of voluntariness, it cannot be taken into consideration even if it is true:
The Evidence Act does not define "confession". The courts adopted the definition of "confession" given in Stephen's Digest of the Law of Evidence. According to that definition, a confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime. The act of recording a confession is a very solemn act and section 164 of the Code of Criminal Procedure lays down certain precautionary rules to be followed by the Magistrate recording a confession to ensure the voluntariness of the confession. In such a case, the accused being placed in a situation free from the influence of the Police is expected to speak out the truth being remorseful of what he has committed. A confession can be acted upon if that passes two tests in the assessment of the court. The first test is its voluntariness. If a confessional statement fails to pass the first test, the second test is immaterial. If he does not disclose his complicity in an alleged crime voluntarily, court cannot take into consideration the confessional statement so recorded, no matter how truthful an accused is. (Para 41)

It appears to us that the confessional statements pertaining to assault by knife substantially fit the medical evidence. It is only when the medical evidence totally makes the ocular evidence improbable, then the court starts suspecting the veracity of the evidence and not otherwise. That the mare fact that doctor said that injury No.1 was an "incised looking injury", not "incised injury", is too trifling aspect and there is no noticeable variance. The opinion of the doctor cannot be said to be the last word on what he deposes or meant for implicit acceptance. He has some experience and training in the nature of the functions discharged by him. After Zahangir inflicted the knife blow in the occipital region of victim Professor Taher, the other accused pressed down a pillow in his face to ensure his death. After confirming the victim's death, the accused persons took the dead body to the back side of the house on a dark night and the appellant Mohiuddin ushered them the way with the torchlight of his mobile. They then put the dead body inside the manhole. In doing so the accused had to carry the dead body to a considerable distance and during that time the dead body might have fallen from their grip causing crushing of hair bulbs in the already injured occipital scalp and rendering the incised wound look like 'incised looking' wound. ... (Para 43)

Confessions are considered highly reliable because no rational person would make an admission against his interest unless prompted by his conscience to tell the truth. Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law "(vide Taylor's Treaties on the Law of Evidence)". Confession possesses a high probative force because it emanates directly from the person committing the offence, and on that count, it is a valuable piece of evidence. It is a settled principle of law that the conviction can be awarded solely on the basis of confessional statements of the accused if the same is found to be made voluntarily.

... (Para 44)

<u>Prolonged police custody; Article 33 (2) of the Constitution:</u>
It has been vehemently argued by the defence that appellant Zahangir Alam was kept in the police station from 03.02.2006 to 05.02.2006 i.e beyond the permitted period of 24 hours without taking him before a Magistrate and this illegal detention of the appellant suggests that the confessional statement given by him is not voluntary. From the cross-examination of PW-42 Md. Faizur Rahman, the then Officer-in-Charge of Motihar Police Station, it appears that appellant Zahangir Alam was taken to the police station on 03.02.2006 for questioning him about the occurrence. At that time he was not arrested in connection with this case. In fact, when Zahangir was taken to the police station on 03.02.2006the whereabouts of Professor Taher was not known to anybody and no formal ejahar was lodged. After the discovery of the dead body of Professor Taher Ahmed PW-1 lodged a formal FIR at around 10.10 AM on 03.02.2006. Even at that time, PW-1 did not make Zahangir an accused. It suggests that he was not taken to the police station as an accused. He was just taken there for questioning. The Investigating Officer of a case has the power to require the attendance of a person before him who appears to be acquainted with the circumstances of the case. When appellant Zahangir Alam was taken to the police station the facts of the killing of Professor Taher were still unfolding and nobody knew who did what. Appellan t Zahangir Alam, being the caretaker of the house of the victim, was the best person to demystify and clear many questions about the occurrence posing inside the mind of the Investigating Officer. He was thought to be a vital person who could shed light on many unsolved questions and could help the prosecution to understand what actually happened there. But when from the circumstances it appeared unmistakably that Zahangir Alam must be one of the perpetrators of the killing of victim Professor Taher, he was then arrested on 04.02.2006 and was produced before the Magistrate on the next day, i.e., within 24 hours of his arrest as required by Article 33 (2) of the Constitution. So, the police did nothing wrong in arresting appellant Zahangir Alam after being sure about his complicity with the offence and producing him before the Magistrate within 24 hours of his arrest and for that reason, the defence objection does not sustain.

(Para 45 and 46)

From a careful evaluation of the confessional statements, we are of the opinion that their statements are consistent with one another and corroborates the version given by each other. We are therefore, of the view that confessing accused were speaking the truth. (Para 47)

<u>When a case against an accused rests completely on circumstantial evidence, the prosecution is required to prove the motive:</u>
In a criminal case, motive assumes considerable significance. Where there is a clear proof of motive for the offence, that lends additional support to the finding of the Court

that the accused is guilty. When a case against an accused rests completely on circumstantial evidence, the prosecution is required to prove the motive of the accused for committing the offence. (Para 52)

A complete review of the evidence indicates that there was pre-existing hostility between the victim and appellant Mohiuddin. The motive for the commission of the murder is explicit from the evidence of P.Ws 22, 25, 39 and 43 which is relevant. Proof of motive does lend corroboration to the prosecution case. The same plays an important role and becomes a compelling force to commit a crime and therefore motive behind the crime is a relevant factor. Motive prompts a person to form an opinion or intention to do certain illegal acts with a view to achieving that intention. Adequacy of motive is of little importance as it is seen that atrocious crimes are committed for very slight motives. One cannot see into the mind of another (State Vs. Santosh Kumar Singh, 2007 Cr LJ 964). However, motive alone is not sufficient to convict the accused in case of circumstantial evidence. Along with motive, there should be some further corroborative evidence. (Para 55)

A voluntary and true confession made by an accused can be taken into consideration against a co-accused by virtue of section 30 of the Evidence Act but as a matter of prudence and practice the Court should not act upon it to sustain a conviction of the co-accused without full and strong corroboration in material particulars both as to the crime and as to his connection with the crime [Ram Prakash V. State of Punjab (1959 SCR 1219)]. "As is evident from a perusal of section 30 extracted above, a confessional statement can be used even against a co-accused. For such admissibility it is imperative, that the person making the confession besides implicating himself, also implicates others who are being jointly tried with him. In that situation alone, such a confessional statement is relevant even against the others implicated. (Para 61)

A Judge does not presides over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape the tentacles of justice. That is what the justice stands for. (Para 65)

The principles governing the sentencing policy in our criminal jurisprudence have more or less been consistent. While awarding punishment, the Court is expected to keep in mind the facts and circumstances of the case, the legislative intent expressed in the statute in determining the appropriate punishment and the impact of the punishment awarded. Before awarding punishment a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances. Considering the depraved and shameful manner in which the offence has been committed, the mitigating factor would not outweigh the aggravating factors. In this case, there was no provocation and the manner in which the crime was committed was brutal. It is the legal obligation of the Court to award a punishment that is just and fair by administering justice tempered with such mercy not only as the criminal may justly deserve but also the right of the victim of the crime to have the assailant appropriately punished is protected. It also needs to meet the society's reasonable expectation from court for appropriate deterrent punishment conforming to the gravity of offence and consistent with the public abhorrence for the heinous offence committed by the convicts. (Para 67)

JUDGMENT

Hasan Foez Siddique, CJ:

1. Delay in filing the Criminal Petition Nos. 257 and 260 of 2022 is condoned.

2. Criminal Appeal No.90 of 2013 preferred by Dr. Miah Md. Mohiuddin, Criminal Appeal No.108 of 2013 and Jail Petition No.27 of 2014 preferred by Md. Zahangir Alam, Criminal Petition No.257 of 2022 and Jail Petition No.28 of 2014 preferred by Md. Nazmul, Criminal Petition No.260 of 2022 preferred by Md. Abdus Salam, Criminal Petition No.322 of 2019 filed by the State against Md. Nazmul for enhancement of sentence and Criminal Petition No.323 of 2019 filed by the State against Md. Abdus Salam for enhancement of sentence are directed against the judgment and order dated 15.04.2013, 16.04.2013, 17.04.2013, 18.04.2013 and 21.04.2013 passed by a Division Bench of the High Court Division in Death Reference No.57 of 2008, Jail Appeal Nos.631-634 of 2008 and Criminal Appeal Nos.3455 and 4058 of 2008.

3. Earlier Druto Bichar Tribunal, Rajshahi in Druto Bichar Tribunal Case No.38 of 2007 arising out of M.G.R. case No.90 of 2006 corresponding to Motihar Police Station Case No.02 dated 03.02.2006 and Sessions Case No. 280 of 2007, convicted the appellants Dr. Miah Md. Mohiuddin, Md. Zahangir Alam, Md. Nazmul and Md. Abdus Salam for the commission of offence punishable under section 302/34 of the Penal Code and sentenced each of them to death by the judgment and order dated 22.05.2008.

4. The prosecution case, in short, was that, Dr. S.Taher Ahmed was the seniormost Professor of the Department of Geology and Mining, University of Rajshahi. He was a Member of both the Departmental Planning Committee and the Expert Committee of the University. Pursuant to the pre-concerted plan, Dr. Taher was brutally killed at his Quarters (Pa-23/B) by all the accused in furtherance of their common intention on 01.02.2006 after 10.00 P.M. or thereabout on his arrival thereat from Dhaka. After the killing of Dr. Taher, his dead body was dumped into a manhole behind the place of occurrence house. In the morning of 03.02.2006, his dead body was recovered from the manhole. Thereafter, the son of the victim, namely, Mr. Sanjid Alvi Ahmed alias Himel (P.W.1), lodged an ejahar with Motihar Police Station, Rajshahi.

5. The Investigating Officers P.W.47 Md. Omar Faruk, P.W.48 Md. Golam Mahfiz and P.W. 49 Md. Achanul Kabir investigated the case. Accused Zahangir Alam, Abdus Salam and Nazmul made confessional statements before P.W.46 Magistrate Jobeda Khatun recorded under section 164 of the Code of Criminal Procedure. Finding prima facie case, the last Investigating Officer submitted a charge-sheet against all the accused including the acquitted accused Md. Azim Uddin Munshi and Md. Mahbub Alam @ Saleheen for committing offence punishable under section 302/201/34 of the Penal Code.

6. The Tribunal charged all the accused except Azim Uddin Munshi under section 302/34 of the Penal Code and the co-accused Azim Uddin Munshi was charged under section 201 of the Penal Code. They pleaded not guilty thereto and claimed to be tried.

7. The defence version of the case, as it appears from the trend of cross-examination of the prosecution witnesses, was that the accused are innocent and have been falsely implicated in the case and the alleged confessional statements of the accused Zahangir, Salam and

Nazmul are the products of police torture, oppression and maltreatment and the P.W.25 Dr. Md. Sultan-Ul-Islam Tipu and P.W.29 Golam Sabbir Sattar Tapu are responsible for the death of Dr. Taher.

8. After hearing both the parties and upon perusing the materials on record and having regard to the attending facts and circumstances of the case, the Tribunal came to the conclusion that the prosecution brought the charge home against the appellants and petitioners, and accordingly, it convicted and sentenced them. The Tribunal also found the co-accused Saleheen and Azim Uddin Munshi not guilty and accordingly acquitted them.

9. Against the said judgment and order of the Tribunal, the convicts preferred criminal appeals and jail appeals. The Tribunal transmitted the record to the High Court Division for confirmation of the sentence of death which was registered as Death Reference No. 57 of 2008. The High Court Division by the impugned judgment and order, dismissed the Criminal Appeal No.3455 and 4058 of 2008 and Jail Appeal Nos.631-634 of 2008. However, the High Court Division commuted the sentence of death to imprisonment for life awarded to convict Md. Abdus Salam and Md. Nazmul. It confirmed the sentence of death awarded to the appellant Dr. Miah Md. Mohiuddin and Md. Zahangi Alam. Against which, they preferred instant criminal appeals, criminal petitions and jail petitions and the State preferred Criminal Petition Nos.322-323 of 2019 for enhancement of sentence of Md. Nazmul and Md. Abdus Salam from imprisonment for life to death.

10. Mr. Khondakar Mahbub Hossain and Mr. S.M. Shahjahan, learned Senior Counsel appeared on behalf of appellant Dr. Miah Md. Mohiuddin in Criminal Appeal No.90 of 2013. Mr. Emran-A- Siddiq, learned Counsel appeared on behalf of appellant Md. Zahangir Alam in Criminal Appeal No.108 of 2013 and Jail Petition No.27 of 2014 and for Abdus Salam in Criminal Petition No.260 of 2022. Mr. Shamsur Rahman, learned Counsel appeared on behalf of Md. Nazmul in Criminal Petition No. 257 of 2022 and Jail Petition No.28 of 2014.

11. On the other hand, Mr. A.M. Amin Uddin, learned Attorney General along with Mr. Biswajit Debnath, Deputy Attorney General appeared on behalf of the respondent State in all the matters and they also appeared on behalf of the State in Criminal Petition for Leave to Appeal Nos. 322 -323 of 2019.

12. Mr. S.M. Shahjahan, learned Senior Counsel appearing for the appellant Dr. Miah Md. Mohiuddin, submits that the High Court Division and the Tribunal have committed the error of law and fact in convicting the appellant Miah Md. Mohiuddin on the basis of circumstantial evidence and confessional statements of co-accused Md. Zahangir Alam, Md. Nazmul and Abdus Salam though the confessional statements of co-accused are not admissible against this appellant to connect him with the occurrence and that there are no such strong circumstances that connect him with the occurrence. He further submits that motive which is one of the elements of the circumstantial evidence to connect the appellant Miah Md. Mohiuddin with the occurrence has not been proved and that the Courts below committed the error of law in convicting the appellant Miah Md. Mohiuddin relying upon such circumstantial evidence. He further submits that the statements made by the appellant Miah Md. Mohiuddin at the time of his examination under section 342 of the Code of Criminal Procedure is not admissible in evidence. He lastly submits that the sentence of death awarded to the appellant Miah Md. Mohiuddin is too severe and that his sentence may be commuted from death to one of imprisonment for life.

13. Mr.Emran-A- Siddiq, learned Counsel, appearing for the appellant Md. Zahangir Alam and Md. Abdus Salam, submits that their confessional statements were not made voluntarily and those were not true and not recorded following the provisions of sections 164 and 364 of the Code of Criminal Procedure. He further submits that the convict Md. Zahangir Alam and Abdus Salam in their statements under section 342 of the Code of Criminal Procedure categorically stated that their confessional statements were extracted by the Police keeping them in custody for more than 24 hours without producing them before Magistrate as required by law and that those were extracted by torturing them severely. In such a view of the matter, the Courts below committed an error of law in relying upon the confessional statements. He further submits that the postmortem report does not support the confessional statements made by the appellant Md. Zahangir Alam and petitioner Abdus Salam, so they are entitled to get the benefit of doubt. He further submits that the confessional statements were mechanically recorded without following the mandatory provision of law and that the Magistrate failed to make a memorandum to the effect that the confessional statements of the accused were made voluntarily. He further submits that column No. 8 of the prescribed form was not filled up in any of the confessional statements, which casts serious doubt about the voluntary character of them. He, lastly, submits that the Courts below failed to make difference between incised wound and incised looking wound and thereby, erroneously held that the postmortem report has corroborated the confessional statements, and thus, they erroneously relied upon the confessional statements of the confessing accused.

14. Mr. Shamsur Rahman, learned Counsel appearing for the petitioner Md. Nazmul in Criminal Petition No.257 of 2022 and Jail Petition No.28 of 2014, submits that the confessional statement of convict Nazmul was not voluntarily made and the same was not true and the same was not recorded following the provisions of law. He further submits that the confessional statement of Md. Nazmul was recorded after two days of his arrest and the confession was extracted by exercising coercive force upon him. Therefore, the learned Courts below committed error of law in relying upon the confessional statement of petitioner Nazmul.

15. Mr. Biswajit Debnath, learned Deputy Attorney General for the State, submits that the appellant Zahangir Alam and petitioners Md. Nazmul and Abdus Salam gave confessional statements voluntarily and those were recorded following the legal formalities as stipulated in sections 164 and 364 of the Code of Criminal Procedure. He further submits that the appellant Miah Md. Mohiuddin along with the co-convicts hatched a conspiracy for killing the victim Professor Dr. Taher Ahmed. They, in furtherance of their common intention, and in order to implement their ill desire of killing the innocent victim, hatched such a conspiracy and finally killed him. Therefore, the learned Courts below rightly convicted the appellants and petitioners and awarded the sentence of death to appellants Dr. Miah Md. Mohiuddin and Md. Zahangir Alam. He further submits that the circumstantial and oral evidence and the confessional statements of the co-accused, which are admissible against other co-accused under the provision of section 10 of the Evidence Act conclusively proved that the appellants had committed such a brutal offence and that the Courts below did not commit any error in convicting and sentencing them. He further submits that the High Court Division erroneously reduced the sentence of convict Nazmul and Abdus Salam from death to one of imprisonment for life.

16. Contents of the charge as framed against appellants are as follows:

"এতদ্বারা আপনি (২) আসামী (১) ডঃ মিয়া মোঃ মহিউদ্দিন, (২) মোঃ মাহাবুব আলম ওরফে সালেহী ওরফে সালেহীন ওরফে নুহু, (৩) মোঃ জাহাংগীর আলম, (৪) মোঃ আবদুস সালাম ও (৫) মোঃ নাজমুল-কে

নিম্নলিখিত রূপে অভিযুক্ত করিতেছি যেঃ-
আপনারা গত ০১-২-২০০৬ ইং তারিখ ২০.০০ ঘটিকা হইতে ০৩-০২-২০০৬ ইং তারিখ সকাল ৮.০০ ঘটিকার মধ্যে যে কোন সময়ে রাজশাহী মহানগরীর মতিহার থানাধীন রাজশাহী বিশ্ববিদ্যালয়ের প-২৩ বি নং বাসার পূর্ব পরিকল্পিত ও ষড়যন্ত্রমূলক ভাবে একই সাধারণ অভিপ্রায় পরস্পর যোগসাজসে রাজশাহী বিশ্ববিদ্যালয়ের ভু-তত্ত্ব ও খনি বিদ্যা বিভাগের প্রফেসর ডঃ এস, তাহের আহমেদকে হত্যা করিয়া উক্ত বাসার পিছনে ম্যানহোলে ফেলিয়া রাখেন। এবং ইহার দ্বারা দন্ড বিধির ৩০২/৩৪ ধারার অধীনে শাস্তিযোগ্য অপরাধ করিয়াছেন এবং তাহার (৪) আমার দায়রা আদালতে বিচার্য।
এবং এতদ্বারা আমি নির্দেশ দিতেছি যে, এই অভিযোগে (৫) উক্ত আদালতে আপনাদের বিরুদ্ধে অনুষ্ঠিত হইবে।
গঠিত অভিযোগ পড়ে ও ব্যাখা করে শোনালে আসামীগণ প্রত্যেকে নিজেদের নির্দোষ দাবী করে বিচার প্রার্থনা করেন।”

17. In this case, the prosecution has examined as many as 49 witnesses to prove the charge as framed against the appellants and defence has examined one witness.

18. The testimonies of prosecution witnesses, in a nutshell, are as follows:
Informant P.W.1 Md. Sanjid Alvi Ahmed, son of deceased Dr. Taher, in his testimony stated that on 01.02.2006 his father, after arrival at Rajshahi, made a phone call to his mother at about 7:45 P.M. and informed her that he had reached Rajshahi safely. After that, his mother did not receive any telephone call from his father. She told him that the mobile phone of his father had been switched off and she failed to connect him through the T & T number as well. She contacted Mr. Md. Aminul Islam and Mr. Md. Sultan-Ul-Islam, teachers of the university, in order to ascertain the whereabouts of the victim and they told her he did not attend the meeting of the Planning Committee held on 02.02.2006. Thereafter, on the night following 02.02.2006 at about 12:45 A.M. (03.02.2006), he started for Rajshahi by a private car and reached there at about 5:00 A.M. on 03.02.2006 and, thereafter, he along with his friend Yusuf Zamil Zumma went to the house of Professor Dr. Sultan-Ul-Islam Tipu. Dr. Golam Sabbir Sattar Tapu also went there. P.W.-1 came to know from them that at about 1:30 o'clock (early hours of 03.02.2006), the Proctor, Provost and some other teachers broke open the lock of the victim's house and entered there; but they did not find any trace of the victim. On 03.02.2006 at 7:00 A.M., he along with Sultan-Ul Islam Tipu, Golam Sabbir Sattar Tapu, Aminul Islam and Yousuf Zamil went there again and found the trouser of his father hanging in his bedroom on the first floor. He told others that his father had certainly arrived at his house at Rajshahi from Dhaka and all the teachers present there at that time consoled him; but only Dr. Mohiuddin stood in front of the gate at some distance hiding his eyes and wiping the same with his muffler. They again started searching. At one stage, the dead body of Dr. Taher was found in a manhole and it was lifted therefrom by the members of the local Fire Brigade and he saw an injury on the occipital region of his father and blood was oozing out therefrom. P.W.1 also saw blood at his mouth and nostrils and found marks of fastening towards his left heel. Thereafter, P.W. 1 Md. Sanjid Alvi Ahmed lodged an ejahar (Exibit-1).

19. P.W. 2 Md. Kamal Mostafa, Professor of the Department of Political Science of Rajshahi University and resident of Quarter No. Pa-23/A contiguous west of the house of Dr. Taher, deposed that accused Zahangir was the caretaker of the house of Dr. Taher. On 01.02.2006, the victim went to his house after Magreb prayer and on the following day (02.02.2006) at 9:00 A. M., he (P.W.2) was reading a newspaper sitting in front of his house and then Tipu went there and asked the caretaker Zahangir whether Dr. Taher had come or not. Then Zahangir replied that Dr. Taher had not come. Thereafter, Zahangir went inside the house probably in fear, but Tipu called out to Zahangir and told him to close the window of

the bedroom of Dr. Taher on the first floor which was left open. At that time, Zahangir was looking downwards and he was tearing off a rose. From his demeanour, it appeared that he had committed some crimes.

20. P.W.3, Md. Ziauddin Ahmed deposes that in the morning of 3rd February, 2006 he came to know that his maternal uncle (Dr. Taher) was missing. He went to the house of Dr. Taher and saw his dead body by the side of a manhole. On 03.02.2006, the police seized a kamiz, a sweater, a shawl, a white panjabi, a blue shirt and a vest from the dead body of Dr. Taher and prepared a seizure-list (exhibit-3(ka)) and he signed on it as a witness. P.W. 4 Md. Rabiul Islam, Assistant Professor of the Department of Pharmacy, Rajshahi University states that on 03.02.2006, in his presence, the police searched the bedroom of Dr. Taher and seized a coat, a pair of trousers with a black belt, a handkerchief, a comb and a ticket of National Travels dated 01.02.2006 and prepared a seizure-list (exhibit-3(kha)) whereupon he put his signature as a witness. Police also prepared another seizure list (exhibit 3 (Ga)) after seizing a plastic mat, a pillow, and a curtain from the ground floor of the house and this witness put his signature on it. P.W. 5 Md. Yousuf Zamil Zumma states in his evidence that in the morning of 03.02.2006, his friend Md. Sanjid Alvi Ahmed Himel (P.W.1) came to their house and told them that his father had been missing and thereafter they went to the house of Dr. Taher, and saw many teachers, employees and officers there and they all searched the house thoroughly and at one stage, the dead body of Dr. Taher was found in a manhole at the backyard. The police seized some apparel found with the deceased Dr. Taher and prepared a seizure-list (exhibit-3(ka)) in his presence and he signed it as a witness. P.W. 6, Md. Nazmul Islam in his evidence states that on 05.02.2006 Police recovered a knife wrapped up in polythene at the showing of the accused Azim Uddin from a heap of bricks at Khojapur Mouza and seized it. They prepared a seizure-list (exhibit-3(Gha)) and this witness put his signature on it as a witness. P.W.7 Md. Monjurul Haque states that on 05.02.2006 police recovered a knife from a heap of bricks near the house of Azim Uddin alias Azim Munshi at Khojapur and seized it. He put his signature in the seizure-list (exhibit-3(Gha)/2). P.W.8 Md. Abdul Malek @ Mintu deposes that on 05.02.2006 police recovered a knife wrapped up in a polythene bag from a heap of bricks and he signed on a seizure-list. P.W. 9 Md. Jamal Ahmed Babu testifies that on the night following 07.02.2006 at about 12:00/12:45 o'clock, the police called him from his house and took him to the house of Abul Kashem at Kadirganj and he saw a bag, a shirt, a pair of trousers, a coat, sweater and books there and the police seized them and prepared a seizure-list (exhibit-3(uma)) and he signed on it as a witness.

21. P.W.10 Piasmin Ara Dina, P.W. 11 Kiasmin Ara Lucky, P.W. 12 Md. Torikuzzaman Ovi, P.W. 16 Md. Tofazzal Hossain, P.W. 17 Md. Abdul Hadi, P.W. 19 Md. Selim Reza, P.W. 23 S. Tarek Ahmed, P.W. 28 Md. Maidul Haque, P.W. 29 Golam Sabbir Sattar, P.W. 31 Md. Khoda Bux and P.W. 35 Md. Nazrul Islam were tendered witnesses.

22. P.W.13, Md. Farjon deposes that at one night about one year earlier, police called him out from his house and took him to the house of accused Zahangir and he saw a mobile phone along with a charger there and the police seized the same and prepared a seizure-list and he put his left thumb impression thereon. P.W.14 Md. Dulal testifies that on 07.02.2006, police called him out from his house and he saw a mobile phone and the police took his signature on a seizure-list (Exhibit-3 (cha)). P.W.15, Md. Zahangir Alam, testifies that on 12.02.2006, he saw some plain-clothe policemen and a handcuffed person and as per his pointing out two ATM cards and a piece of paper were recovered from underneath a stone and the police seized the same and prepared a seizure-list (exhibit-3(chha)) and he signed on it as a witness.

23. P.W.18, Md. Abdus Salam states that he was the Registrar of the Rajshahi University. On 02.02.2006, after 11:00 P.M., Professor Aminul Islam and Sultan- Ul-Islam of the Department of Geology and Mining told him that they had come to know from a telephonic conversation with the wife of Dr. Taher that he had reached Rajshahi in the evening of 01.02.2006; but he was not receiving any phone call. He adds that they went to the house of Dr. Taher and found it under lock and key and sent for the caretaker Zahangir to come with keys. The police personnel also went there. On being asked caretaker Zahangir said that he had been suffering from fever and as such he would not be able to come there. He then sent a microbus along with a guard to bring back Zahangir and after questioning him on his arrival, Zahangir told that Dr. Taher had not come. They opened the house with the keys, went upstairs and in presence of the police personnel, some teachers and guards, the closed door of a room was opened by means of a shovel and they looked for the travel bag of Dr. Taher to ascertain as to whether he had returned from Dhaka or not. On 03.02.2006 at about 6:30/7:00 A.M., he was informed that Dr. Taher's son Himel had already reached Rajshahi. Then he also rushed to the house of Dr. Taher and found many teachers including the Pro-Vice-Chancellor Mr. Mamunul Keramat there and they searched the rooms of both the floors of the house and at one stage, they went to the backyard of the house and found the dead body of Dr. Taher in one of the manholes. After the recovery of the dead body, the police held an inquest thereon and prepared an inquest report and he signed on it. On 05.04.2006, the Investigating Officer seized the bio-data of Dr. Mohiuddin, papers relating to his appointment and the decisions of the Planning Committee about his promotion and the copies of note-sheets from his (P.W. 18) office and prepared a seizure-list (exhibit-3(Ja)) and he signed on it. P.W.21, Professor Md. Mushfique Ahmed, a Professor of the Department of Geology and Mining in his testimony states that on 02.02.2006, at about 11:45 P.M. receiving a phone call from the Registrar of the University he went to the house of Dr. Taher, and came to know that caretaker Zahangir had been called for but Zahangir did not turn up. Registrar sent a microbus of the university to bring Zahangir. The police also reached there and after a while, the caretaker Zahangir reached there and on being questioned as to why he had failed to turn up, he replied that he had a fever and the Registrar touched his forehead with his hand and told that Zahangir was really suffering from a fever. Caretaker Zahangir told that the keys of the rooms of the first floor were lying with Dr. Taher and that he would come on 03.02.2006 and at that time, a conversation was going on between Mr. Aminul Islam and the wife of Dr. Taher over a mobile phone. He also talked to her over the mobile phone of Aminul Islam and she requested him to look for her husband and she also told Aminul Islam over the mobile phone to break open the door and then a shovel was fetched and the door of the first floor was broken open by means of the shovel by the area guard and they searched all the rooms there and looked for the travel bag and coat of Dr. Taher; but nothing was found. He came to know that Himel (P.W.1) had already started for Rajshahi from Dhaka and told the local area guard to take Himel to the house of Sultan-Ul-Islam on his arrival and at about 3:00 o'clock at night, they left for their respective houses taking up a decision that they would start searching Dr. Taher in the morning. On 03.02.2006 at about 8:00 A. M., the Chief Medical Officer of the university informed this witness over telephone that the dead body of Dr. Taher had been found in a safety tank in the backyard of his house. At about 8:30 A.M., he rushed to the house of Dr. Taher and saw his dead body in the safety tank in a sitting position with his head drooping forward and there was clotted blood on his occipital region. His dead body was recovered. On 21.03.2006, the Investigating Officer seized the personal file of Dr. Mohiuddin, two C.Ds, and one hazira khata from his office-chamber and prepared a seizure-list (exhibit-3 (jhha)) and he (P.W. 21) signed on it as a witness. They told Zahangir that the wife of Dr. Taher intimated that Dr. Taher had reached Rajshahi on 01.02.2006; but he (Zahangir) told that Dr. Taher had not arrived at Rajshahi and when he (Zahangir) was asked

as to his whereabouts on the night following 01.02.2006, Zahangir told that on 01.02.2006 at the time of Magreb prayer, he switched on the lights in the ground floor of the house and afterward, he went to take his meal and came back at about 9:30 P.M. and stayed there overnight. This witness adds that he was Member of the Planning Committee of the Department of Geology and Mining for the last 15 (fifteen) years and he had been the Chairman of the Department from 1996 to 2000 and the promotion matter of Dr. Mohiuddin as Professor was discussed in six meetings of the Departmental Planning Committee and unanimous decisions were taken thereon in all the six meetings and in the first meeting of the Planning Committee, they noticed that it was the decision of the syndicate that Dr. Mohiuddin would have to publish two papers for his confirmation as Associate Professor on promotion from the post of Assistant Professor; but in his appointment letter, that was not stated and accordingly they wrote a letter to the Registrar of the university with a view to removing this anomaly and the Registrar replied concurring with them and then Dr. Mohiuddin applied for his confirmation as Associate Professor on the basis of his two publications; but one paper was shown twice relating to his confirmation and that was published while he was an Assistant Professor and when Dr. Mohiuddin was apprised of this mistake, he again submitted an application annexing two papers and they (P.W. 21 and others) recommended confirmation of Dr. Mohiuddin as Associate Professor as Members of the Planning Committee. This witness further adds that Dr. Mohiuddin made an application for his promotion as Professor prior to holding the fourth meeting of the Departmental Planning Committee and they came to know that simultaneously Dr. Mohiuddin made another application of a similar nature for his promotion to the office of the Registrar and the Planning Committee held that there was no scope to take any decision in this regard when the similar application was submitted both to the Planning Committee and the office of the Registrar and as per the Rajshahi University Act of 1973, without the decision of the Planning Committee, nobody can be promoted and as such the Vice-Chancellor sent back the application of Dr. Mohiuddin to the Chairman of the Department for taking necessary decision thereon and when they (P.W. 21 and others) sat in the 5th meeting of the Planning Committee, Dr. Taher expressed his indignation at the conduct of Dr. Mohiuddin. He states that for promotion to the post of Professor, a candidate has to put in 12 (twelve) years of service including 5 (five) years of service as Associate Professor and he needs to have two publications and Dr. Mohiuddin, having completed 12 (twelve) years of service on 04.01.2006, applied for Professorship again on 18.01.2006 and they sat at the meeting of the Planning Committee on 02.02.2006 and Dr. Taher was supposed to be present at that meeting; but he was absent thereat and at that meeting, they came to learn that again Dr. Mohiuddin made another application to the University Authority for his promotion and that was processed and sent to the experts for their opinion and they took a decision that there was no scope to consider the application of Dr. Mohiuddin for promotion in view of making similar application for promotion to the University Authority and its processing to that end. In his cross-examination, the P.W. 21 states that in 2005, a Fact-Finding Committee was constituted with regard to the piracy and standard of some papers of Dr. Mohiuddin by the Departmental Academic Committee and the Fact-Finding Committee submitted its report while Dr. Mohiuddin was in jail-custody.

24. P.W.22 is Sultana Ahmed Reshmi wife of deceased Dr. Taher. In her testimony she states that they resided at Rajshahi University Campus up to 2005 and in the interest of the education of their children, she moved to Dhaka and Dr. Mohiuddin was a student of her husband and he visited their house at Rajshahi from time to time and she knew him accordingly. Dr. Mohiuddin moved heaven and earth for his promotion as Professor and her husband (Dr. Taher) told him that he would be promoted as a matter of course and probably

on 13th April, 2005, Dr. Mohiuddin wanted to come to their house while she was there at Rajshahi University Campus for having a talk on his promotion; but her husband forbade him to visit their house till the settlement of his promotion matter. While she was at their house at the University Campus, one day in the afternoon of 2005, her husband went to the university and returned to the house at 9:45 P.M. and when she asked her husband for the delay in returning to the house, he told her that Nur Mohammad of the Department of Geography, Abdul Hye of the Department of Philosophy and one Nazrul of the Department of Commerce had detained him and told him to take steps for the promotion of Dr. Mohiuddin and her husband further told her that he had washed the dirty linen of Dr. Mohiuddin in public and this incident probably took place in the month of August, 2005.She states that her husband came to Dhaka from Rajshahi on 26th January, 2006 for five days and then irregularities pertaining to the promotion of Dr. Mohiuddin were reported in newspapers and at that time, her husband had discussions with the Departmental Chairman Shamsuddin and with Sanjid, Mushfique and Tapu over his mobile phone in respect of promotion matter of Dr. Mohiuddin and on 01.02.2006 at 2:00 P.M., her husband started for Rajshahi from Dhaka and reached there at about 6:00/6:30 P.M. and at about 7:45 P.M., he phoned her and told her that there was no electricity and he contacted the house of Sultan-Ul- Islam Tipu to send the maid-servant to his house on the following day. On 02.02.2006, Dr. Taher did not phone her either in the morning or in the afternoon and as such she became worried and at about 9:00 P.M., she tried to communicate with Dr. Taher over T & T phone; but she could not get through, though she heard its ringing sound and by that reason, she became more worried and made a phone call to the next- door neighbour Hazi Kamal and wanted to know about the whereabouts of her husband from the son of Hazi Kamal, but he replied that he did not see Dr. Taher and the house was under lock and key. She adds that later she contacted Aminul Islam, a teacher in the department, over the telephone and asked her query. Aminul Islam told her that he had not met Dr. Taher, and then she talked to some other teachers in the department over the telephone and requested them to see what was what by breaking open the lock of the door and they told her that nobody was found inside after breaking open the lock and subsequently she sent her son to Rajshahi. She deposes that a meeting as regards the promotion of Dr. Mohiuddin was scheduled to be held on 02.02.2006 and on 01.02.2006 during night-time when Dr. Taher was talking to her over telephone, he told her that the caretaker Zahangir had been staying at the house to prepare his lessons and on 03.02.2006, the dead body of her husband was recovered from a safety tank at the backyard of the house. Before his journey for Rajshahi, she found her husband in a pensive mood and on being questioned, he told her that there were irregularities relating to the promotion of Dr. Mohiuddin and in the meeting, he would say ‘no’ and her husband opposed the promotion of Dr. Mohiuddin in various meetings held earlier and that is why, Dr. Mohiuddin misbehaved with her husband and her husband told her from time to time that Dr. Mohiuddin was very discourteous and insolent to him. She deposes that about three years back, her husband told her that Dr. Mohiuddin had threatened him with throwing him down from the second floor of the university building. She had a talk with her husband about a job in Petro-Bangla and Dr. Mohiuddin also tried for that job and one of his influential relatives told Dr. Mohiuddin that he would arrange the job for him (Dr. Mohiuddin) in Petro-Bangla provided he was promoted as Professor and then Dr. Mohiuddin became desperate for his promotion as Professor.

25. P.W.24 Constable Md. Jasim Uddin carried the dead body of Dr. Taher to Rajshahi Medical College for autopsy and after an autopsy, he handed over the dead body to the victim’s son. P.W.25, Dr. Md. Sultan-Ul-Islam Tipu, Professor of the Department of Geology and Mining at the University of Rajshahi, deposes that on 01.02.2006 at about 10:05 P.M., his wife told him that Dr. Taher had made a telephone call at 7:20 P.M. and requested her to

send the maid-servant to his house after doing her household works at their building on the following day and after some time, he made a telephone call to Dr. Taher and the telephone kept on ringing, but nobody responded thereto and he thought that Dr. Taher had fallen asleep because of the exhaustion of the journey. He states that in his evidence that on 02.02.2006 at 8:45 A.M. on his way to the department, he went in front of the house of Dr. Taher by a rickshaw and saw two windows of the bedroom of Dr. Taher open on the first floor and at that point of time, the caretaker Zahangir was standing in front of the house. He got down from the rickshaw and entered the courtyard of the house of Dr. Taher and asked Zahangir as to whether Dr. Taher had arrived or not; but Zahangir went inside the house quickly and after a while, he called Zahangir and then Zahangir came out and told him that Dr. Taher had not arrived. At that time, Zahangir looked unmindful and somewhat restive. He told Zahangir as to why the two windows of the bedroom of Dr. Taher were open. Then Zahangir went to shut down the windows and he went to the department by the rickshaw. He states that on 02.02.2006, a meeting of the Departmental Planning Committee was held; but Dr. Taher was absent thereat and on 02.02.2006 at about 10:40 P.M., Md. Aminul Islam, an Assistant Professor in the Department of Geology and Mining, went to his house and told him that the wife of Dr. Taher informed him that Dr. Taher had reached Rajshahi on 01.02.2006; but his whereabouts were unknown and she requested him to look for the whereabouts of Dr. Taher at his house and later he along with Aminul Islam went to his house but found the same under lock and key and they saw some guards on the road in front of the house and when they asked the guards as to whether they knew the house of the caretaker Zahangir or not, then two guards rushed to the house of the caretaker Zahangir. He further states that they apprised the Registrar Abdus Salam of the matter and the Registrar told the Police, Proctor and Professor Musfique Ahmed to go in front of the house of Dr. Taher and after a while, two guards who went to the house of Zahangir returned with three keys and the gate of the courtyard of the house was opened with one of the keys and by another key, they opened the entrance door of the house and entered the drawing, dining rooms and room of Zahangir and also went upstairs and at that time, the Proctor and the police reached there and by the third key, they tried to open the room in the first floor; but in vain. The door was broken open with a shovel and they entered the bed room of Dr. Taher. In presence of Registrar Abdus Salam, Proctor Shamsul Islam Sardar, Police Personnel, Professor Mushfique Ahmed and others, caretaker Zahangir was brought to the house, but they did not find the bag, clothes, food and specs of Dr. Taher. At that point of time, Mrs. Taher again made a mobile phone call to Aminul Islam and Registrar Abdus Salam informed Mrs. Taher that the bag, food and wearing- apparels of Dr. Taher were not inside the bed room and then Mrs. Taher intimated that on his arrival at Rajshahi, Dr. Taher told her that there was no electricity and he was lying on bed and she requested the Registrar to look for the whereabouts of Dr. Taher thoroughly. At 7:00 A.M., this witness along with Dr. Golam Sabbir Sattar, Aminul Islam, Himel and Zumma went in front of the house of Dr. Taher and saw many teachers of the university including the Pro-Vice-Chancellor Dr. Mamunul Keramat. The Registrar also went there and after opening the lock, they again entered the bed room of Dr. Taher in the first floor and seeing a pair of black trousers with a black belt hanging on a hanger, Himel told that his father had certainly reached Rajshahi and after searching the house, they searched the courtyard of the house and at one stage, the dead body of Dr. Taher was found in a manhole at the backyard of the house and in presence of the Pro-Vice-Chancellor and the police, the dead body was identified and the police held an inquest on the dead body and thereafter it was sent for post-mortem examination and after holding of janaza prayer in the afternoon, the dead body was taken to Dhaka and it was buried there on 04.02.2006.He further adds that on 03.03.2006 the police also seized a blood-stained pillow which was wrapped up with a piece of cloth, a blood-stained carpet, a blood-stained window-screen and a plastic mat from the room of the

caretaker Zahangir at the place of occurrence house and prepared a seizure list (exhibit 3 (Ga)) and he put his signature on it.

26. P.W.26 Dr. Kamrul Hasan Mazumdar, Professor of the Department of Geology and Mining, states that on 19.03.2006 at about 2:15 o'clock, the Investigating Officer went to the department and in his presence, the sealed office-chamber of Dr. Taher was opened and on search, the Investigating Officer seized some writings of Dr. Taher relating to the length of service and promotion of Dr. Mohiuddin and prepared a seizure-list (exhibit-3 (niyo)) and he signed on it as a witness.P.W.27 Dr. Md. Badrul Islam, Professor of the Department of Geology and Mining, states that he was in Brunei in connection with a conference from 12.01.2006 to 30.01.2006 and he returned to Dhaka on 31.01.2006 and on 01.02.2006 at about 3:00/3:30 P.M., he came to know that the Planning Committee would hold a meeting on 02.02.2006 and accordingly he participated in the meeting held on 02.02.2006 and the Chairman of the Department Dr. Shamsuddin Ahmed, Professor Mushfique Ahmed and Professor Anwarul Islam were also present at that meeting and Professor Anwarul Islam told him to hold inquire over telephone as to why Dr. Taher did not attain the meeting. He tried to contact him over his cell phone; but he did not respond. In the morning of 03.02.2006, he went to the house of Dr. Taher and saw many people there and after about 10 minutes of his arrival there, the dead body of Dr. Taher was found in a safety tank at the backyard of the house and the Fire Brigade personnel lifted the dead body from the safety tank and they attended the namaz-e-janaza of Dr. Taher in the afternoon at Rajshahi University Central Mosque. This witness wrote an ejahar as per the oral statement of Himel and he signed the ejahar as its scribe. P.W.29, Dr. Golam Sabbir Sattar Tap was tendered by the prosecution for cross-examination by the defence. He denies a defence suggestion that he and Dr. Tipu are involved in the killing of Dr. Taher. P.W. 30 is Md. Afarul Islam in his testimony states that he was going to Khojapur Maddhyapara from Rajshahi University Campus and at the call of the police, he halted and they seized the SIM of a mobile phone from a woman (Rani) and thereafter he signed on a piece of paper.P.W.32 Md. Akkas Ali deposes that about two years back, the Investigating Officer seized some alamats and at the instance of the police, he signed a piece of paper.P.W.33 Md. Masud Rana states that one day, he came to DB (Detective Branch) Office and his brother was a Sub-Inspector at that office and then some staff of the DB office were writing something on a piece of paper on a table and at their instance, he signed the piece of paper.P.W.34 Md. Minhazul states that he is a cow-trader and the police found some pieces of torn paper underneath a stone on the bank of the river Padma and at their instance, he signed a piece of paper and he also made a statement to the Magistrate.P.W.36 Md. Manik Hossain states that on 12.02.2006, he was on duty as a Sepoy at Shahapur Border Outpost and at a distance of about 200 yards to the west from the outpost, he went to a beat for performing his duty and found two persons moving about and one person disclosed his identity as a member of the DB police and after 10/15 minutes, three white micro-buses went there and 12/15 people being variously armed were on board the micro-buses and out of them, one accused was hand-cuffed and those 12/15 people took the hand-cuffed accused to the bank of the river and they found some papers beneath a stone and picked up the same.

27. P.W.37 Mst. Bulbuli states that on 02.02.2006 at about 9:00 A.M., she went to the house of Dr. Taher in order to prepare his breakfast and pressed the calling-bell of the house and then Zahangir came out and told her that Dr. Taher would come on 03.02.2006 and then she went away.P.W.38 Md. Enamul Haque deposes that on 05.04.2006, the police seized some papers from the office of the Registrar in his presence and prepared a seizure-list and he signed on it.

28. P.W.39 Dr. Syed Shamsuddin Ahmed in his testimony states that on 02.02.2006 at about 11:00 P.M., his colleague Dr. Golam Sabbir Sattar phoned him and told that Dr. Taher had arrived at Rajshahi, but he was not available at his house. He continued keeping contact with Dr. Golam Sabbir Sattar and Dr. Sultan-Ul-Islam over telephone until 2 A.M. that night and wanted to know from them as to whether Dr. Taher had arrived at his house or not and they replied that Dr. Taher was not available thereat. He deposes that in the early morning of 03.02.2006, he went to the house of Dr. Taher and saw many people and police personnel there and Dr. Taher was being looked for and at one stage, the neighbour of Dr. Taher, namely, Professor Kamal Mostafa of the Department of Political Science ran to him and told him that the dead body of Dr. Taher had been found in a manhole and after performance of janaza, the dead body was taken to Dhaka for burial. He further deposes that at the time of the occurrence, he was the Chairman of the Department of Geology and Mining and Dr. Taher was the seniormost Professor of the department and about one year prior to the occurrence, some complications cropped up centering on one promotion of the department and the first meeting of the Planning Committee with regard to the promotion of Dr. Mohiuddin was held on 28.04.2005 and at that meeting, the Planning Committee found some inconsistencies between the decision of the selection board and the appointment letter of Dr. Mohiudddin as Associate Professor on promotion in consequence of which the Planning Committee asked for an explanation from the Registrar in this regard and subsequently Dr. Mohiuddin applied for his confirmation as Associate Professor; but he showed the same paper (publication) twice therefor and so the Planning Committee did not make any recommendation for his confirmation as Associate Professor and later on, Dr. Mohiuddin amended the two papers and accordingly a recommendation was made for his confirmation as Associate Professor. He also deposes that the Planning Committee found that Dr. Mohiuddin made simultaneous applications for promotion to the University Administration and the Planning Committee and as such at that time, the Planning Committee did not recommend the case of Dr. Mohiuddin for promotion; but at the instance of the Vice-Chancellor of the University, the application made to the University Administration was referred to the Planning Committee and the said Committee did not consider the case of Dr. Mohiuddin for lack of required length of service. He further states that again Dr. Mohiuddin applied for promotion as Professor in the month of January, 2006 and the meeting of the Planning Committee was slated for 02.02.2006 and at that meeting of the Planning Committee held on 02.02.2006, it transpired that Dr. Mohiuddin again applied for promotion simultaneously to the Planning Committee and the Vice-Chancellor and since the matter was referred to the referees by the Vice-Chancellor, the Planning Committee washed its hands of the matter. He deposes that the Departmental Academic Committee inquired into the allegation of forgery brought against Dr. Mohiuddin and found the same true and as such the relevant paper was not published in the journal as requested by Dr. Mohiuddin. He further deposes that Dr. Taher and Dr. Mohiuddin had been at odds with each other for a long time and both of them expressed their indignation over the use of a laboratory of the department and many teachers of the university told Dr. Taher that the promotion of Dr. Mohiuddin got stuck because of him as he told him(P.W. 39) and Dr. Taher requested him (P.W. 39) as the Chairman of the Department to take some action against Dr. Mohiuddin. He also deposes that he is a witness to the inquest-report and on 12.04.2006, the police seized some alamats including some pictures, slides etc. and prepared a seizure-list (exhibit-3(ta)) and he signed the same as a witness.

29. P.W.40 Md. Motlebur Rahman states that on 02.03.2006, he was on duty as Sub-Inspector at Bhanga Police Station, Faridpur and on that day, he verified the permanent address of Dr. Taher and found it correct. P.W. 41 Md. Monjurul Islam, S.I, Kurigram, states

that he served the attachment warrant against the accused Salehin and submitted a report accordingly. P.W.42 Md. Foyzur Rahman states on 03.02.2006, he was on duty as Officer-in-Charge of Motihar Police Station, Rajshahi and on that day, on the basis of a written ejahar of the informant Sanjid Alvi Ahmed, he registered the case by filing in the prescribed form of the First Information Report.

30. P.W. 43 Dr. Chowdhury Sarwar Zahan testifies that at the meeting of the Departmental Academic Committee held on 11.07.2005, the letters of Dr. Sultan-Ul-Islam and Dr. Mohiuddin addressed to the Editor of Bangladesh Geo-Science Journal were discussed and Dr. Sultan-Ul-Islam claimed that he was a co-author of the research paper sent to the editor of the journal for publication by Dr. Mohiuddin; but Dr. Mohiuddin submitted the research paper to the editor of the journal for publication in his single name claiming the same to be his own original work and in this situation, the Departmental Academic Committee formed a Two-Member Fact- Finding Committee with him (P.W. 43) as its convener at the instance of Dr. Taher and others. P.W. 43 also testifies that after inquiry and hearing Dr. Mohiuddin and all concerned, the Fact Finding Committee submitted its report on 22.04.2006 and the Committee was of the opinion that Dr. Sultan-Ul-Islam Tipu had contributed to the research paper at the preliminary stage and the Departmental Academic Committee, as well as the Departmental Planning Committee found the evidence of plagiarism and piracy in the professed paper of Dr. Mohiuddin. He also testifies that over the use of the Micro-Paleontology Laboratory of the department, bitterness developed between Dr. Taher and Dr. Mohiuddin as a result of which Dr. Mohiuddin wrote to the Departmental Chairman twice in 2001 to initiate a resolution of condemnation against Dr. Taher, but without any result. When Dr. Mohiuddin applied for Professorship, he showed one publication twice; but on a subsequent amendment, Dr. Mohiuddin showed those two publications which were earlier shown at the time of his promotion as Assistant Professor and this amounted to a violation of the relevant provisions of the Rajshahi University Act. Dr. Taher was very much vocal against the irregularities committed by Dr. Mohiuddin and Dr. Taher was a teacher of the Department of Geology and Mining, a Member of the Departmental Planning Committee and a Member of the Expert Committee at the same time and he did not compromise with any irregularities or illegalities and he used to take a stern attitude thereto. At the time of his attempted promotion as Professor through a rebate, Dr. Mohiuddin, by way of showing off additional publications, used the findings of the self-same research under different captions which were opposed by Dr. Taher and Dr. Taher was also very much annoyed at and fed up with the political pressure of different quarters exerted upon him for the promotion of Dr. Mohiuddin and he disclosed the same to them. In his cross-examination, Chowdhury Sarwar Zahan states that the single opinion of deceased Dr. Taher Ahmed in the Departmental Planning Committee might not have decisive force, but as a senior teacher in the Department, he had an influence upon other teachers and they would certainly count his opinion.

31. P.W.44 Dr. Md. Enamul Haque states in his evidence that while he was on duty as a Lecturer in the Department of Forensic Medicine of Rajshahi Medical College on 03.02.2006, he held an autopsy on the deceased Dr. Taher identified by Constable No. 192 Jashim Uddin as a Member of the Medical Board and found the following injuries on the person of the victim:

> "(1) One incised-looking wound on the occipital scalp, size is $2\frac{1}{4}''$ X $\frac{1}{2}''$ X bone-depth;
> (2) One haematoma on the occipital region, size is 3″ X 3″;

(3) One bruise on the scapular region, vertically placed (right scapula), size is $2\frac{1}{2}'' \times \frac{1}{2}''$;

(4) One bruise on the back of the right upper chest, size is $4'' \times \frac{1}{2}''$; and

(5) One bruise on the back of right abdomen above the right iliac chest, size is $2'' \times \frac{1}{2}''$.

On detailed dissection, brain was found injured. Intra-cranial haemorrhage was detected with fracture of occipital bone.”

32. He states in his evidence that in his opinion, the death of Dr. Taher was due to shock and intra-cranial haemorrhage resulting from the above-mentioned injuries which were ante-mortem and homicidal in nature.

33. P.W. 45 Dr. Md. Emdadur Rahman states that the autopsy on the deceased Dr. Taher was performed through a Medical Board and as a Member of the Medical Board, he signed the autopsy-report.

34. P.W. 46 Jobeda Khatun in her testimony states that being a Magistrate of the 1st Class at Rajshahi Metropolitan Magistracy, on 07.02.2006, she recorded the confessional statement of the accused Zahangir and it was read over to Zahangir and he signed it. On 08.02.2006, she recorded the confessional statement of the accused Nazmul and the same was read over to him and he signed it. She next states that on 12.02.2006, she recorded the confessional statement of the accused Md. Abdus Salam and it was read over to him and he signed on it and the confessions of all the accused recorded under Section 164 of the Code of Criminal Procedure were voluntary. In her cross-examination, she denies a defence suggestion that the accused Nazmul was tortured to such an extent that he was unable to sit or stand. On 19.06.2006, she received the retraction petitions of all the confessing accused.

35. P.W. 47 Md. Omar Faruk deposes that on 03.02.2006, on the basis of a written ejahar lodged by the informant Md. Sanjid Alvi Ahmed, the Officer-in-Charge of Motihar Police Station Foyzur Rahman registered the case and endorsed it to him for investigation, and having taken up investigation thereof, he visited the place of occurrence, held an inquest on the dead body of Dr. Taher, made an inquest-report and sent the dead body to the morgue of Rajshahi Medical College Hospital through Constable No. 192 Md. Jashim Uddin. He seized a kamiz, a blood-stained shawl, a navy-blue sweater, one blue shirt and a blood-stained torn panjabi which were attached to the body of the deceased Dr. Taher and prepared a seizure list (exhibit-3(ka)) and signed the same as its maker. He further deposed that on 03.03.2006 he seized a blood-stained carpet, a blood-stained window-screen, a blood-stained pillow and a plastic mat from the room of Zahangir in the ground floor of the place of occurrence and prepared a seizure list (exhibit 3(Ga)).P.W. 48 Golam Mahfiz discloses in his evidence that on 12.02.2006, he was on duty at the Detective Branch of Rajshahi Metropolitan Police, Rajshahi and on that day, in view of the requisition of the Investigating Officer Md. Omar Faruk, he (P.W.48) seized the mobile phone of Dr. Mohiuddin, namely, Siemens S-55, bearing no. 0176408243 as produced by the assistant of Mr. Saiful Islam Shelly, Advocate, namely, Md. Mostakim Billah.P.W.49 Md. Achanul Kabir testifies that he took over the investigation of the case on 14.02.2006, visited the place of occurrence, perused the case docket, sent the relevant alamats to the Chief Chemical Examiner, Mohakhali, Dhaka for chemical examination with the consent of the Court, obtained the opinion of the Chemical

Examiner on the said alamats, examined some witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure; and having found a prima facie case, he submitted charge-sheet No. 36 dated 17.03.2007 against the accused under Sections 302/201/34 of the Penal Code.

36. The sole D.W. is Md. Mahbub Morshed, Manager, Brac Bank Limited, Rajshahi. He claims in his evidence that on 30.11.2006, Bangladesh Bank accorded them permission to open a branch of Brac Bank Limited at Rajshahi, and accordingly a branch of Brac Bank was opened on 07.12.2006 and there is no branch of Standard Chartered Bank at Rajshahi.

37. There is no eye witness in this case and the prosecution case is based on circumstantial evidence and confessional statements of three accused persons. It appears from the materials on record that the convict appellant Md. Zahangir Alam and petitioners Md. Nazmul and Md. Abdus Salm made confessional statements before the Metropolitan Magistrate, Rajshahi which were marked as exhibit-12, 13 and 20 respectively. P.W.46 Jobeda Khatun, Metropolitan Magistrate, Rajshahi recorded those confessional statements.

38. The contents of the confessional statement of appellant Md. Zahangir Alam run as follows:

"আমি মির্জাপুর হাইস্কুলে পুরাতন ১০ম শ্রেণীতে পড়ি। মার্চের ৯ তারিখে আমার এস.এস.সিপরীক্ষা। আজ থেকে ৩ মাস আগে থেকে রাজশাহী বিশ্ববিদ্যালয়ের শিক্ষক ডঃ তাহের স্যারের বাসার কেয়ারটেকার হিসাবে আছি। সন্ধ্যা থেকে সকাল ৭/ ৮ টা পর্যন্ত ডিউটি থাকতো। গত ১৩-০১-২০০৬ তারিখে সন্ধ্যা পৌনে ছয়টার দিকে ক্যাম্পাসের ভেতরের শিশু পার্কের মোড়ে ভু-তত্ব ও খনি বিভাগের প্রফেসর মোঃ মহিউদ্দিনের সাথে দেখা হয়। তিনি আমাকে অনেক কথা জিজ্ঞাসা করেন— কি করি না করি সে বিষয়ে। তখন তিনি আমাকে বলেন তুমি আমার কথামত কাজ করলে তোমাকে কম্পিউটার কিনে দেবো। ২৬-০১-২০০৬ তারিখে পশ্চিম কোয়ার্টারের পুকুর পাড়ে মহিউদ্দিন স্যারের সাথে আমার দেখা হয়। তাহের স্যার কবে আসবে ঢাকা থেকে—একথা জিজ্ঞাসা করে। আমি বলি স্যার, আজ ঢাকায় গেছেন । আসবেন ৩ তারিখে । ক্যাম্পাসে কাজ থাকলে আগেও আসতে পারেন। তখন মহিউদ্দিন স্যার বলে যে, তাহের স্যার ফিরে আসলে তাকে হত্যা করতে হবে। স্যারকে হত্যা করলে আমাকে কম্পিউটার ও আমার ভাইকে চাকুরী দেয়া হবে বলে মহিউদ্দিন স্যার বলেন।

আমি বলি যে, আপনি লোকজন দিবেন। কাজ হবে। তখন আমাকে চলে যেতে বলে স্যার । আমি চলে যাই। ২৭-০১-২০০৬ তারিখে সন্ধ্যায় মাগরিব নামাজ পড়তে মসজিদে যাই। সেখানে মহিউদ্দিন স্যার শিবিরের সভাপতি সালেহীনের সাথে আমার পরিচয় করে দেন আর বলেন যে, সালেহীন এর সাথে সম্পর্ক রেখো। তাহলে ক্যাম্পাসে চলতে তোমার সমস্যা হবে না। কথা বার্তায় জানলাম সালেহীন মাদারবক্স হলে থাকে। তখন মহিউদ্দিন স্যার বলেন যে, আগামী ৩০-০১-২০০৬ তারিখ তাহের স্যারের বাসায় বসবো সন্ধ্যায়। তার কথামত ৩০-০১-২০০৬ তারিখ ৬:৩০/৬:৪৫ এর দিকে আমার বড় ভাই সালাম, আমার ভাই এর সম্বন্ধী নাজমুল ও আমি তাহের স্যারের বাসায় আসি। ঐ সময় মহিউদ্দিন স্যার ও সালেহীন এসে ঢুকলো। তারপর একসাথে আলোচনা হয়।

আমি বলি তাহের স্যার ৩ তারিখে আসবেন। মহিউদ্দিন স্যার বলেন, তাহের আসলে গুলি করে হত্যা করতে হবে। সালেহীন বলে গুলি করলে শব্দ হতে পারে। আমি বলি তাহলে অন্য কিছু করা হোক। মহিউদ্দিন স্যার বললেন ঘাড়ের পেছনে আঘাত করলে সেন্সলেস হয়ে যায়। স্যারের ঘাড়ের পেছনে আঘাত করতে হবে। তারপর নাকে বালিশ চাপা দিতে হবে। এ পর্যন্ত আলাপ করেই আমরা সকলেই চলে যাই।

০১-০২-২০০৬ তারিখ আমি সন্ধ্যায় বাতি জ্বালাতে আসি বাসায় তখন এরিয়া গার্ড নাজমুলের সাথে দেখা । সে বাসায় কলিং বেল টিপে। আমি বাহির হলে, সাইকেলটা ভেতরে ঢুকিয়ে নাও। আমি বলি, এখনই চলে যাবো, সাইকেল ভেতরে নেব না। তখন নাজমুল চলে যায়। আমিও কিছুক্ষণ পরে চলে যাই। আমি আমার বাসায় খেয়ে দেয়ে আবার রাত ৯:৩০ টার দিকে তাহের স্যারের বাসায় আসি। আসার পথে মুন্নুজান হলের পেছনে রাস্তার উপর সালেহীন ও মহিউদ্দিন স্যার অপেক্ষা করছিল। আমাকে দেখে আমাকে দাঁড়াতে বলে। স্যার বললো যে, তাহের স্যার ঢাকা থেকে এসেছে, মহিউদ্দিন স্যার বলেন- আজকেই স্যারকে খুন করতে হবে। বলে আমার হাতে একটা রিভলবার দেয় এবং বলে যে, তুমি যাও, আমরা আসছি। আমি রিভলবার নিয়ে তাহের স্যারের বাসার দিকে আসতেই সামনে ভাই সালাম আর ভাই এর সম্বন্ধী নাজমুলকে দেখি। আমি ওদেরকে বলি যে, আমি বাসায় আছি। তোমরা আসো। তারপর আমি গেটে কলিংবেল বাজাই। বেল বাজেনা। স্যার স্যার করে ডাকতে থাকলে স্যার দরজা খুলে দেয়। কারেন্ট ছিল না ঐ সময় স্যার নিচে এসে গেট খুলে দেয়। ঐ সময় আই, পি, এস, চলছিল। আমি নীচে ড্রইং রুমে পড়তে বসি। স্যার উপরে চলে যায়। মিনিট ১০ পর মহিউদ্দিন স্যার, সালাম, নাজমুল (সালামের সম্বন্ধী), আর সালেহীন এসে দরজা নক করে। সালাম, সালেহীন, নাজমুল ড্রইং রুমে ঢুকে

সোফায় বসে। ২/১ মিনিট পর আমি দোতলায় উঠে যাই। দেখি স্যার টিভির সামনে দাঁড়িয়ে আছে। আমি বলি যে, স্যার, নীচের টিউব লাইট কেটে গেছে। তখন স্যার সামনে ঘুরেছে। অমনি আমি পেছন থেকে ঘাড়ের উপর রিভলবারের বাট দিয়ে আঘাত করি। ইতোমধ্যে মহিউদ্দিন স্যার সহ ওরা ৪ জন উপরে উঠে এসেছে। স্যার আঘাত পেয়ে মেঝেতে লুটিয়ে পড়ে। মহিউদ্দিন স্যার বলে, তাড়াতাড়ি ধরে নীচে নামাও। আমি ও সালেহীন স্যারের দুই হাতের বোগলের নীচে ধরি। নাজমুল আর সালাম স্যারের কোমড়ের নীচটা ধরে। মহিউদ্দিন স্যার তখন তাহের স্যারের দোতলার বেড রুমে অবস্থান করেন। আমরা ধরাধরি করে নীচে নিয়ে আসি। যে ঘরে আমি থাকতাম, সেই ঘরের কার্পেটের উপর চিৎ করে শোয়াই।

আমি ও সালেহীন ভাই স্যারের নাকের উপর বালিশ চাপা দেই। স্যার তখন হাত পা নাড়াতে থাকে। মহিউদ্দিন স্যার তখন নীচে এসেছিল। স্যার বলে জোর করে চেপে ধর। ডিপার্টমেন্টে বড়াই করে। উচিৎ শিক্ষা হবে। তখন নাজমুল তাহের স্যারের পা এবং সালাম স্যারের হাত চেপে ধরে মেঝের সাথে। সালেহীন বলে যে,"ডিপার্টমেন্টের বড়াই, উচিৎ শিক্ষা দিয়ে দেই।" স্যার ঝাটকা মেরে ডান দিকে উল্টে যায়। তখন আমি আগে থেকে লুকিয়ে রাখা ছোরা দিয়ে স্যারের মাথার পেছনে একটা আঘাত করি। রক্ত বের হতে থাকে আঘাত থেকে। আমরা সবাই স্যারকে চিৎ করে শোয়ায়ে দেই। আবার সালেহীন ও আমি বালিশ দিয়ে নাকের উপর চাপা দেই। একটু পরেই স্যারের দম শেষ হয়ে যায়। তখন মহিউদ্দিন স্যার তাহের স্যারের বুকের উপর কান পাতে এবং হাত টিপে দেখে বলে শেষ।

স্যার তাহের স্যারের লাশকে রান্না ঘরে রাখতে বলে। আমি অস্বীকার করি। বাড়ীর পিছনের হাউজে রাখার কথা বলি। স্যার রাজী হয়। তাহের স্যারের মাথার রক্ত না পড়ার জন্য পড়নের হালকা ঘিয়া রংয়ের চাদরে মাথা ও ঘাড় পেচিয়ে দেই আমিও সালেহীন। রক্ত পড়তেই থাকে। মহিউদ্দিন স্যার ন্যাকড়া আনতে বলে আমি মহিউদ্দিন স্যারকে নিয়ে পাশের ঘরে যাই। স্যার মোবাইলের লাইট জ্বালায়। আমি কার্টুন থেকে ছেড়া পাঞ্জাবী ও কাজের মেয়ের ফ্রক নিয়ে এসে তাহের স্যারের ঘাড়, বুক পেচিয়ে ফেলি ফ্রক দিয়ে।

স্যারের লাশ সালেহীন, সালাম, নাজমুল ধরে হাউজের দিকে নেয়। আমি আগে পাঞ্জাবীটা হাউজের কাছে বিছাই। মহিউদ্দিন স্যার মোবাইলের আলোয় রাস্তা দেখায়। আমি হাউজের মুখ খুলি । হাউজের মধ্যে স্যারের লাশকে ঢুকিয়ে দেই। সালেহীন, নাজমুল, সালাম চলে যায়। আমি ও মহিউদ্দিন স্যার এসে নীচের সোফায় বসি। স্যার আমার মাথায় হাত দিয়ে বলে "কিছু চিন্তা করিস না। যা হবার হয়ে গেছে। মুখ খুলিস না। কম্পিউটার আর চাকরী হয়ে যাবে। জীবনে ও মুখ খুলবি না। মুখ খুললে জাহান্নামে থাকলেও বাঁচতে পারবি না। তোর ফ্যামিলি ও বাঁচবে না।" বলে আমাকে হুমকী দিয়ে রিভলবারটা নিয়ে তাহের স্যারের দোতলায় যায়। তারপর নীচে নেমে এসে বলে তুই থাক আমি আসছি।স্যার পরদিন সকালে এসে তাহের স্যারের ব্যবহারী ট্রাভেলিং ব্যাগ নিয়ে আমাকেসহ সাহেব বাজার আসে। তার কথামত আমি ব্যাগটা আমার এক আত্মীয়ের বাসায় রাখি। আত্মীয় জানে না ওটা কিসের ব্যাগ। স্যার আর আমি একসাথে রিক্সায় ফিরে আসি।

মহিউদ্দিন স্যার কম্পিউটার ও চাকুরীর লোভ দেখিয়ে ছিল বলেই আমি স্যারকে হত্যা করেছি। তাহের স্যার আমাকে খুব ভালোবাসতো। আমি গরীব মানুষ। কম্পিউটার শিখতাম। কম্পিউটার কেনার পয়সা আমার বাবার নেই। কম্পিউটারের লোভে আমি স্যারকে খুন করেছি। আমি আমার কৃতকর্মের জন্য অনুতপ্ত ও ক্ষমাপ্রার্থী।"

39. The contents of the confessional statement made by convict petitioner Md. Nazmul run as follows:

"আমি গৌরসাহা রেলগেটে গ্রিলের ওয়েল্ডিং এর কাজ করি। ১৩-০১-২০০৬ তাং কাজ শেষে রাত ৮:০০ টার দিকে বাড়ী ফেরার পথে ভদ্রা আবাসিকের ডান সাইডের রাস্তায় আমার ভগ্নিপতি সালাম এর সাথে সাক্ষাত হয়। সালাম আমাকে বলে যে, "ভাই, একটা কাজ আছে। কাজটা করে দিতে পারলে জাহাংগীর, তোমার ও আমার চাকুরী হবে।"জিজ্ঞেস করি চাকুরীটাকে দিবে। সালাম বলে যে, মহিউদ্দিন স্যার চাকরী দিবে। কি কাজ করতে হবে জিজ্ঞাসা করলে সালাম বলে একজনকে থ্রেট করতে হবে। রাজী না হলে শেষ করে দিতে হবে। আমি বলি যে, এসব কাজে রিক্স আছে না। পরে ফেঁসে যেতে পারি। সালাম বলে যে, ফাঁসাফাঁসির কিছু নাই। সব আমরা নিজেদের লোক। সময় মত তোমাকে খবর দিব। তারপর আমি চলে যাই। ০১-০২-২০০৬ তারিখ সালাম আমাকে রাত ৯ টার দিকে মোবাইল ফোনে বলে আপনি চলে আসেন। এদিকে সব রেডি আছে। ভার্সিটির পশ্চিম কোয়ার্টারের উত্তর মাথায় চলে আসেন। তখন আমি কোয়ার্টারের পশ্চিম গেট দিয়ে ঢুকে উক্ত স্থানে যাবার পথে রাস্তায় সালামকে দেখতে পাই। সালাম ও আমি পূর্ব দিকে যেতেই জাহাংগীরের সাথে দেখা। সালাম আমাকে ও জাহাংগীরকে নিয়ে মুন্নুজান হলের পেছনে নিয়ে যায়। সেখানে সালাম আমাকে মহিউদ্দিন স্যার ও শিবির নেতা সালেহীনের সাথে পরিচয় করে দেয় আর বলে যে— এই স্যারই আমাদেরকে চাকরী দিবে। তখন ও কেউ বলে নাই কাকে খুন করতে হবে। ঐ সময় মহিউদ্দিন স্যার জাহাংগীরকে একটা পিস্তল দেয়। জাহাংগীর পিস্তল নিয়ে আগে চলে গেল। মিনিট ১০/১৫ পরে স্যার ও সালেহীন বলে"চলো আগাই"।তখন ৪ জন যেতে থাকি। সালাম, সালেহীন ও স্যার তিনজনই ঘটনার কোয়ার্টার চিনতো। আমি চিনতাম না। ঐ কোয়ার্টারে এসে সালাম গেটে নক করে। জাহাংগীর গেট খুলে দেয়। আমরা ৪ জন ড্রইং রুমে ঢুকে বসি। জাহাংগীর বলে যে, "আমি উপরে উঠার পর পরই আপনারা উঠে আসবেন।" বলে জাহাংগীর উঠে যায়। একটু পরেই আমি, মহিউদ্দিন স্যার, সালেহীন আর সালাম দোতলায় উঠি। উঠেই দেখি তাহের স্যার মেঝেতে পড়ে গেল এবং সেন্স হারিয়ে ফেললো। মহিউদ্দিন স্যার বলে যে, ধরাধরি করে নীচে নামাও। তখন

জাহাংগীর, সালাম, সালেহীন ও আমি ধরাধরি করে স্যারকে নীচে নামিয়ে যে ঘরে জাহাংগীর থাকে সেই ঘরে নিয়ে যাই। জাহাংগীর ঐ স্যারের বাসার কেয়ারটেকার। কার্পেটের উপর স্যারকে শোয়ায়ে ফেলি। জাহাংগীর ও সালেহীন নাকে বালিশ চাপা দেয়। সালাম হাত ধরেছিল। আমি পা ধরেছিলাম। স্যার একটা ঝটকা মেরে উল্টে যায়। তখন জানালার উপর রাখা একটা ছুরি দিয়ে জাহাংগীর স্যারের মাথার পিছনে একটা কোপ মারে। সালেহীন তাহের স্যারের পিঠের উপর চেপে বসে বলে শালা ডিপার্টমেন্টের বড়াই দেখাচ্ছি। মহিউদ্দিন স্যারও বলে"ডিপার্টমেন্টের বড়াই, দেখিয়ে দে।" আবারো সালেহীন স্যারের নাক বালিশের সাথে চেপে ধরতেই জান বের হয়ে যায়। মহিউদ্দিন স্যার, বুকে কান পেতে এবং হাতে টিপে ধরে দেখে জান বের হয়েছে কিনা।

এরপর, কামিজ নিয়ে আসে জাহাংগীর। স্যারের গায়ের চাদর ও ঐ কামিজ দিয়ে ক্ষতস্থান চেপে ধরে জাহাংগীর । মহিউদ্দিন স্যার লাশকে রান্না ঘরে রাখতে বলে। পরে জাহাংগীরের পরামর্শে হাউজে রাখা হয়। স্যারের লাশ আমি, সালাম, সালেহীন ও জাহাংগীর ধরে হাউজে নিয়ে যাই। মহিউদ্দিন স্যার মোবাইলের আলোয় রাস্তা দেখায়। লাশকে হাউজে রেখে আবার ড্রইং রুমে সবাই আসি। মহিউদ্দিন স্যার বলে যা হবার হয়েছে। কারো কাছে কিছু ফাঁস করবি না। করলে নির্ঘাত ফাঁসি হবে। একটু পরে আমি আর সালাম চলে আসি। শুনেছি জাহাংগীর দোতলায় উঠে পিস্তল দিয়ে স্যারের ঘাড়ে আঘাত করেছিল। হত্যার আগে যখন ড্রইং রুমে ছিলাম তখন মহিউদ্দিন স্যার বলেছিল— গুলি করলে শব্দ হবে। ঘাড়ের পেছনে আঘাত করে বালিশ চাপা দিতে হবে।

তাহের স্যারকে হত্যা করার দিনই স্যারের নাম জেনেছি। তার আগে আমাকে বলা হয় নাই— এই স্যারকেই হত্যা করতে হবে। শুনেছি তাহের স্যার খুব ভালো লোক ছিল। তাকে খুন করে আমরা নিজেই খুন হয়ে গেছি। সালামের কাছে শুনেছি মহিউদ্দিন স্যার তাহের স্যারের কাছে প্রমোশন চেয়েছিল। তাহের স্যার নাকি আর কিছুদিন অপেক্ষা করতে বলেছিল। প্রমোশনের ফায়দা লুটার জন্যই মহিউদ্দিন স্যার লীড দিয়ে এই খুন করিয়াছে। আমি একটা চাকুরীর লোভে মহিউদ্দিন স্যারের জঘন্য প্রস্তাবে রাজী হয়েছি। আমি জীবনে এ রকম অপরাধ করি নাই। আমি ভুল করেছি। আমার ভুলের জন্য আমি অনুতপ্ত ও ক্ষমা প্রার্থী।"

40. The confessional statement of the convict petitioner Abdus Salam run as follows:

"আমি পদ্মা আবাসিক এলাকার গার্ড হিসাবে চাকরী করি। ঘটনার ২০/২২ দিন আগে সকাল ৮:২০ টায় আমার বাড়ী হতে পদ্মা আবাসিকে যাচ্ছিলাম। বিশ্ববিদ্যালয় ক্যাম্পাসের মধ্য দিয়ে। পথিমধ্যে দেখি বিশ্ববিদ্যালয়ের কোয়ার্টারের এলাকার শিশু পার্কের পার্শ্বের রাস্তায় আমার ছোট ভাই জাহাংগীরও রাজশাহী বিশ্ববিদ্যালয়ের মহিউদ্দিন স্যার দাঁড়িয়ে কথা বলছে; আমি ওদেরকে দেখে তাদের সামনে সাইকেল থামাই। আমি আগে থেকেই মহিউদ্দিনকে বিশ্ববিদ্যালয়ের একজন স্যার হিসাবে চিনতাম। জাহাংগীর আমাকে তার বড় ভাই হিসাবে স্যারের সাথে পরিচয় করে দেয় । তারপর আমি পদ্মা আবাসিকে চলে যাই। তারপর হতে ২/১ দিন পর পরেই স্যারের সাথে দেখা হতো। আসা যাওয়ার পথে। সালাম কালাম বিনিময় হতো। কয়েকদিন পর আমি পদ্মা আবাসিক এলাকা বাড়ী ফিরছিলাম ক্যাম্পাসের ভেতর দিয়ে বিকাল ৫/ ৫:১৫ টার দিকে। দেখি মহিউদ্দিন স্যার তার বাসার সামনে নীচে দাঁড়িয়ে আছে। স্যারের সাথে দেখা হলো। সালাম দিলাম। স্যার আমার সাথে তখন ১৫/২০ মিনিট আলাপ করেন। এক পর্যায়ে বলেন, একটা কাজ করে দিলে কিছু টাকা পয়সা ও চাকুরী হতে পারে। কথাটা শুনে আমি বাড়ী চলে যাই। কয়েকদিন পর আবার বিশ্ববিদ্যালয়ের শিশু পার্কের পাশের রাস্তায় মহিউদ্দিন স্যারের সাথে আমার দেখা হয় সকালে। স্যারকে জিজ্ঞাসা করি "স্যার কাজটা কি?স্যার পরে আসতে বলে। ঐ দিনই সন্ধ্যায় মহিউদ্দিন স্যারের বাসার সামনে আসি। স্যার বাসার সামনে নীচেই ছিল। স্যার বললো"তাহের স্যারকে খুন করতে হবে। জাহাংগীরকে সব বলা আছে। জাহাংগীরের কাছ থেকে শুনে নিয়ো, আর ৩০-০১-২০০৬ তারিখ সন্ধ্যায় তাহের স্যারের বাসায় এসো।" ১ দিন পরেই জাহাংগীরের সাথে কথা বলি বাড়ীতে। জাহাংগীর জানায় যে, সেও ঘটনা জানে। জাহাংগীরকে মহিউদ্দিন স্যার কম্পিউটার আর চাকরী ও ৬০ হাজার টাকা দিতে চেয়েছিল বলে জাহাংগীর আমাকে বললো। এর আগে ১৩-০১-২০০৬ তারিখে এই ঘটনা আমি আমার সম্বন্ধী নাজমুলকে ও বলি। পদ্মা আবাসিকের রাস্তার ডান সাইডে ঐদিন রাত ৮ টার দিকে নাজমুলের সাথে দেখা হলে তাকে ঘটনা জানাই। আমি নাজমুলকে বলি যে, ভাই একটা কাজ আছে। কাজটা করতে পারলে আমাদের চাকুরী হবে। কিছু টাকাও পাওয়া যাবে। নাজমুল ভাই জিজ্ঞাসা করে, কি কাজ করতে হবে। আমি বলি যে, একজনকে থ্রেট করতে হবে। রাজী না হলে শেষ করে দিতে হবে।নাজমুল বলে যে, এসব কাজতো খুব রিস্কের । ফেঁসে টেসে যাবো নাতো?আমি বলি যে, কোন রিস্ক নাই। নিজেরাই সব করবো। সময় মত তোমাকে খবর দিব। বলে আমরা যে যার মত চলে যাই। আবার একদিন নাজমুল ভাই এর সাথে পদ্মা আবাসিকে দেখা হলে আমি তাকে ৩০-০১-২০০৬ তারিখে ভার্সিটির ভেতরে আমার সাথে দেখা করতে বলি।

৩০-০১-২০০৬ তাং সন্ধ্যা সাড়ে ৬/ পৌনে ৭ টার দিকে নাজমুল ভাই এর সাথে মুন্নুজান হলের পেছনে দেখা। নাজমুল ভাইও আমি সোজা তাহের স্যারের বাসায় চলে গেলাম। নীচ তলার ড্রইং রুমে নক করলে জাহাংগীর দরজা খুলে দেয়। ড্রইং রুমে মহিউদ্দিন স্যার, জাহাংগীর ও মাহাবুব আলম সালেহী @ সালেহীন -দেখি। মাহাবুব আলম সালেহী @ সালেহীন রাজশাহী বিশ্ববিদ্যালয় ছাত্র শিবিরের সভাপতি। তাকে আমি আগে থেকেই চিনতাম। বিভিন্ন মিটিং মিছিলে তাকে নেতৃত্ব দিতে, বক্তৃতা দিতে দেখতাম। আমিও আগে ছাত্র শিবির করতাম। ২/৩ বছর হলো বাদ দিয়েছি। মাহবুব আলম

সালেহীকে আমরা সবাই সালেহীন ভাই বলে ডাকি। আমরা তাহের স্যারের ড্রইং রুমে বসলাম। মহিউদ্দিন স্যার বলেন- তাহের স্যারকে খুন করতে হবে। কিভাবে খুন করা যায়। বলে মহিউদ্দিন স্যারই চিন্তা ভাবনা করে বলে যে, "গুলি করা যায়।" সালেহী ভাই বলে যে, গুলি করলে আওয়াজ হবে। মহিউদ্দিন স্যার বলে যে, ঘাড়ের পেছনে আঘাত করলে মানুষ সেন্সলেস হয়ে যায়। তাই ঘাড়ের পেছনে আঘাত করতে হবে। তারপর নাকে বালিশ চাপা দিতে হবে। এপর্যন্ত আলাপ আলোচনার পর আমরা সকলেই চলে যাই।

০১-০২-২০০৬ তারিখ রাত ৯:০০ টার দিকে আমি আমার সম্বন্ধী নাজমুলকে মোবাইল ফোনে বলি—সব ঠিক আছে, চলে আসেন ভার্সিটির পশ্চিম কোয়ার্টারের উত্তর মাথায়। মোবাইল ফোনে কথা বলে আমি মুন্নুজান হলের পিছন সাইডের রাস্তায় আসি। রাস্তায় নাজমুলের সাথে সাক্ষাত হলো। নাজমুল আর আমি সামনে আগাতেই জাহাংগীরের সাথে দেখা। আমি নাজমুল আর জাহাংগীরকে সাথে নিয়ে মুন্নুজান হলের পিছনে গেলাম। সেখানে মহিউদ্দিন স্যার ও সালেহীন ভাইকে দেখলাম। তখন মহিউদ্দিন স্যার জাহাংগীর কে একটা পিস্তল দেয়। জাহাংগীর পিস্তল নিয়ে আগে চলে গেল। মিনিট ১০/১৫ পর আমরা ৪ জন আগাতে থাকি। তারপর, তাহের স্যারের কোয়ার্টারে গিয়ে আমি গেটে নক করি। জাহাংগীর গেইট খুলে দেয়। আমরা ৪ জন ড্রইং রুমে বসি। প্রথমে জাহাংগীর তাহের স্যারের দোতলার ঘরে উঠে যায়। একটু পরেই মহিউদ্দিন স্যার, মাহাবুব আলম সালেহী @ সালেহীন, নাজমুল ও আমি ৪ জনে উপরে উঠি। আমরা উপরে উঠতে না উঠতেই জাহাংগীর পিস্তলের বাট দিয়ে তাহের স্যারকে আঘাত করে দেয়। অমনি স্যার মেঝেতে পড়ে গেলেন। মহিউদ্দিন স্যার তাড়াতাড়ি নিচে নামাতে বললেন। তখন জাহাংগীর, আমি, সালেহী আর নাজমুল তাহের স্যারকে ধরাধরি করে নীচে নামাই এবং জাহাংগীর যে ঘরে থাকতো ঐ ঘরের মেঝেতে কার্পেটের উপর চিৎ করে শোয়াই। সালেহী ও জাহাংগীর স্যারের নাকে বালিশ চেপে ধরে। আমি স্যারের হাত ধরি আর নাজমুল পা ধরে থাকে। স্যার একটা ঝটকা মেরে কাত হয়ে পড়লে অমনি জাহাংগীর জানালার পাশে রাখা ছোরা নিয়ে স্যারের মাথার পিছনে কোপ মেরে দেয়। এদিকে সালেহীন আর জাহাংগীর বালিশ চেপে ধরেই আছে। কিছুক্ষণের মধ্যে স্যার মারা যায়। মহিউদ্দিন স্যার বলে যে, ডিপার্টমেন্টের বড়াই, দেখিয়ে দে। সালেহী স্যারের পিঠের উপর বসে চাপ দিতে দিতে বলে ডিপার্টমেন্টের বড়াই?

মহিউদ্দিন স্যার তাহের স্যারের বুকে কান পেতে দেখলো। হাত টিপে দেখলো মরেছে কিনা। তারপর স্যার বলে যে, লাশ রান্না ঘরে রাখা হোক। জাহাংগীর বলে ঠিক হবে না। আমি ফেঁসে যেতে পারি। তার চেয়ে হাউজে রাখা ভালো হবে। মহিউদ্দিন স্যারের নির্দেশে জাহাংগীর একটা ছেড়া পাঞ্জাবী ও একটা পুরাতন কামিজ নিয়ে আসলো। স্যারের গায়ের চাদর, ঐ পাঞ্জাবী আর কামিজ দিয়ে জাহাংগীর ও সালেহী স্যারের মাথা সুন্দর করে বেঁধে ফেললো। শেষে লাশটাকে নাজমুল, সালেহী আর আমি ধরাধরি করে হাউজে নিয়ে যাই। যাবার পথে কারেন্ট না থাকায় মহিউদ্দিন স্যার মোবাইলের আলোয় রাস্তা দেখায়। জাহাংগীর হাউজের ঢাকনা খুলে দেয়। লাশটাকে হাউজে রেখে আমরা ড্রইং রুমে আসলাম। একটু পরে আমি আর সালাম চলে গেলাম।

আমরা গরীব মানুষ। মহিউদ্দিন স্যার আমার ভাইকে, আমাকে চাকরীর লোভ দেখিয়ে ছিল। আমাদের কোন স্যারের সাথে কোন শত্রুতা নাই। চাকরীর ধান্দায় মহিউদ্দিন স্যারের ষড়যন্ত্রে খুন করেছি। আমি এখন ভুল বুঝতে পেরেছি। আর জীবনেও এরকম ভুল হবে না। আমি কৃতকর্মের জন্য অনুতপ্ত।"

41. The Evidence Act does not define "confession". The courts adopted the definition of "confession" given in Stephen's Digest of the Law of Evidence. According to that definition, a confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime. The act of recording a confession is a very solemn act and section 164 of the Code of Criminal Procedure lays down certain precautionary rules to be followed by the Magistrate recording a confession to ensure the voluntariness of the confession. In such a case, the accused being placed in a situation free from the influence of the Police is expected to speak out the truth being remorseful of what he has committed. A confession can be acted upon if that passes two tests in the assessment of the court. The first test is its voluntariness. If a confessional statement fails to pass the first test, the second test is immaterial. If he does not disclose his complicity in an alleged crime voluntarily, court cannot take into consideration the confessional statement so recorded, no matter how truthful an accused is. From the confessional statements made by the convict Zahangir, Abdus Salam, and Nazmul, it appears that the recording Magistrate (P.W.46) told them that she was not an Officer of Police but a Magistrate and that the appellant and petitioners are not bound to make confessional statements and that if they do so the same may be used as evidence against them and that they have the liberty to say whatever they desire to say. The Magistrate also asked them whether they had decided to make such confessional statements voluntarily or not and why they had decided to make such confessional

statements. Each of them replied that they decided to make confessional statements to disclose the truth. It further appears from the confessional statements and evidence of P.W.46 Magistrate Jobeda Khatun that she recorded those confessional statements following the provisions of sections 164 and 364 of the Code of Criminal Procedure.

42. It appears from the confessional statements of the appellant Zahangir Alam and petitioners Abdus Salam and Nazmul that the recording Magistrate has made an endorsement in each of the confessional statements to the effect that she has made the accused aware of the fact that he is not bound to confess and if he confesses, that can be used against him as evidence. Thereafter, when the accused agreed to confess voluntarily, she recorded his confession. It was recorded within the range of her hearing and she believes that the confession contains the total and true statement of the accused. The confession so recorded was read over to the accused; and admitting the same to be correct, he has signed on it. Though in the paper book it appears that the above-stated identical endorsement was quoted after paragraph No.1 in all the three confessional statements, it is apparent from the words used therein that those were endorsed after recording the respective statement. The Magistrate noted what she told by the accused at the time of recording the confessions and wrote and signed a memorandum in each of the statements being satisfied that those were made voluntarily and contained a true account of the occurrence. The recorded statements show that P.W.46 did not compel them to make confessional statements, rather she assured them that if they decided not to make any confession, even then they would not be sent to the police again. Before recording confessionsP.W.46 was satisfied that the accused were not forced to make confessions and they were not threatened or induced to make such confessional statements. It appears that the confessional statements were recorded in the language of the confessing accused. Articles seized by the Investigating Officer from the body of the victim and the room of the appellant Zahangir situated on the ground floor of the house of the victim pointed out that the confessional statements are true. Moreover, the recovery of the dead body from the backyard of the house as stated in the confessional statements clearly shows that the confessional statements are the narration of a true account of the offence, which took place on 01.02.2006 at about 10 PM inside the victim's house. It further appears from the Post-mortem report (exhibit-38) and evidence of P.W.44 Dr. Enamul Huq, who held an autopsy of the dead body, that the victim sustained one incised-looking wound on the occipital scalp, one haematoma on the occipital region, one bruise on the scapular region, one bruise on the back of the right upper chest and one bruise on the back of the right abdomen. Those injuries of the victim corroborated the statement made in the confessional statements. Appellant Zahangir mentioned in his confession that he hit the back of the head of the victim Taher with a revolver. This strike surely caused the haematoma. Injury No.2, as it appears from the postmortem report, that there was a haematoma on the occipital region, size is 3" X 3" " which is consistent with the confession of appellant Zahangir. All the confessing accused including Zahangir himself mentioned in the confessional statements that Zahangir inflicted a knife blow on the back of the victim's head. That blow caused the 'incised-looking wound' described as injury No.1 in the post-mortem report. Learned Counsel for the appellant Zahangir, however, raised a question as to the injury No.1 described in the post-mortem report that it was not an 'incised wound', rather, it was an 'incised looking wound' and the learned Courts below have failed to differentiate between those two types of the wound, which has caused a failure of justice. Wound No.1 was on the occipital scalp, size is $2\frac{1}{4}$" X $\frac{1}{2}$" X bone depth, Doctor termed that wound as " incised looking wound" . From Modi's Medical Jurisprudence and Toxicology, it appears that an 'incised looking wound' definitely has some characteristics of an 'incised' wound. To

quote from Modi-

> "Incised or Slash Wounds
>
> An incised or slash wound is defined as orderly solution of skin and tissue by a sharp cutting weapon drawn across the skin. It may either be produced by light sharp cutting instruments such as knife, razor, scissors, or heavy sharp cutting weapons such as sword, gandasa (chopper), axe, hatchet, scythe, kookri or any object such as a broken piece of glass or metal which has a sharp, cutting pointed or linear edge and are mostly intentionally inflicted. The cutting edge of a knife may be completely or partly sharp and partly blunt and the other edge may be blunt, serrated, scalloped or hollow, all these variations affect the shape of the wound."

43. In such a view of the matter, it appears to us that the confessional statements pertaining to assault by knife substantially fit the medical evidence. It is only when the medical evidence totally makes the ocular evidence improbable, then the court starts suspecting the veracity of the evidence and not otherwise. That the mare fact that doctor said that injury No.1 was an "incised looking injury", not "incised injury", is too trifling aspect and there is no noticeable variance. The opinion of the doctor cannot be said to be the last word on what he deposes or meant for implicit acceptance. He has some experience and training in the nature of the functions discharged by him. After Zahangir inflicted the knife blow in the occipital region of victim Professor Taher, the other accused pressed down a pillow in his face to ensure his death. After confirming the victim's death, the accused persons took the dead body to the back side of the house on a dark night and the appellant Mohiuddin ushered them the way with the torchlight of his mobile. They then put the dead body inside the manhole. In doing so the accused had to carry the dead body to a considerable distance and during that time the dead body might have fallen from their grip causing crushing of hair bulbs in the already injured occipital scalp and rendering the incised wound look like 'incised looking' wound. Therefore, the confessional statements made by the accused Zahangir, Nazmul and Salam are true. In the case of Wazir Khan and others V. State of Delhi [(2003)8 SCC 461] it was held that a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt.

44. Since the voluntary character of the confessions has been proved and their truthfulness has been corroborated, it is safe to rely on them, we do not find any wrong in the conclusion arrived at by the Courts below that the confessional statements made by the appellant Md.Zahangir Alam and petitioners Md. Nazmul and Md. Abdus Salam were made voluntarily and the contents of those were true. Confessions are considered highly reliable because no rational person would make an admission against his interest unless prompted by his conscience to tell the truth. Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law "(vide Taylor's Treaties on the Law of Evidence)". Confession possesses a high probative force because it emanates directly from the person committing the offence, and on that count, it is a valuable piece of evidence. It is a settled principle of law that the conviction can be awarded solely on the basis of confessional statements of the accused if the same is found to be made voluntarily. In such view of the matter, the Courts below did not commit any error of law in convicting the appellant Md. Zahangir Alam and petitioners Md. Nazmul and Abdus Salm relying upon their confessional statements.

45. It has been vehemently argued by the defence that appellant Zahangir Alam was kept in the police station from 03.02.2006 to 05.02.2006 i.e beyond the permitted period of 24 hours without taking him before a Magistrate and this illegal detention of the appellant

suggests that the confessional statement given by him is not voluntary.

46. From the cross-examination of PW-42 Md. Faizur Rahman, the then Officer-in-Charge of Motihar Police Station, it appears that appellant Zahangir Alam was taken to the police station on 03.02.2006 for questioning him about the occurrence. At that time he was not arrested in connection with this case. In fact, when Zahangir was taken to the police station on 03.02.2006the whereabouts of Professor Taher was not known to anybody and no formal ejahar was lodged. After the discovery of the dead body of Professor Taher Ahmed PW-1 lodged a formal FIR at around 10.10 AM on 03.02.2006. Even at that time, PW-1 did not make Zahangir an accused. It suggests that he was not taken to the police station as an accused. He was just taken there for questioning. The Investigating Officer of a case has the power to require the attendance of a person before him who appears to be acquainted with the circumstances of the case. When appellant Zahangir Alam was taken to the police station the facts of the killing of Professor Taher were still unfolding and nobody knew who did what. Appellant Zahangir Alam, being the caretaker of the house of the victim, was the best person to demystify and clear many questions about the occurrence posing inside the mind of the Investigating Officer. He was thought to be a vital person who could shed light on many unsolved questions and could help the prosecution to understand what actually happened there. But when from the circumstances it appeared unmistakably that Zahangir Alam must be one of the perpetrators of the killing of victim Professor Taher, he was then arrested on 04.02.2006 and was produced before the Magistrate on the next day, i.e., within 24 hours of his arrest as required by Article 33 (2) of the Constitution. So, the police did nothing wrong in arresting appellant Zahangir Alam after being sure about his complicity with the offence and producing him before the Magistrate within 24 hours of his arrest and for that reason, the defence objection does not sustain.

47. From a careful evaluation of the confessional statements, we are of the opinion that their statements are consistent with one another and corroborates the version given by each other. We are therefore, of the view that confessing accused were speaking the truth.

48. Now we will see how far the prosecution has been able to prove the charge against the appellant Mohiuddin. In a criminal case, the onus lies on the prosecution to prove affirmatively that the accused was connected with the acts or omissions attributable to the crime committed by him. In the light of the arguments made by the parties, it falls upon us to consider the case against appellant Mohiuddin in terms of four issues. Firstly, whether there existed a motive for the appellant Mohiuddin to murder Dr. Taher; secondly, whether the appellant Mohiuddin conspired with the other accused to commit the offence; and thirdly, whether the confessional statements of accused Zahangir Alam, Abdus Salam and Nazmul are admissible in evidence against appellant Mohiuddin; and lastly whether he was involved in killing the victim. It is relevant here to state that each criminal case is to be decided having regard to its own peculiar facts and circumstances. A test to be essentially applied in one case may absolutely be irrelevant in another, as the crimes are seldom committed in identical situations. It is to be mentioned here that the object of the criminal law process is to find out the truth and not to shield the accused from the consequences of his wrongdoing.

49. In the present case, we will follow the approach described above and see whether there is sufficient evidence against the appellant Mia Md. Mohiuddin to find him guilty of murdering Professor Dr. Taher.

50. PW-47 Md. Omar Faruk, the first investigating officer of the case stated in his

testimony that at the time of interrogation appellant Mia Md. Mohiuddin admitted that he had kept two ATM cards and one visiting card of victim Dr. Taher Ahmed at a place called Sahapur Paschim Para situated on the northern bank of the river Padma. Then, they took Mohiuddin to that place and as per pointing out by him, as well as in presence of many witnesses, Investigating Officer seized two ATM cards and one visiting card of Dr Taher Ahmed and prepared a seizure list exhibit 3(Chha)) and put his signature on it exhibit 3(Chha)/3. Statement relating to concealment of the article is admissible in evidence by virtue of section 27 of the Evidence Act. Accused must be deemed to be in exclusive possession of articles concealed under the earth though the spots in which they were concealed may be accessible to public (Limbaji Vs. State of Maharastra, AIR, 2002 SC491). The recovery evidence is relevant and can be relied on. The information relates to the facts and discovery on the basis such information is admissible. The possession of such articles with the accused has to be explained by the accused and the burden would be on the accused to explain as to how he came into possession of those articles. The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts may be used in evidence against him. Section 27 of the Evidence Act permits such information leading to the discovery of a fact to be admitted in evidence.

51. This fact has been supported by the evidence of PW-25 who in his testimony stated that entering into the bedroom of victim Taher he found many papers at sixes and sevens. The High Court Division came to the finding that the appellant Mohiuddin stormed the bedroom of Professor Taher after killing him to search for any report prepared by the victim against Mohiuddin. While searching the bedroom of the victim Dr. Taher, appellant Mohiuddin could also find the PINs of the two ATM cards of Dr. Taher written on any paper and then could take a decision to steal and conceal those two ATM cards and use them at a convenient time. We endorse the finding of the High Court Division as correct in this regard. Such being the case, this circumstantial evidence unmistakably points to the guilt and complicity of the appellant Mohiuddin in the instant case.

52. In a criminal case, motive assumes considerable significance. Where there is a clear proof of motive for the offence, that lends additional support to the finding of the Court that the accused is guilty. When a case against an accused rests completely on circumstantial evidence, the prosecution is required to prove the motive of the accused for committing the offence. Now, let us consider the evidence against Dr. Mohiuddin to see whether any motive for the murder has been established. As regards the motive of appellant Mohiuddin, the High Court Division elaborately discussed the oral and documentary evidence adduced by the prosecution and came to the conclusion that appellant Mohiuddin knew very well that had Dr. Taher remained present in the scheduled meeting of the Departmental Planning Committee on 02.02.2006, he would have no chance to get promotion to the post of Professor. The Registrar gave the note to the effect that appellant Mohiuddin had completed 12 years, 1 month and 13 days when he applied for the promotion to the post of Professor. On the contrary Professor Taher calculated the length of service of appellant Mohiuddin (material exhibit-XXVII) and that fell short of 9 (nine) days on the scheduled date of the meeting of the Planning Committee on 02.02.2006 to fulfill the requirement of 12 years of service. This calculation of Professor Taher further deteriorated the relationship between him and appellant Mohiuddin. Furthermore, Professor Taher knew about the plagiarism committed by appellant Mohiuddin in publishing an academic research paper; and had he disclosed this fact in front of the Planning Committee, appellant Mohiuddin would not have any chance for promotion and might have faced departmental action leading to termination of his service. This prompted appellant Mohiuddin to murder Professor Taher to pave the way for his promotion.

The High Court Division also found that appellant Mohiuddin had practised fraud upon it. While submitting papers before the Court under section 342 of the Code of Criminal Procedure, which further depicts the guilty mind of the appellant Mohiuddin.

53. It appears from the testimonies of P.W.18 Md. Abdus Salam, the Registrar of Rajshahi University, P.W.21 Dr. Mushfiq Ahmed, Professor of Department of Geology and Mining, P.W.22 Sultana Ahmed Resmi, wife of victim Professor Abu Taher, P.W.25 Dr. Sultan-Ul-Islam, Professor of Department of Geology and Mining of Rajshahi University, P.W.39 Dr. Syed Shamsuddin Ahmed, Professor of Department of Geology and Mining of Rajshahi University and P.W.43 Chowdhury Sarowar Jahan, another Professor of the Department of Geology and Mining of Rajshahi University as well as from the statement of appellant Dr. Mia Md. Mohiuddin, recorded under section 342 of the Code of Criminal Procedure that appellant Mia Md. Mohiuddin had a grievance against victim Professor Taher Ahmed on the issue relating to his promotion from Associate Professor to Professor in the said department. In different meetings, Professor Dr. Taher raised his voice as to the non-fulfillment of requisite qualifications by the appellant Miah Md. Mohiuddin to get such a promotion. P.W. 22 Sultana Ahmed Resmi, wife of victim Dr. Taher, in her testimony, inter alia, stated: "রাজশাহী আসার আগে আমি আমার স্বামীকে চিন্তিত দেখে জিজ্ঞেস করলে সে বলে যে, মহিউদ্দিনের প্রমোশনের ব্যাপারে অনিয়ম আছে এবং সে মিটিংয়ে না বলবে। পুর্বেও তার প্রমোশনের ব্যাপারে মিটিং হইয়াছে এবং আমার স্বামী বিরোধিতা করেছে। এজন্য আসামী মহিউদ্দিন আমার স্বামীর সাথে খারাপ আচরন করেছে। আমার স্বামী আমার সাথে বিভিন্ন সময় বলে যে, মহিউদ্দিন তার সাথে বেয়াদবি ও খারাপ আচরণ করেছে। এই একজন শিক্ষক সম্পর্কেই তার সাথে খারাপ আচরন করার কথা আমি শুনেছি। এই কারনে আমার দৃঢ় বিশ্বাস আমার স্বামী হত্যার মুল পরিকল্পনাকারী মহিউদ্দিন। তিনবছর পুর্বে মহিউদ্দিন আমার স্বামীকে তিন তলা থেকে ছুড়ে ফেলিয়া দিবে মর্মে বলেছিল মর্মে আমার স্বামী জানিয়েছিল। ২০০৫ সালে আমার স্বামী একা থাকায় বিশ্ববিদ্যালয়ের বাসাটি ছাড়িয়া দিয়া ছোট বাসা নেয়ার জন্য খোঁজ করলে একদিন মহিউদ্দিন এসে ডঃ আজহার উদ্দিন বিনোদপুরের একটি বাসার সন্ধান দেন। আমি ও আমার স্বামী বাসাটিতে গিয়ে দেখি যে, তা বিনোদপুরের শেষ প্রাপ্ত শেষ বাড়ি এবং ধুধু মাঠ। আমি বাড়িটি ভাড়া নিতে স্বামীকে নিষেধ করি। পেট্রো বাংলার একটি চাকুরীর ব্যাপারে আমার স্বামীর সাথে কথা হয়। মহিউদ্দিন ও সে চাকুরীর জন্য চেষ্টা করিলে তাহার একজন প্রভাবশালী আত্মীয় বলে যে, প্রফেসর হিসেবে প্রমোশন নিয়ে এলে সে চাকুরীর ব্যবস্থা করে দিবে। তখন সে পদোন্নতির জন্য মারিয়া হইয়া ওঠে। কেয়ার টেকার জাহাংগীরকে বাসায় রাখার সময় আমার স্বামী আমার সামনে তাহাকে জিজ্ঞেস করলে সে বলেছিল যে, সে লেখা পড়া করে এবং শিবির দল করে ও উক্ত দল থেকে কিছু সুযোগ সুবিধা পায়।"

54. P.W. 25 Dr. Md. Sultanul Islam Tipu in his testimony stated that victim Dr. Abu Taher was a man of strong principle. He was against any injustice and irregularity and always took a strong stand supporting the rules and regulations of the University. For which a distance, developed between Dr. Mohiuddin and the victim after applying for promotion as professor by Dr. Mohiuddin. Distance raised its height and the same was discussed at the University and the teachers were aware thereof. The victim disclosed that some teachers of the University pressurised him with regard to the promotion of Dr. Mohiuddin and an unscheduled meeting was held at the department thereabout and at that meeting, the teachers requested Dr. Mohiuddin to refrain from making derogatory comments on Dr. Abu Taher and requested him not to pressurise him through teachers for his promotion. In a meeting for the department appellant Mohiuddin requested all the teachers to propose a resolution for condemnation against Dr. Abu Taher but at that meeting, all teachers asked Dr. Mohiuddin to beg an apology to the victim. He disclosed the story of forgery of publication by Dr. Mohiuddin. A meeting of the departmental academic committee was held to ascertain and verify the allegations of forgery and at last, the forgery resorted to by appellant Mohiuddin

was proved as per the unanimous decision of the academic committee. The forged publication of the appellant Mohiuddin became manifestly clear to the victim which led to the torment of the appellant's ill feelings or animus against Dr. Abu Taher. P.W. 39 Dr. Sayed Shamsuddin made identical statements saying that the departmental academic committee inquired into the allegation of forgery brought against the appellant and found the same true. He said that the victim and the appellant Mohiuddin had been at odds with each other for a long time and both of them expressed their indignation over the use of a laboratory in the department, and some teachers of the University told Dr. Abu Taher that the promotion of Dr. Mohiuddin got stuck because of him. P.W. 43 Dr. Chowdhury Sarowar Jahan in his testimony stated that the victim was very much vocal against the irregularities committed by appellant Mohiuddin. The victim did not compromise with irregularities or illegalities he used to take a stern attitude thereto.

55. From the aforesaid evidence of the P.Ws. 22, 25, 39 and 43 it is clear that accused Mohiuddin had a personal grudge towards the victim. A complete review of the evidence indicates that there was pre-existing hostility between the victim and appellant Mohiuddin. The motive for the commission of the murder is explicit from the evidence of P.Ws 22, 25, 39 and 43 which is relevant. Proof of motive does lend corroboration to the prosecution case. The same plays an important role and becomes a compelling force to commit a crime and therefore motive behind the crime is a relevant factor. Motive prompts a person to form an opinion or intention to do certain illegal acts with a view to achieving that intention. Adequacy of motive is of little importance as it is seen that atrocious crimes are committed for very slight motives. One cannot see into the mind of another (State Vs. Santosh Kumar Singh, 2007 Cr LJ 964). However, motive alone is not sufficient to convict the accused in case of circumstantial evidence. Along with motive, there should be some further corroborative evidence. We have already found that some incriminating materials (A.T.M. Cards and visiting cards of the victim) were recovered as per pointing out by the appellant Mohiuddin which clearly established that he was involved with the occurrence.

56. Along with the aforesaid evidence, we feel the necessity to take into consideration of the confessional statements of the co-accused for assurance in support of the conclusion to be arrived at. We have seen the confessional statements of co-accused Zahangir Alam, Abdus Salam and Nazmul. From their confessional statements it appears that appellant Mohiuddin planted the plan with the confessing accused for killing the victim, allured them (confessing accused) and hatched a conspiracy for implementing his ill design. Thereafter, all of them, in furtherance of their common intention, had killed a genius teacher of the country. From the facts, circumstances and the confessional statements, it appears that there was a unity of object and purpose. It further appears from the charge (quoted earlier) that there is a specific charge against the appellants that they hatched a conspiracy to kill the victim and in furtherance of their commission intention, they, in connivance with each other, implemented their ill-design. In Noor Mohammad Yusuf Momin V. The State of Maharastra (AIR 1971 SC 885) it was observed that like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed in most cases, proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. Conspiracy is apparent from the confessional statements of the confessing accused. The

confessions contain statements inculpating the makers as well as accused Mohiuddin. In the case of Kashmira Singh V. State of M.P. (AIR 1952 SC 159) Supreme Court of India observed that some conditions are needed to be fulfilled before taking into consideration the confession of one accused against others. Those are : (i) The person who is making a confession and the accused persons are being jointly tried; (ii) All the accused are being tried for the same offence; and (iii) The confession must affect the confessor as well as the other accused persons. Those conditions are present in this case. In the cited case it was further observed that the Court may take up the confession in aid and use it to lend assurance to the other evidence, and thus secure itself to believe that without the aid of the confession, it would not be prepared to accept the other evidence. Common charge of conspiracy was framed against all the accused persons who were tried jointly. The object behind the conspiracy is to achieve the ultimate aim of the conspiracy. Confessional statements indicate that all the accused persons were in consent touch with each other, in arranging weapons, and finally, in the commission of offence.

57. In the case of Major Bazlul Huda Vs State reported in LXII DLR (AD) page 1, this Division has observed as under:

> "There is no substantial difference between conspiracy as defined in section 120A and acting on a common intention as contemplated in section 34. In the former, the gist of the offence is bare agreement and association to break law even though the illegal act does not follow while the gist of an offence under section 34 is the commission of a criminal act in furtherance of a common intention of all the offenders which means that there should be a unity of criminal behaviour resulting in something for which an individual will be punishable if it is done by himself alone." It was further observed that "When specific acts done by each of the accused have been established showing their common intention they are admissible against each and every other accused. Though an act or action of one accused cannot be used as evidence against other accused but an exception has been carved out in section 10 of the Evidence Act in case of criminal conspiracy. If there is reasonable ground to believe that two or more persons have conspired together in the light of the language used in 120A of the Penal Code, the evidence of acts done by one of the accused can be used against the other."

58. It was further observed that, "In pursuance of the criminal conspiracy if the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences. It is not required to prove that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime since, from its very nature, a conspiracy is hatched in secrecy, direct evidence of a criminal conspiracy to commit a crime is not available otherwise the whole purpose may frustrate – in most cases only the circumstantial evidence which is available from which an inference giving rise to the commission of an offence of conspiracy may be legitimately drawn." Direct independent evidence of criminal conspiracy is generally not available and its existence is a matter of inference. In the case of State of Tamil Nadu V. Nalini reported in AIR 1999 SC 2640 it was observed that under section 10 of the Evidence Act statement of a conspirator is admissible against co-conspirator on the premise that this relationship exits. It was held that everything

said, written or done by any of the conspirators in execution of or in reference to their common intention is deemed to have been said, done, or written by each of them.

59. In Noor Md. Yusuf Momin Vs State of Maharashtra (Supra), it was observed by the Supreme Court of India, "Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is a close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers." It was further observed that, "In fact, because of the difficulties in having direct evidence of criminal conspiracy, once the reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything, done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of Evidence, relevant for proving both conspiracy and the offences committed pursuant thereto." The existence of conspiracy and its object are usually deduced from the circumstances of the case and the conduct of the accused involved in the conspiracy [K.R. Purushothaman V. State of Kerala (2005) 12 SCC 631]. Regarding admissibility of evidence, loosened standards prevail in a conspiracy trial. Contrary to the usual rule, conspiracy prosecutions, any declaration by one conspirator, made in furtherance of a conspiracy and during its pendency, is admissible against each co-conspirator. Despite the unreliability of hearsay evidence, it is admissible in conspiracy prosecutions [Firozuddin Basheeruddin V. State of Kerala (2001) 7 SCC 596].

60. The criminal cases are to be decided on its peculiar facts and circumstances; as such, the rules laid down in the earlier cases cannot be applied in the subsequent cases in the omnibus- statistics manner. The Court should begin with other evidence adduced by the prosecution and after it has formed an opinion with regard to the quality and effect of the evidence, then it is permissible to turn to the confession in order to receive assistance to the conclusion of the guilt if the judicial mind is about to reach on the said evidence. We have found that by adducing the unimpeachable evidence of PWs-18, 21, 22, 25, 39 and 43 the prosecution has proved the motive of the appellant Mohiuddin behind killing Professor Taher Ahmed and that was, for securing his promotion to the post of Professor from Associate Professor. We have also found that some incriminating materials were recovered as per admission of accused Mohiuddin. In accordance with the provisions of section 30 of the Evidence Act, if we take the aid of confessional statements of appellant Zahangir Alam and petitioners Abdus Salam and Nazmul, we find that Associate Professor Mia Md. Mohiuddin is the main perpetrator of killing Professor Taher Ahmed whom he considered to be an obstacle in getting a promotion to the post of Professor in the Department of Geology and Mining and as such, he conspired with other appellants and petitioners to kill Professor Taher and executed the killing in a ruthless manner. Considering all the facts and evidence, the issue at hand can also be examined from another perspective. In the case of State of Moharastra Vs. Kamal Ahmed Mohammad Vakil Ansari reported in AIR 2013 SC 1441, it was observed by the Supreme Court of India that, "A confessional statement is admissible only as against an accused who has made it. There is only one exception to the aforesaid rule,

wherein it is permissible to use a confessional statement, even against person(s) other than the one who had made it. In State of Tamil Nadu V. Nalini (Supra) it was observed that normal rule of evidence that prevents the statement of one co-accused from being used against another under section 30 of the Evidence Act does not apply in the trial of conspiracy in view of section 10 of the Act when we say that court has to guard itself against readily accepting the statement of a conspirator against co-conspirator what we mean is that Court looks some corroboration to be on the safe side. It is not a rule of law but a rule of prudence bordering on the law. All said and done ultimately it is the appreciation of evidence on which the Court has to embark. A statement of an accused would be admissible against co-accused only in terms of section 30 of the Evidence Act. The aforesaid exception has been provided for in Section 30 of the Evidence Act, which is being extracted hereunder:-

> "30. Consideration of proved confession affecting person making it and others jointly under trial for same offence-
>
> When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.
>
> Illustrations
>
> (a) A and B are jointly tried for the murder of C. It is proved that A said - "B and I murdered C". The Court may consider the effect of this confession as against B.
>
> (b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said, "A and I murdered C".
>
> This statement may not be taken into consideration by the Court against A, as B is not being jointly tried."

61. A voluntary and true confession made by an accused can be taken into consideration against a co-accused by virtue of section 30 of the Evidence Act but as a matter of prudence and practice the Court should not act upon it to sustain a conviction of the co-accused without full and strong corroboration in material particulars both as to the crime and as to his connection with the crime [Ram Prakash V. State of Punjab (1959 SCR 1219)]. "As is evident from a perusal of section 30 extracted above, a confessional statement can be used even against a co-accused. For such admissibility it is imperative, that the person making the confession besides implicating himself, also implicates others who are being jointly tried with him. In that situation alone, such a confessional statement is relevant even against the others implicated (Nalini).

62. Having regard to the evidence available on record, we are of the opinion that this is not a case where the prosecution case was entirely based on the confessional statements of the co-accused for connecting accused Mohiuddin. Rather we find that the prosecution case was based on other evidence to establish the circumstances pointing towards the guilt of the accused Mohiuddin. In the light of evidence (both oral and documentary) on time, place and manner of occurrence provide a coherent links connecting the appellant Mohiuddin with the occurrence.

63. If we take into consideration the testimonies of those witnesses and the confessional statements of co-accused Md. Zahangir Alam, Md. Nazmul and Md. Abdus Salam together, it would be clear that appellant Miah Mohammad Mohiuddin hatched the conspiracy to kill Professor victim Taher Ahmed in order to clear his way to become a Professor in the Department, and in doing so, he allured the other appellant and petitioners to a good prospect of having jobs and meeting other material satisfactions. He conspired with them and made planning in implementing the conspiracy to kill the victim Professor Taher Ahmed and, consequently, together they implemented their plan by killing Professor Taher Ahmed, a legend Professor of the country. A perusal of the above confessions; by the co-conspirators would show that appellant Mohiuddin was playing a key role in furtherance of the conspiracy. He played an active role in generation and management for achieving the object behind the conspiracy and in all subsequent events. It is clear from the materials available on the record that all the accused persons had hatched criminal conspiracy to commit the offence in question and prior of meeting of mind to commit the same. From the confessional statements it is explicit that Dr. Mohiuddin had hatched conspiracy with other confessing accused to kill the victim. In Ferozuddin Basheeruddin (Supra), it was observed that conspiracy is not only a substantive crime, it also serves as a basis for holding one person liable for the crimes of others in cases where the application of the usual doctrines of complicity would not render that person liable. Thus, one who enter into a conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission.

64. In view of the evidence as discussed earlier we have no hesitation to hold that Dr.Mohiuddin, a highly educated man and Associate Professor of Rajshahi University, only for the purpose of getting promotion as Professor annihilated Dr. Taher from this world presuming that if Professor Taher lived, the chance of his getting promotion as Professor was zero. We also have no hesitation to hold that appellant Zahangir Alam and petitioners Abdus Salam and Nazmul in order to get monetary benefits, services and computers accepted the proposal from Dr. Mohiuddin to kill Professor Taher Ahmed and accordingly committed the offence of murder of Professor Taher Ahmed.

65. A Judge does not presides over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape the tentacles of justice. That is what the justice stands for. The legal principle with regard to the circumstantial evidence is not a fossilized one. It has to be carefully scrutinized and applied to the peculiar facts of the case [State of Punjab Vs. Karnail Sing (2003) 1 SCC 271].

66. Considering the facts, circumstances and evidence, our view is that the courts below did not commit any error of law in convicting and sentencing the appellants and petitioners.

67. The principles governing the sentencing policy in our criminal jurisprudence have more or less been consistent. While awarding punishment, the Court is expected to keep in mind the facts and circumstances of the case, the legislative intent expressed in the statute in determining the appropriate punishment and the impact of the punishment awarded. Before awarding punishment a balance sheet of aggravating and mitigating circumstances has to be

drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances. Considering the depraved and shameful manner in which the offence has been committed, the mitigating factor would not outweigh the aggravating factors. In this case, there was no provocation and the manner in which the crime was committed was brutal. It is the legal obligation of the Court to award a punishment that is just and fair by administering justice tempered with such mercy not only as the criminal may justly deserve but also the right of the victim of the crime to have the assailant appropriately punished is protected. It also needs to meet the society's reasonable expectation from court for appropriate deterrent punishment conforming to the gravity of offence and consistent with the public abhorrence for the heinous offence committed by the convicts. It is unfortunate but a hard fact that appellants and petitioners have committed such a heinous and inhumane offence. The murder of a genius professor of the University has shocked the collective conscience of the Bangladeshi people. It has a magnitude of unprecedented enormity.

68. For the above reasons, we are of the view that the Courts below did not commit any error in convicting and sentencing the appellants and petitioners and the decisions of the Courts below are unassailable. In such view of the matter, we do not find any substance in Criminal Appeal No.90 of 2013 preferred by Dr. Miah Mohammad Mohiuddin, Criminal Appeal No.108 of 2013 and Jail Petition No. 27 of 2014filed by Md. Zahangir Alam, Criminal Petition No.257 of 2022 and Jail Petition No. 28 of 2014 filed by Md. Nazmul, and Criminal Petition No.260 of 2022filed by Md. Abdus Salam and, as such, those are liable to be dismissed.

69. It appears that the State has filed Criminal Petition No.322 of 2019 against Md. Nazmul and Criminal Petition No.323 of 2019 against Md. Abdus Salam for enhancement of their sentence. In this regard, we approve the finding of the High Court Division that their role in committing the crime was secondary in nature, and in such a case, imposing the sentence of imprisonment for life is appropriate. Therefore, considering the facts and circumstances of the case, we find no substance in the petitions filed by the State for enhancement of the sentence of the petitioners, namely, Md. Abdus Salam and Nazmul.

70. Accordingly, Criminal Appeal No.90 of 2013 and Criminal Appeal No. 108 of 2013 are dismissed and the sentence of death awarded to Dr. Miah Mohammad Mohiuddin and Md. Zahangir Alam by the trial Court and maintained by the High Court Division is hereby affirmed. Jail Petition No.27 of 2014, Criminal Petition for Leave to Appeal No.257 of 2022, Jail Petition No.28 of 2014 and Criminal Petition No. 260 of 2022 are also dismissed.

71. The order of commutation of sentence from death to imprisonment for life awarded to Md. Nazmul and Md. Abdus Salam by the High Court Division is hereby affirmed, and each of them is ordered to pay a fine of Taka 10,000/-, in default, to suffer rigorous imprisonment for a period of 6(six) months more. The Criminal Petition for Leave to Appeal No.322 of 2019 and Criminal Petition for Leave to Appeal No.323 of 2019 are also dismissed.

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APPELLATE DIVISION

PRESENT:
Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Ms. Justice Krishna Debnath

CIVIL PETITION FOR LEAVE TO APPEAL NO. 3135 OF 2014
(From the judgment and order dated 19.05.2014 passed by the High Court Division in Civil Revision No.3437 of 2012)

Terab Ali and others **… Petitioners**

=VERSUS=

Syed Ullah and others **… Respondents**

For the Petitioners	:Mr. Chanchal Kummar Biswas, Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record
For the Respondents	:Mr. Hamidur Rahman, Advocate, instructed by Mr. Mohammad Ali Azam, Advocate-on-Record
Date of hearing and judgment on	:The 31st August, 2022

Editors' Note
The petitioner-judgment debtor filed an application for dismissal of an execution case as being time barred. The learned Senior Assistant Judge rejected the application relying on a synopsis of a decision of one of the High Courts of Pakistan passed in 1998 published in a D.L.R. reference book which was affirmed by the High Court Division. The Appellate Division, however, found that the decision of the High Court of Pakistan is not applicable in our jurisdiction after 25th March 1971 and detailed as to which precedents of Dhaka High Court, Federal Court of Pakistan, Supreme Court of Pakistan, Calcutta High Court, Federal Court of India and the Privy Council are binding on us and which are not. Finally, finding that the execution proceeding was initiated after 3 years beyond the permissible period under Article 182 of the Limitation Act, dismissed the execution case.

Key Words:
Persuasive efficacy; interpretation of law; Article 111 read with Article 149 of the Constitution of Bangladesh, 1972

Article 111 read with Article 149 of the Constitution of Bangladesh, 1972:
In this connection, our considered view is that case laws of any jurisdiction is applicable in our jurisdiction subject to the provisions of Article 111 read with Article 149 of the Constitution of Bangladesh, 1972 only and anything beyond that periphery, specially from Subordinate Judiciary, could be termed as judicial adventurism. (Para 15)

Which precedents are applicable in our jurisdiction:
Regarding the binding effect of precedents of Supreme Court, Article 212 of the

Government of India Act 1935; Article 163 of Constitution of Pakistan 1956 and Article 63 in Constitution of Pakistan of 1962 served the purposes of the present Article 111 of Bangladesh Constitution. By dint of the above mentioned constitutional provisions the case laws of the then higher courts namely Dhaka High Court, Federal Court of Pakistan (14 August 1947 of its independence to 1956); Supreme Court of Pakistan (1956 to 25 March 1971); Calcutta High Court, Federal Court of India (1935-1947 13th August) the Privy Council (till 13th August, 1947) is applicable with binding effect in our jurisdiction. (Paras 19 and 20)

Case laws which are not applicable in our jurisdiction but may have some sort of persuasive efficacy:

We can sum up in this way that the case laws declared by any superior court other than Bangladesh including Pakistan after 25th March, 1971 (that is after independence of Bangladesh) and that of India after 13th August, 1947 (that is after partition of Pakistan) are not applicable in our jurisdiction as binding precedents. They may have some sort of persuasive efficacy in our legal arena and can be used to assist or guide Bangladesh Supreme Court ... Hence, both the Division of the Supreme Court of Bangladesh can discuss and cite foreign case laws in reaching any decision on some points of law applicable in Bangladesh. However, no reliance ipso facto could be placed upon those precedents in any way as was relied upon by the learned Senior Assistant Judge, Sylhet. (Para 27)

Judges of Sub-ordinate Judiciary are not empowered to interpret laws:

The Judges of Sub-ordinate Judiciary, as a whole, are not empowered to interpret laws or making a precedent, rather, are bound to apply "existing laws" as it is, it is better for them only to cite or rely on the existing laws and case laws applicable in our jurisdiction and at the same time refrain from rely on foreign case law, not covered under the constitutional scheme framed through Article 111 and Article 149 of the Constitution of Bangladesh as discussed above. Moreover, as per the provisions of the Law Reports Act, 1875 and practices of the Court, using of reference books other than recognized law reports, is not appropriate. (Para 28)

JUDGMENT

Md. Nuruzzaman, J:

1. This Civil Petition for Leave to Appeal is directed against the judgment and order dated 19.05.2014 passed by the High Court Division in Civil Revision No.3437 of 2012 discharging the Rule and thereby affirming the judgment and order dated 15.07.2012 passed by the learned Special District Judge, Sylhet in Civil Revision No.3 of 2012, rejecting the revisional application and thereby affirming the judgment and order dated 11.01.2012 passed by the learned Senior Assistant Judge, Sadar, Sylhet in Title Execution Case No.3 of 1993, rejecting the petition filed by the petitioner-judgment debtors praying for dismissal of the execution case as being time barred.

2. The facts, leading to filing this Civil Petition for Leave to Appeal, in short, are that the respondent Nos.1-8 herein as plaintiffs instituted Title Suit No.22 of 1983 impleading the defendants for declaration of their title in the suit land, as well as for recovery of khas possession. The principal defendants (petitioners of this petition) submitted written statement

in that suit but ultimately did not contest. Accordingly, the said suit was decreed ex-parte on 15.04.1989. For setting aside the said ex-parte decree dated 15.04.1989, the judgment debtors instituted Miscellaneous Case No.36 of 1989 under order 9 Rule 13 of the Code of Civil Procedure on 15.05.1989 which was dismissed for default on 23.05.1989. Thereafter, for setting aside the said ex-parte decree, the judgment debtors as plaintiffs instituted Title Suit No.53 of 1995, in the same Court praying for a decree declaring that the said ex-parte judgment passed in the said Title Suite No.22 of 1989 is not binding upon them for the reason that the decree passed in that suit was obtained by practicing fraud upon the Court. The said suit was dismissed and against the judgment of dismissal of that suit, they preferred Title Appeal No.309 of 2012 in the Court of District Judge, Sylhet, and the said appeal was also dismissed. Against such judgment of dismissal of the said appeal, they preferred Civil Revision No.6615 of 2002, before the High Court Division and obtained a Rule. At the time of issuance of the Rule, the High Court Division stayed further proceeding of aforesaid Title Execution Case No.03 of 1983. Ultimately, the Rule issued in the said Civil Revision No.6615 of 2002 was discharged by judgment and order dated 17.12.2009 and the order of stay was vacated. The further case is that the respondent Nos.1-8 herein as plaintiffs decree holders, instituted the Title Execution Case No.3 of 1993 in the original Court of Senior Assistant Judge, Sadar, Sylhet on 21.10.1993 praying for execution of the ex-parte decree obtained by them on 15-04-1989 in Title Suit No.22 of 1989 against the petitioners and the opposite Party Nos.9-52 as judgment debtors stating that as there is no legal impediments against the execution of the original judgment and decree the Decree Holders have filed this Title Execution Case.

3. The Judgment Debtors have filed a petition supported with verification on 27.02.2011 for disallowing the execution case. They have averred on that petition that the present Title Execution Case has been filed on the basis of ex-parte decree of Title Suit no. 22 of 1983 passed on 15.04.1989. But the decree holders have filed the instant Title Execution Case on expiry of the specified there years. Thus the instant execution case is barred by limitation and liable to be disallowed.

4. The Decree Holders have filed a written objection against the said petition of the Judgment Debtor. The Decree Holders have averred in their written objection that the original Title Suit no. 22 of 1983 has been decreed on declaring title and recovery of possession against the Judgment Debtors. The Defendants-Judgment Debtors filed written statement on the original suit but did not contest. That's why that suit has been decreed ex parte. The Defendants-Judgment Debtors filed Miscellaneous Case under Order 9 rule 13 of the Code of Civil Procedure, 1908 and that was disallowed on 23.11.1993. Thereafter the Decree Holders have filed this Execution Case on 8.11.1993. The Judgment Debtor as Plaintiffs filed Title Suit 53 of 1995 to declare the ex parte judgment decree of T.S. 22.83 as void, collusive, inoperative and not binding upon the plaintiff of Title Suit 52 of 1995. That suit no. 53 of 95 has been dismissed on contest on 12.8.1999. Thereafter, the judgment debtors-defendant filed Title Appeal no. 309 of 1999 and that appeal has also been disallowed. The judgment debtors/defendants filed Civil Revision no. 6615 of 02 and the proceedings of this execution case has been stayed till disposal of the Civil Revision. And then High Court Division disallowed that civil revision with as follows- "And it is further ordered that the order of stay passed by this court staying all further proceedings of Title Execution case No. 3 of 1993 now pending in the Court of Senior Assistant Judge, Sadar, Sylhet is hereby vacated". As such, they prayed for disallowance of the petition.

5. The learned Senior Assistant Judge after hearing the parties rejected the said prayer by

the order dated 11.01.2012.

6. Feeling aggrieved, by the order dated 11.01.2012 passed the Execution Court, the petitioners preferred Civil Revision No.3 of 2012 before the Court of learned District Judge, Sylhet. On transfer the said revisional application was heard by the learned Special Judge, Sylhet, who by his judgment and order dated 15.07.2012 rejected the revisional application and thereby affirmed the order dated 11.01.2012 passed by the learned Senior Assistant Judge, Sadar, Sylhet.

7. Feeling aggrieved, by the judgment and order dated 15.07.2012 passed by the appellate Court, the judgment debtors as petitioners preferred Civil Revision No.3437 of 2012 before the High Court Division and obtained the Rule.

8. In due course, a Single Bench of the High Court Division upon hearing the parties was pleased to discharge the Rule by the impugned judgment and order dated 19.05.2014 and thereby affirmed the order of the Execution Court.

9. Feeling aggrieved, by the judgment and order dated 19.05.2014 passed by the High Court Division, the judgment debtors as petitioners filed the instant Civil Petition for Leave to Appeal.

10. Mr. Chanchal Kummar Biswas, the learned Advocate appearing on behalf of the petitioners submits that the High Court Division failed to consider that the miscellaneous case is not a continuation of the suit and the very first execution case was barred by limitation and the unreported decision of a case as passed in Civil Revision No.4949 of 2001 and the decision referred by the High Court Division are not at all applicable in the facts and circumstances of the present case. He further submits that the ex-parte decree passed in Title Suit No. 22 of 1983 on 15.04.1989 and the execution case has been filed on 20.10.1993 which is beyond the period of 3 years as codified by the article 182 of limitation Act, 1908. The learned Executing Court relied on a synopsis of a decision of High Court Division of Pakistan passed in 1998, published in a D.L.R. reference book, though the decision has neither binding effect nor is applicable in the instant case after independence. And reliance on reference book is not legal. Moreover, the decision appears as stare decisis in the Pakistan contest and learned special District Judge as well as the High Court Division failed to consider it. He next submits that the learned Courts below failed to consider that there has been a great change in Limitation Act in Pakistan after 1971. In Pakistan the Article 182 of the Limitation Act has been omitted and there is no other provision for limitation regarding filing of execution proceeding except article 181 and according to the provision of article 181 of Limitation Act of Pakistan, limitation starts, when the right to apply accrues, and learned Executing Court failed to realise that the decision relied on has been passed under Article 181 of the Limitation Act of Pakistan. But in our Limitation Act, there is specific provision for limitation for filing execution proceedings prescribing 3 years from the date of the decree or order and where there has been appeal from the date of final decree or order of appellate court or withdrawal of appeal or where there has been a review of the judgment from the date of the decision passed in review or where the decree has been amended the date of amendment etc. No where the period of miscellaneous case under order 9 rule 13 or any other miscellaneous case under order 41 rules 19 and 21 has been included. From the decision referred by the judgment debtors in ILR VOL LIV page 1052, it is found that though the period of limitation of appeal is included but the period of miscellaneous appeal has been omitted. Both the courts below fails realize it. He last submits that all the statements made in

the written objection filed the decree holders against the petition dated 27.02.2011 filed by the judgment-debtors, is not correct. The miscellaneous case under order 9 rule 13 has been dismissed for failure of taking steps of service of notices and subsequent Title suit no. 53 of 1995 challenging the ex-parte decree on the ground of fraud etc. has failed due to the latches of the engaged lawyer and the ex-parte decree passed in Title Suit No. 22 of 1989 is non-executable and, as such, the impugned judgment and order of the High Court Division is liable to be set aside.

11. Mr. Hamidur Rahman, the learned Advocate appearing on behalf of the respondents made submissions in support of the impugned judgment and order of the High Court Division and, prayed for dismissal of the instant Civil Petition for Leave to Appeal.

12. We have considered the submissions of the learned Advocate for the respective parties. Perused the impugned judgment of the High Court Division and other connected materials on record.

13. As per Article 182 of the Limitation Act, 1908 the very first execution case must be filed within 03 (three) years of the date of decree. And admittedly as well as documentarily the Title Execution case in question bearing no. 03 of 1993 was filed on 20.10.1993 where as the original Title Suit no. 22 of 1989 was decree ex-parte on 15.04.1989 which makes the Title Execution case no. 03 of 1993 hopelessly barred by limitations for at least 01 and half years. We surprising observed that all the courts below missed the clear and unambiguous provisions of law.

14. This Division ridiculously found that the learned senior Assistant Judge of the executing court arrived at this perverse finding on point of limitation based on a ruling of a foreign court i.e. Peshawar High Court of Pakistan. The relevant portion of the order is worth mentioning:

> “The learned counsel of the contesting judgment debtors has cited a decision of ILR Vol. LIV page no. 1052. But the facts and circumstances of that decision are not similar with the facts and circumstances of the instant execution case. But the learned counsel of the decree holders has vehemently opposed the above mentioned proposition. The learned counsel of the decree holders has cited a decision, "Art. 181:- Ex-parte decree-Application for setting aside ex-parte decree was filed on 1.3.1996- Application for execution of decree was dismissed by Executing Court on 30.9.1992, became sub-judice because of application filed by judgment debtors Application for setting aside exparte having been rejected on 13.3.1996, Application for execution filed thereafter, was well within time order of the execution court rejecting execution application was set aside and it was directed to proceed with execution application already filed before it. United Bank limited Vs. Victory Engineering company, SIE, Abbottabad: 1998 CLC 690 (The Limitation Act, 1908, 3rd Edition, 2009, Dhaka Law Reports Publication, page no. 507). The decree holders have filed the execution case on disposal of the miscellaneous case filed by the judgment debtors. On reliance upon the above discussion and the decision cited by the learned counsel of the decree holders it transpires that the execution case filed by the decree holders in justified period. Moreover, the judgment debtors have filed the instant petition after long period of 18 years. It transpires from the petition and the circumstances that the judgment debtors have waived their right to raise the present plea of limitation.”

15. In this connection, our considered view is that case laws of any jurisdiction is

applicable in our jurisdiction subject to the provisions of Article 111 read with Article 149 of the Constitution of Bangladesh, 1972 only and anything beyond that periphery, specially from Subordinate Judiciary, could be termed as judicial adventurism.

16. For a better understanding we need to travel down the legal memory lane a bit through the history of doctrine of Stare Decisis and enforcement of enlisting laws in our jurisdiction. Pakistan became independent on the 14th August, 1947 and Bangladesh emerged as a sovereign independent State on 26th March, 1971. As Article 111 and Article 149 are as follows:

> "BINDING EFFECT OF SUPREME COURT JUDGMENTS-
> 111.The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it."
>
> "SAVING FOR EXISTING LAWS-
> 149. Subject to the provisions of this Constitution all existing laws shall continue to have effect but may be amended or repealed by law made under this Constitution."

17. Prior to the provisions of Article 149 continuance of existing laws in our jurisdiction was regulated by LAWS CONTINUANCE ENFORCEMENT ORDER, 1971 which was as follows:

> "LAWS CONTINUANCE ENFORCEMENT ORDER
> MUJIBNAGAR
> Dated 10th day of April, 1971
> I, Syed Nazrul Islam, the Vice President and Acting President of Bangladesh, in exercise of the powers conferred on me by the Proclamation of Independence dated tenth day of April. 1971 do hereby order that all laws that were in force in Bangladesh on 25th March, 1971, shall subject to the Proclamation aforesaid continue to he force with such consequential changes as may be necessary on account of the creation of the sovereign independent State of Bangladesh formed by the will of the people of Bangladesh and that all government officials-civil, military, judicial and diplomatic who take the oath of allegiance to Bangladesh shall continue in their offices on terms and conditions of service so long enjoyed by them and that all District Judges and District Magistrates, in the territory of Bangladesh and all diplomatic representatives elsewhere shall arrange to administer the oath of allegiance to all government officials within their jurisdiction.
>
> This Order shall be deemed to have come into effect from 26th day of March 1971
> SYED NAZRUL ISLAM
> Acting President."

18. Before that, the similar kind of provisions were enforced through Article 225 of the Constitution of Pakistan 1962 and Article 224 of the Constitution of Pakistan 1956. As per the section 8(1) of the Indian Independence Act, 1947, the combination of The Government of India Act, 1935 and the Indian Independence Act, 1947, the two constitutional instruments, served as an interim constitutional order for Pakistan until its Constituent Assembly adopted its own constitution on 1956 and Article 292-293 of the Government of India Act 1935 served the comparable purposes of continuance of existing laws in our jurisdiction then.

19. And regarding the binding effect of precedents of Supreme Court, Article 212 of the Government of India Act 1935; Article 163 of Constitution of Pakistan 1956 and Article 63 in Constitution of Pakistan of 1962 served the purposes of the present Article 111 of Bangladesh Constitution.

20. By dint of the above mentioned constitutional provisions the case laws of the then higher courts namely Dhaka High Court, Federal Court of Pakistan (14 August 1947 of its independence to 1956); Supreme Court of Pakistan (1956 to 25 March 1971); Calcutta High Court, Federal Court of India (1935-1947 13th August) the Privy Council (till 13th August, 1947) is applicable with binding effect in our jurisdiction.

21. In this end, opinion of two eminent jurists of our country are worth studying. Former Honb'le Judge of Appellate Division of the Supreme Court of Bangladesh Late Mr. Justice Kazi Ebadul Haque in his book namely 'The Code of law of Precedent (Nojir Ain Songhita)', Volume 1, 1st Edition (November 2011), Page 3, Bangla Academy observed that:

> "Now the question is, whether the decisions of the Privy Council, the Indian Federal Court and the Calcutta High Court during the period before the independence of Pakistan through the partition of India on August 14, 1947 and the decisions of the Pakistan Federal Court and Supreme Court and Dhaka High Court on December 16, 1971 i.e. Bangladesh Pre-independence shall be binding on the courts of Bangladesh.
>
> 24. According to the Law's Continuance Enforcement Order and Article 149 of the Constitution of Bangladesh, those precedents are binding as common law unless later overruled by any decision of the Appellate Division of the Supreme Court of Bangladesh or any law enacted by the Legislature. But the decisions of those courts rendered after those dates shall not be binding as foreign precedents. They will only be examples that produce persuasive efficacy. During the colonial rule, if the Privy Council as the highest court in the decision of a case invented a rule of law, it was binding on all the subordinate courts including the High Court Division of this country. Similarly, the ruling of the Federal Court of India and the Calcutta High Court, when a rule of law was laid down in a case, were binding on it and all the courts subordinate to it. It has already been mentioned that those pre-independence precedents are still binding as common law."

22. Former Attorney General of Bangladesh and Senior Advocate of the Supreme Court Late Mahmudul Islam in his "Constitutional Law of Bangladesh" (page 915, 3rd edition, reprinted on January 2019, Mullick Brothers, Dhaka) opined that:

> "JUDGMENTS OF THE PRIVY COUNCIL, FEDERAL COURT AND SUPREME COURT OF PAKISTAN:
>
> Now the question is whether the laws declared by the Privy Council, Federal Court and the Supreme Court of Pakistan before the liberation of Bangladesh are binding precedents. Because of the then existing constitutional dispensation the statements of law by these courts formed part of the corpus juris of this country and were continued as existing laws by virtue of the Laws Continuance Enforcement Order, 1971 and art.149 of the Constitution and are as such binding on the High Court Division and the subordinate courts until the Appellate Division renders any contrary decision. The Indian Supreme Court made a distinction between principles of substantive law and the principles relating to interpretation of statutes and opined that the former were continued by the Constitution but not the latter.' The Indian Supreme Court seems to have rightly made the distinction and it is submitted that art.149 of the Constitution should be deemed to have continued the principles of substantive law laid down by

earlier Supreme Courts and Privy Council as part of the 'existing law'."

23. Concerning the execution proceedings this Division observed in the case of Bangladesh Jatiya Samabaya Bank Ltd. vs. Sangbad Daily Paper and others reported in 36 DLR(AD) (1984) 5 as follows:

"It is well settled that 12 years is to be counted from terminus quo mentioned in clauses (a) and (b) of section 48(1). Although the period of 12 years has been fixed which has been termed as an "outside period" the decree must be kept alive under the Limitation Act and Article 182 requires the first application for execution to be made within 3 years of the decree and each successive application to be made within three years of the final order passed on the last application. In Pingle Venkata Rama Reddy Vs. Kakaria Buchanna & others. AIR. 1963 Andhra Pradesh F.B. page I it was held that section 48 deals with the maximum limit of the time for execution. This includes the "out side period" after which no execution could be granted. It was considered that section deals with the maximum limit of time for execution and no application would be entertained after this period, notwithstanding that the last application was filed within three years of the final order made on the previous application as required by article 182 of the Limitation Act. It was further noticed that the section requires the decree-holder to be diligent in realising the fruits of the decree. Even if successive applications are filed within three years of each order, it will not avail the decree-holder if the last one is not put in within the period -specified in section 48. It was considered that the judgment debtor is under no obligation to establish that the earlier petition was out of time. It is enough for him to show that the execution proceeding which was the subject matter of enquiry is hit by section 48 C.P.C. In Lalji Raja and Sons Vs. Firm Hansraj Nathuram, A.I.R. 1971 (S.C) 974 the Supreme Court of India considered that section 48(1) of the Code indicated that the period is a period of limitation not a bar as was a judicial opinion at one time. The opinion that has now crystalised is that section 48 is controlled by the provision of the Limitation Act. In India by Limitation Act, 1963 section 48 of the Code is deleted and its place has now been taken by Article 136 of the Limitation Act, 1963. In this view the contention of Dr. Kamal Hossain that the execution proceeding is hit by Article 182 of the Limitation Act has considerable force.

24. This view has been expressed in 27 D.L.R. Dac. 72 Md. Abdur Rahim and others vs. Sree Sree Gredhari Jeo where it was observed:

Both prescribe the period of limitation for the execution of the decree. The Civil Procedure Code fixes the longest period, whereas the Limitation Act the earliest period to take the first step in execution and the subsequent steps known as steps-in-aid.

25. It was further observed:

An application for execution has therefore to satisfy first Article 182 of the Limitation Act the earliest period prescribed and then also section 48 of the Code which prescribed the maximum period of limitation. If the execution petition is hit by any of the two provisions it is to fail.

This is a correct approach and it is interesting to note that the learned Judges commented that these two provisions though expressed in different language "create anomaly" "The removal of the anomaly is the function of the Parliament and not the court". Precisely for this reason, in India section 48 has been deleted by the Limitation Act, 1963 and the period of limitation is now governed by Article 136 instead of the

previous article 182."

26. The same view was reiterated by this Appellate Division in the case of Assistant Custodian, Enemy Property (Vested and Non-Resident) (L and B) and ADC (Revenue), Pabna vs. Md. Abdul Halim Mia reported in 1996 16 BLD (AD) 73 as follows:

> "In support of his submission that the last Execution Case was barred by Section 48 C.P.C. Mr. Moksudur Rahman has relied upon some decisions all of which are not relevant. This Court has, however, already pronounced itself on this point in the case of Bangladesh Jatiya Samabaya Bank Ltd. Vs. The Sangbad, Daily Paper and others. BCR 1983, (AD) 418. The said decision was given on consideration of the cases of Md. Abdur Rahim and others Vs. Sree Sree Gredhari Jeo, 27 DLR (Dhaka) 72, Pingle Venkata Rama Reddy Vs. Kakaria Buchanna and others, AIR 1963 Andhra Pradesh (FB)1 and Lalji Raja and Sons Vs. Firm Hansraj Nthuram, AIR 1971 (SC) 974. This Court approved of the approach of the then Dhaka High Court in the afore-cited cases in 27 DLR (Dhaka) 72 and affirmed that both Section 48 C.P.C. and Article 182(2) of the First Schedule to the Limitation Act provide the period of limitation for the execution of a decree. The Civil Procedure Code fixes the longest period whereas the Limitation Act fixes the earliest period to take the first step in execution and the subsequent steps known as steps-in-aid. This Court also affirmed further view of then Dhaka High Court that an application for execution has therefore to satisfy first Article 182 of the Limitation Act being the earliest period prescribed and then also Section 48 C.P.C. which prescribes the maximum period of limitation. If the execution petition is hit by any of the two provisions it is to fail."

27. We can sum up in this way that the case laws declared by any superior court other than Bangladesh including Pakistan after 25th March, 1971 (that is after independence of Bangladesh) and that of India after 13th August, 1947 (that is after partition of Pakistan) are not applicable in our jurisdiction as binding precedents. They may have some sort of persuasive efficacy in our legal arena and can be used to assist or guide Bangladesh Supreme Court in unaling decisions on new facts. Hence, both the Division of the Supreme Court of Bangladesh can discuss and cite foreign case laws in reaching any decision on some points of law applicable in Bangladesh. However, no reliance ipso facto could be placed upon those precedents in any way as was relied upon by the learned Senior Assistant Judge, Sylhet.

28. Moreover, as the Judges of Sub-ordinate Judiciary, as a whole, are not empowered to interpret laws or making a precedent, rather, are bound to apply "existing laws" as it is, it is better for them only to cite or rely on the existing laws and case laws applicable in our jurisdiction and at the same time refrain from rely on foreign case law, not covered under the constitutional scheme framed through Article 111 and Article 149 of the Constitution of Bangladesh as discussed above. Moreover, as per the provisions of the Law Reports Act, 1875 and practices of the Court, using of reference books other than recognized law reports, is not appropriate.

29. Accordingly, we find merit in submissions of the learned Counsel for the leave petitioner. However, in our opinion, it is worth disposing of the leave petition instead of granting leave.

30. Hence, this petition is disposed of. The impugned judgment and order of the High Court Division and Courts below are set aside. The application filed in Execution Court for rejecting the execution case is allowed. The Execution Case is dismissed as barred by law.

17 SCOB [2023] AD 43

APPELLATE DIVISION

PRESENT:
Mr. Justice Hasan Foez Siddique, *Chief Justice*
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim
Ms. Justice Krishna Debnath

CRIMINAL APPEAL NO.23 of 2005
(From the judgment and order dated 12.03.2003 passed by the High Court Division in Criminal Appeal No.31 of 2001)

The State ....**Appellant**

-Versus-

Badal Kumar Paul ....**Respondent**

For the appellant	Mr. Biswajit Debnath, Deputy Attorney General with Ms. Abantee Nurul, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record.
For the respondent	Mr. Syed Mahbubur Rahman, Advocate-on-Record (Not present).
Date of hearing	The 19th day of January, 2022.
Date of judgment	The 1st day of February, 2022.

Editors' Note
The Appellate Division answered two important questions in this criminal appeal clearing a cloud of confusion as to (i) whether 'Codeine' and a derivative of codeine i.e. 'Codeine Phosphate', are prohibited items as narcotics and whether its presence in any liquid i.e. phensedyl renders the total amount of phensedyl/liquid as narcotics and (ii) whether having possession or carrying phensedyl is a punishable offence under section 19(1) serial 3(Kha) of the Narcotics Control Act, 1990.
The respondent was arrested for having possession of 250 bottles of Phensedyl each containing 100 ml. totaling 25 liters and 72 pieces of Indian woolen mufflers. The trial Court found the respondent guilty under section 19(1) serial 3(Kha) of the Narcotics Control Act, 1990 and sentenced him to suffer imprisonment for life. The High Court Division, however, acquitted him on the ground that "phensedyl" is not a contraband drug under the laws of the land. The Appellate Division taking into consideration the chemical examination report of 'phensedyl' and analyzing relevant laws and judicial pronouncements of the highest Courts of Bangladesh and India came to the conclusion that phensedyl contains 'Codeine Phosphate' which is a derivative of codeine and its presence in the drug renders the total amount of phensedyl as narcotics and, therefore, possessing or carrying phensedyl is a punishable offence under section 19(1) serial 3(Kha) of the Narcotics Control Act, 1990. Thereafter, it set aside the judgment and order of the High Court Division and restored the same of the trial Court.

Key Words:
Section 19(1) Serial 3(Kha), 19(4) and 25 of the Narcotics Control Act, 1990; Phensedyl; Codeine Phosphate; Schedule III of the Drugs (Control) Ordinance, 1982:

Since codeine phosphate is a derivative of codeine, it thus also stands as a 'Ka' class narcotic under Schedule-I of the Narcotics Control Act, 1990:
'Codeine phosphate' is a derivative of codeine and codeine is a scheduled narcotic under Section 19(1) Serial 3 of the Narcotics Control Act, 1990, which is an opium derivative. In schedule-I of the Narcotics Control Act, 1990 three categories of narcotics have been enumerated. The derivatives of opium have been mentioned in serial 3 of 'Ka' class of narcotics, where codeine is one of the derivatives. So, indisputably according to the Narcotics Control Act, 1990 'codeine' is a scheduled narcotic and it is prohibited. Guidelines for evaluation of medical products proposed in Annexure–III of the Report of the Expert Committee for Drugs on the National Drug Policy of Bangladesh, 1982 strictly prohibits the use of codeine in any combination form as it causes addiction. Since codeine phosphate is a derivative of codeine, it thus also stands as a 'Ka' class narcotic under Schedule-I of the Act. (Para 13)

For the purpose of imposing punishment the 'total amount of substances' with which the narcotic has been mixed requires to be considered as narcotic substances:
Phensedyl is a liquid substance with which a solid substance i.e. codeine phosphate is found mixed. In this circumstance, we are of the view that when any kind of narcotic is found mixed with other substances whether it is liquid or solid, for the purpose of imposing punishment the 'total amount of substances' with which the narcotic has been mixed requires to be considered as narcotic substances and the accused will be punished accordingly. In this situation, if the substance with which the narcotic has been found mixed is liquid, the total amount of narcotic substance need to be counted based on volume or mass. (Para 15)

Section 19(1) Serial 3(Kha) of the Narcotics Control Act, 1990:
Since in the instant case, total 250 bottles i.e. 25 liters of the Phensedyl containing codeine phosphate have been seized the entire measure of Phensedyl is to be considered as narcotics. As the quantity of seized Phensedyl exceeds 2 kilograms, the accused-respondent will be convicted under Section 19(1) Serial 3(Kha) of the Act. The High Court Division committed a serious error of law holding that in the absence of any law declaring Phensedyl contraband, the existence of codeine phosphate in Phensedyl does not make Phensedyl a schedule narcotic. (Para 17)

Schedule III of the Drugs (Control) Ordinance, 1982:
'Codeine' and 'codeine phosphate' are included in Schedule III of the Drugs (Control) Ordinance, 1982. So, the use of codeine and codeine phosphate is not permitted in our country. Moreover, Phensedyl is also a prohibited drug in Bangladesh under Section 8 Schedule-III of the Drugs (Control) Ordinance, 1982. Since codeine phosphate is one of the ingredients of Phensedyl, the import, manufacture or sale of Phensedyl is punishable under the Act. Again in the Narcotics Control Act, 1990 codeine has been mentioned as schedule of narcotics. Since codeine phosphate is a derivative of codeine, in our unerring opinion it is also a scheduled narcotic. Due to its addictive nature, it cannot be used in any cough syrup or any other liquid substance in any combination form. (Para 25)

It is well settled principle that if the prosecution case is proved otherwise beyond reasonable doubt based on evidence, the accused can be convicted despite the seizure list witnesses denied supporting the prosecution case i.e. recovery and seizure. (Para 41)

JUDGMENT

Obaidul Hassan, J:

1. This criminal appeal is directed against the judgment and order dated 12.03.2003 passed by a Division Bench of the High Court Division in Criminal Appeal No.31 of 2001 allowing the appeal and thereby setting aside the judgment and order of conviction and sentence dated 13.11.2000 passed by the learned Sessions Judge, Jashore (hereinafter referred to as the trial Court) in Sessions Case No.39 of 1999 under Section 19(1) Serial 3(Kha) of the Narcotics Control Act, 1990 (hereinafter referred to as the Act).

2. The prosecution case, in short, is that on 05.11.1997 at about 9:10 am the police found 250 bottles of Phensedyl each containing 100 ml. totaling 25 liters and 72 pieces of Indian woolen mufflers worth of Tk.32,200.00 in the possession of the accused Badal Kumar Paul at the place in front of Mallik Bari at Village-Taherpur under police station- Chougacha, District-Jashore. The police seized the Phensedyl and mufflers in presence of witnesses and arrested the accused-respondent and lodged the First Information Report (FIR).

3. The trial commenced on framing charge against the accused-respondent along with co-accused Nousher Ali under Section 19(1) Serial 3(Kha) 19(4) and 25 of the Narcotics Control Act, 1990. The charge so framed was read over and explained to both the accused when they pleaded not guilty and claimed to be tried. The defence plea as revealed from the trend of cross-examination of prosecution witnesses was of innocence and further that no Phensedyl was recovered from their possession.

4. In course of trial the prosecution examined eight witnesses and the defence examined none. On closure of the prosecution evidence, both the accused were examined under Section 342 of the Code of Criminal Procedure, 1898, drawing attention to the incriminating evidence adduced when both of them repeated their innocence.

5. The trial Court upon consideration of the materials and evidence on record convicted the accused-respondent under Section 19(1) Serial 3(Kha) of the Narcotics Control Act, 1990 and sentenced him to suffer imprisonment for life and the other accused got acquittal.

6. The accused-respondent being aggrieved with the verdict of trial court convicting and sentencing him preferred criminal appeal before the High Court Division and the High Court Division by rendering its judgment and order dated 12.03.2003 allowed the appeal and acquitted the accused-respondent from all the charges of leveled against him.

7. Being aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the appellant preferred a petition for leave to appeal before this Division which was granted accordingly.

8. Mr. Biswajit Debnath, learned Deputy Attorney General, appearing for the appellant took us through the judgment and order passed by the High Court Division, the FIR, the charge sheet, the seizure list, the connected materials on record and submits that the learned Judges of the High Court Division did not consider the evidence of Chemical Examiner

(P.W.6) adduced before the trial Court, who was attached to CID Office, Dhaka to the effect that on examination of a bottle seized containing 100 ml. of Phensedyl sent for Chemical examination it was found to have contained 'Chlorpheniramine Maleate' and 'Codeine Phosphate'. 'Codeine' is a prohibited item as narcotic and codeine Phosphate is a derivative of codeine which is a narcotic substance and that the possession or carrying of Phensedyl containing such narcotic substance is a punishable offence under Section 19(1) Serial 3(Kha) of the Narcotics Control Act, 1990. He further submits that the Narcotics Control Act, 1990 expressly describes any opium derivative *viz* Morphine, Codeine, Heroin, Buprenorphine, Thebaine, Noscapaine, Narcotine, Papavarine, etc. and their alkali as narcotic substance and carrying, possessing, selling etc. of any of these narcotic substances attract penal provision and in the case in hand there was sufficient evidence that explicitly demonstrates that Phensedyl contains narcotic substances, but on an erroneous view of law and facts the learned Judges of the High Court Division acquitted the accused-respondent.

9. The learned Deputy Attorney General also submits that the observation of the High Court Division to the effect that "we must record that the axiom that the ignorance of law is no defence requires the law particularly such harsh law claiming life should be simple and flawless for easy understanding of the people on the streets. If the Government thinks that use or consumption of Phensedyl is hazardous or harmful to public health, it should come out with proper legislation, without the backing of a law, it has got no right to prosecute and harass a citizen" is not at all acceptable. Because not only the government, but any prudent person is aware that excessive or regular consumption of Phensedyl containing narcotic substance 'Codeine" can make anybody addict.

10. Though Mr. Sayed Mahbubur Rahman, learned Advocate-on-record filed caveat on behalf of the accused-respondent, but he was not found in the Court at the time of hearing of the case.

11. We have heard the learned Advocate for the appellant and examined the FIR, the testimony of the witnesses, the police report submitted under section 173 of the Code of Criminal Procedure, 1898 recommending prosecution, the seizure list, the judgment and order of conviction and sentence passed by the trial Court, the judgment and order passed by the High Court Division in appeal and the related materials on record.

12. On appraisal of the materials on record it depicts that in the instant case, leave was granted on 06.08.2005 by this Division to consider the following matters:

I. Whether 'Codeine', 'Codeine Phosphate', and a derivative of codeine, are prohibited items as narcotics and whether its presence in any liquid i.e. phensedyl renders the total amount of phensedyl/liquid as narcotics.

II. Whether having possession or carrying phensedyl is punishable under Section 19(1) Serial 3(Kha) of the Narcotics Control Act, 1990.

13. Therefore, two-fold questions have arisen before this Division to be resolved. First of all, admittedly Phensedyl is not any kind of scheduled narcotics by its name. From the chemical examination report, it appears that on examination of 100 ml. Phensedyl the existence of 'Chlorpheniramine Maleate' and 'codeine phosphate' was found in it. Now, the question arises what is 'codeine phosphate'? 'Codeine phosphate' is a derivative of codeine and codeine is a scheduled narcotic under Section 19(1) Serial 3 of the Narcotics Control Act, 1990, which is an opium derivative. In schedule-I of the Narcotics Control Act, 1990 three categories of narcotics have been enumerated. The derivatives of opium have been mentioned

in serial 3 of 'Ka' class of narcotics, where codeine is one of the derivatives. So, indisputably according to the Narcotics Control Act, 1990 'codeine' is a scheduled narcotic and it is prohibited. Guidelines for evaluation of medical products proposed in Annexure–III of the Report of the Expert Committee for Drugs on the National Drug Policy of Bangladesh, 1982 strictly prohibits the use of codeine in any combination form as it causes addiction. Since codeine phosphate is a derivative of codeine, it thus also stands as a 'Ka' class narcotic under Schedule-I of the Act.

14. As opium and opium derivatives (narcotics) are solid substances, Section 19(1) Serial 3 of the Narcotics Control Act, 1990 provides punishment for breach of provision of Section 9 of the Act by any kind of opium and opium derivatives narcotics counting the quantity of these solid substances based on kilograms. Section 19 of the Act provides that:

"১৯। (১) কোন ব্যক্তি নিম্ন টেবিলের কলাম (২) এ উল্লিখিত কোন মাদকদ্রব্য সম্পর্কে ধারা ৯ এর উপ-ধারা (১) বা (২) এর, চাষাবাদ [উৎপাদন, প্রক্রিয়াজাতকরণ, প্রয়োগ ও ব্যবহার] সম্পর্কিত বিধান ব্যতীত, কোন বিধান লঙ্ঘন করিলে, তিনি উক্ত মাদকদ্রব্যের বিপরীতে টেবিলের কলাম (৩) এ উল্লিখিত দণ্ডে দণ্ডনীয় হইবেন, যথা:-

ক্রমিক নং	মাদকদ্রব্যের নাম	দণ্ড
১	২	৩
৩	অপিয়াম, ক্যানাবিস রেসিন বা অপিয়াম উদ্ভূত, তবে হেরোইন ও মরফিন ব্যতীত, মাদকদ্রব্য]	(ক) মাদকদ্রব্যের পরিমাণ অনূর্ধ্ব ২ কেজি হইলে অন্যূন ২ বৎসর এবং অনূর্ধ্ব ১০ বৎসর কারাদণ্ড। (খ) মাদকদ্রব্যের পরিমাণ ২ কেজির ঊর্ধ্বে হইলে মৃত্যুদণ্ড অথবা যাবজ্জীবন কারাদণ্ড।

15. But Phensedyl is a liquid substance with which a solid substance i.e. codeine phosphate is found mixed. In this circumstance, we are of the view that when any kind of narcotic is found mixed with other substances whether it is liquid or solid, for the purpose of imposing punishment the 'total amount of substances' with which the narcotic has been mixed requires to be considered as narcotic substances and the accused will be punished accordingly. In this situation, if the substance with which the narcotic has been found mixed is liquid, the total amount of narcotic substance need to be counted based on volume or mass.

16. In the case of **the State vs. Miss Eliadah McCord [16 BLD (AD) 239]**, heroin was recovered which is a narcotic mentioned in serial 1 of Section 19(1) of the Act and in determining the amount of seized heroin this Division held that, ***"In the instant case, when it has been proved that the seized packets contained heroin then whole of the contents must be treated as heroin for punishment. It is not necessary for the prosecution to prove the "actual and real heroin content" for the purpose of a conviction under 1(b) of the Serial."*** In light of the decision rendered in this case, it can be lawfully said that if 'codeine phosphate' is used in any combination, irrespective of the amount of codeine phosphate, the total combination needs to be considered as narcotics substance and accordingly punishment to be awarded depends upon the amount of combination under Section 19(1) Serial 3 of the Act.

17. Since in the instant case, total 250 bottles i.e. 25 liters of the Phensedyl containing codeine phosphate have been seized the entire measure of Phensedyl is to be considered as narcotics. As the quantity of seized Phensedyl exceeds 2 kilograms, the accused-respondent will be convicted under Section 19(1) Serial 3(Kha) of the Act. The High Court Division

committed a serious error of law holding that in the absence of any law declaring Phensedyl contraband, the existence of codeine phosphate in Phensedyl does not make Phensedyl a schedule narcotic.

18. The crucial issues need to be determined in this case are: (i) codeine is a scheduled narcotic, (ii) codeine phosphate is derivative of codeine, (iii) the existence of codeine phosphate in Phensedyl makes the total combination narcotics which causes addiction. But the High Court Division failed to take these aspects into account.

19. We have to keep it in mind that the Act has been promulgated to control narcotics and provide treatment and rehabilitation facilities for narcotics addicts. Zero tolerance should be shown in combating use of drugs to keep the young generation secluded from the curse of drugs. The young generation shall go ahead to keep the society and country enlightened with healthy thoughts. Addiction to narcotics makes the society gravely stained and creates clog to the travel of the humanity. It is high time to take initiatives so that they don't nip in the bud.

20. The Narcotics Control Act, 2018 is very much specific in case of defining 'Ka' class narcotics which are opium derivatives. In Schedule I of the Narcotics Control Act, 2018 it is mentioned that any substance made with opium is capable of creating addiction is to be considered as 'ka' class narcotics. Since codeine phosphate causes addiction, any amount of its combination is capable of making the total amount of any liquid intoxicated. If the provisions of the Narcotics Control Act, 1990 and 2018 are taken together, it is crystal clear that the existence of codeine or its derivative in any substance renders the total amount of the combined product as narcotics substances. In this context, it can be lawfully deduced that though Phensedyl is not contraband by itself as narcotics, the existence of codeine phosphate in it makes it contraband automatically and makes it a prohibited item.

21. Taking into consideration the perilous upshot of narcotics on society, in numerous cases, the Indian Supreme Court has held that codeine-based Phensedyl cough syrup can be considered as narcotics substances under the Narcotic Drugs and Psychotropic Substances Act, 1985 if codeine phosphate is not used for therapeutic practice in permissible dosage.

22. In the case of ***Md. Sahabuddin and others vs. State of Assam [2012(79) ACC 730],*** MANU/SC/0836/2012 opinion has been given by the Indian Supreme Court that the content of codeine phosphate if falls within the permissible limits i.e. codeine phosphate should be less than 10 mg. (per dosage), namely, 5 ml. and if it is used for **therapeutic purpose**, then it would not be narcotics substance but in this case, the person in possession had to show documents for what purposes the drugs containing narcotics substances were being transported. If he fails to do so, he will not get exemption from punishment for having possession of narcotics substances.

23. A question may arise what is 'Therapeutics'. Butter Worths Medical Dictionary Second Edition speaks that:

> "Therapeutics: The branch of medicine which is concerned with treatment of disease, palliative or curative."

24. In India, the permissible limit of codeine in cough syrup has been prescribed as per the declaration of Notification by the Central Government in the exercise of the powers conferred by sub-clause (b) of clause (xi) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985. According to the declaration of the Central Government

of India codeine which is compounded with one or more other ingredients not more than 100 milligrams of the drug per dosage unit and with a concentration not more than 2.5 percent in undivided preparation and which has been used in therapeutic practice cannot be considered as narcotics substance. **[Pankaj Shukla vs. Union of India (2016 (4) CHN (CAL) 233].** But in Bangladesh, codeine-containing cough syrup was banned by the Drugs (Control) Ordinance, 1982 due to its abuse of use particularly by the young generation. Section 8 of the Drugs (Control) Ordinance, 1982 provides that:

> **"8.(1) On the commencement of this Ordinance, the registration or license in respect of all medicines mentioned in the Schedules shall stand cancelled, and no such medicine shall, subject to the provisions of sub-section (2), be manufactured, imported, distributed [,stocked, exhibited or sold] after such commencement.**
>
> (2) Notwithstanding anything contained in sub-section (1),-(a) the medicines specified in Schedule I shall be destroyed within three months from the date of commencement of this Ordinance;
>
> (b) the medicines specified in Schedule II may be manufactured or sold for a period of [twelve months] from the date of commencement of this Ordinance and thereafter their manufacture [stock, exhibition and sale] shall be permitted only if they are registered after change in their formulation in accordance with the direction of the licensing authority;
>
> (c) **the medicines specified in Schedule III may be manufactured, imported, distributed and sold for a period of [eighteen months] after the commencement of this Ordinance, and thereafter there shall not be any manufacture, import, distribution [,stock, exhibition or sale] of such medicines [;**
>
> (d) the medicines specified in Schedule IV may be manufactured, distributed and sold for a period of eighteen months after the commencement of this Ordinance, and thereafter their manufacture, distribution [,stock, exhibition and sale] shall be permitted only if they are registered again with the licensing authority:
>
> **Provided that no fresh import of raw materials for the manufacture of the medicines specified in Schedule III and Schedule IV shall be permitted.]"** (Bold by us)

25. 'Codeine' and 'codeine phosphate' are included in Schedule III of the Drugs (Control) Ordinance, 1982. So, the use of codeine and codeine phosphate is not permitted in our country. Moreover, Phensedyl is also a prohibited drug in Bangladesh under Section 8 Schedule-III of the Drugs (Control) Ordinance, 1982. Since codeine phosphate is one of the ingredients of Phensedyl, the import, manufacture or sale of Phensedyl is punishable under the Act. Again in the Narcotics Control Act, 1990 codeine has been mentioned as schedule of narcotics. Since codeine phosphate is a derivative of codeine, in our unerring opinion it is also a scheduled narcotic. Due to its addictive nature, it cannot be used in any cough syrup or any other liquid substance in any combination form.

26. Dr. Saydur Rahman, a Professor of Department of Pharmacology, Bangabandhu Sheikh Mujib Medical University (BSMMU) in his paper titled "Codeine Cough Mixture Abuse, BANGLADESH an Example," presented in an International Seminar observed that the combination of Phensedyl is as below:

a. Promethizine HCL 3.6 mg. per 5 ml.
b. Codeine Phosphate 9 mg. per 5 ml.
c. Ephedrine HCL 7.2 mg. per 5 ml.

27. In this research, he found that production of this Codeine cough preparation in neighboring country can also be disastrous because so called cough preparation (Phensedyl) which is banned in Bangladesh is number one abused medicine by the addicts in our country.

[Source: http://lists.healthnet.org/archive/cgi-bin/mesg.cgi?a=e-drug&i=200202110229 VAA27280% 40 satellife.healthnet.org.]

28. The UN Office of Drug and Crime (UNODC) published a report in their Journal on 01.01.1958. The author of the write-up was D.Sc. Walter R. Heumann, an Associate Professor of Chemistry, University Montreal, Canada. The main content of this publication reveals that the meheylation of Morphine is one of the key operations of the opium Alkaloid industry as up to 90% of the manufactured Morphine is converted into Codeine. Thus, it can be said that the Morphine can be converted into Codeine and abuse of such Codeine can make a person addicted and as such the observation of the High Court Division regarding cough syrup with composition of Codeine cannot be a banned item is not correct.

29. The United Nation's Office on Drugs and Crime (UNODC) in the year 2010 arranged a seminar in New Delhi jointly with the Government of India. The seminar was on **India-Bangladesh: trafficking and abuse of pharmaceuticals and issue of growing public concern.** In the said seminar one Mr. N.K. Paul, Deputy Drug Controller and Controlling Authority of the State of Tripura attended and he was interviewed by UNODC, wherein a question was put to him that what are the main pharmaceutical abuse in Tripura. Mr. Paul answered that Codeine phosphate, which is contained in cough preparations, is the main drug that is abused in the State of Tripura. Codeine is a narcotic drug and causes addiction when used in large quantities over a period of time. One cough preparation contains Chlorpheniramine Maleate, an anti-histaminic, in addition to codeine phosphate, which causes sedation............. The problem is serious, because pharmaceuticals are more affordable and easily available at retail outlets. They are often used as substitutes by drug users. The problem gets magnified when drug users begin to take them over a long period of time. He also said that the drug still continues to enter the State through illegal channels and is mostly smuggled to Bangladesh.

30. Mr. Paul also said that Phensedyl and other cough syrups are illegally brought into the State with forged documents hiding those under other commodities like in trucks and buses. Once inside, they find their way to Bangladesh, with which Tripura shares two thirds of its border. The drug is generally sent in its original packaging. Since liquor is banned in Bangladesh, the drug became a popular alternative for alcohol. Phensedyl used to contain codeine phosphate along with hydrochloride ephedrine and Promethizine, a unique combination for addiction. This is what made it a popular drug of abuse and unfortunately the trend still continues even after the chemical formulation was changed.

31. In view of above interview it can be concluded herein that the State of Tripura of India is contiguous to Bangladesh and the Drug Traders usually send those Phensedyl in

Bangladesh and the youths become addict after consuming those Phensedyl and as such the observation of the High Court Division that the Phensedyl the Combination of Chlorpheniramine and Codeine is not harmful is not at all correct.

[Source: https//www.unodc.org/southasia/frontpage/2010/April/Abuse-and-trafficting of pharmaceuticals.html]

32. Consequence of drug abuse knows no bound. It rather impacts the family, society. Addiction to drugs creates disintegration of family and normal life. All, these must be kept in kind while dealing with the case involving drug trafficking. The youth throughout the world is vulnerable to drugs. In Bangladesh mostly youngsters choose drugs to satiate their desires. Lack of self confidence is the root cause of addiction of drugs. Phensedyl is a popular drug to the young generation of Bangladesh though now a day's different types of drugs are found available in the underworld market. Since we have already observed that if Codeine phosphate is used in any combination irrespective of the amount of Codeine phosphate total combination has to be considered as narcotics substance, and since Phensedyl contains codeine phosphate it falls under the category of narcotics. But the person, who keeps in possession, carry or sell Phensedyl without physician's prescription or any trade license or use it not for therapeutic purpose he must be held responsible for keeping narcotics/drugs and he cannot evade responsibility and escape the clutch of punishment. It is irrefutably concluded that this group of people is consciously engaged in accomplishing the act of dragging the young people towards addiction of drugs. It is thus necessary to keep drugs off from the young people so that one who is not indulged in it remains far from it. Though preventing the addiction of drugs is a very thorny task there are some steps that can be taken to facilitate stop consumption of drugs. It is indispensible le for existence of healthy society. All individuals who are suffering from mental disorders or are victim of depression and stress must be taken to psychiatrist so that their mental infirmity is cured and they become able to quit drug addiction.

33. As an opioid derivative, Codeine impacts on the body that have more significant implications beyond simply being a drug used to address certain forms of illnesses. Particularly, the fear lies in the fact that Codeine tends to have addictive components that can induce abuse. While it would be unfair to assume that it has this impact on everyone, or that everyone will abuse the drug, the fact that there are chemical components that can lead to this possibility is a risk that society as a whole need to take caution over.

34. Continued use of Codeine creates a form of dependency on the medication that leads to consumers suffering from severe withdrawal symptom that result in ailments like aches, nausea, and insomnia, among others. Addiction on the drug almost makes it unfeasible to carry out daily functions without its support for habituated consumers. The abuse of the drug may also result in death. In a study by Roxburg et al. in 2015, Codeine was found to be the contributing factor to over 1400 deaths in Australia- a nation with a more comprehensive healthcare infrastructure than our own. An analgesic of this strength and impact should

ideally be regulated and certainly should not be accessible to consumers as an over-the-counter medication, especially when alternative form of treatment can be used to fill up the gap. The strength of the drug, similar to morphine, makes it likely to be the easy to reach tool to cope with pain.

35. Phensedyl, being composed of Codeine, does have similar effects. It is equally detrimental and is likely to have the same sort of impact on consumers as a result of containing the same elements. However, the extent of accessibility to the medication currently makes consumers susceptible to form a deadly habit that is deleterious to health. It is thus imperative for us to address the depths of its impact, and consider measures that can be placed to limit the harms.

36. Courts are often tasked with devising measures to step in where existing regulations are proved to be inadequate to address an existing problem. The existing situation permits the use of Codeine without regulations to a point where we are leaving the society prone to developing harmful habits that can have far-reaching implications. Understandably, there should be more research to be conducted to better understand the extent of the use of Codeine and such other drugs and the degree to which it is currently being abused and the implications this has. In the absence of such evidence before us, this court is of the opinion that it is within our ambit and duty to ensure that where protective mechanisms are not in place, we develop them. Regulations of this sort can take years to perfect, and lawmakers are hereby urged to look into the matter. However, in the interim, where a likely problem is evident, it is the duty of the court to ensure that the problem is addressed and measures are taken to limit the harms. The regulation of Phensedyl- a drug composed of Codeine, and the ban of its use without a prescription, hence, seems reasonable for us to impose. There must be effective vigilance mechanism on phensedyl–carrying routs.

37. In consideration of the matters discussed above, we are of the view that since codeine phosphate is a derivative of codeine, it has to be considered as scheduled narcotics and any portion of the mixture of codeine phosphate with any other liquid substance shall render the total amount of liquid substance as narcotics substances and punishment will be imposed based on the quantity of total amount of such combination.

38. In view of reasoned discussion made herein above we want to make it very clear that since the existence of codeine phosphate makes Phensedyl a narcotic combination, the possession of or carrying of Phensedyl is thus a punishable offence under Section 19(1) Serial 3 of the Narcotics Control Act, 1990.

39. The prosecution case tends to demonstrate that Inspector Sheikh Abdur Razzaque along with his team laid an ambush on 05.11.1997 at about 9.10 hours on a road in front of Mallick Bari at village-Taherpur and apprehended the accused-respondent Badal Kumar Paul with a jute bag he carried on his head. On opening the bag, they found 250 bottles, each

containing 100 ml. of Phensedyl in five paper cartons weighing 25 liters and 72 pieces of Indian woolen mufflers. Inspector along with his team then seized the incriminating articles in front of P.W.4 Md. Nowsher Ali and P.W.5 Raju Ahmed and arrested the respondent. The Inspector himself investigated into the case and submitted police report recommending prosecution under Section 19(1) Serial 3(Kha) and 19(4) of the Act against the accused-respondent.

40. Let us eye on what has been narrated by the P.W.s, in brief. During trial, in all eight witnesses were examined. Of them P.Ws.1-3, 7 were police officials and P.W.6 was the chemical examiner. P.Ws. 4 and 5 were the seizure list witnesses. P.W.1 was examined twice-- first, as the informant and next as the Investigating Officer. P.W.1 in his deposition stated that on 05.11.1997 he along with his team laid an ambush and arrested the accused respondent with 250 bottles each containing 100 ml. of Phensedyl and 72 pieces of wooden mufflers in front of Mallick Bari at village-Taherpur. P.W.2, ASI Abdul Hannan, P.W.3 Constable Mohiuddin and P.W.7 constable Harun-or-Rashid in a voice corroborated the deposition of P.W.1 and stated that on 05.11.97 all of them were being the members of the force and joined the raid under his leadership. At about 9:10/9:15 am they arrested the accused respondent with 250 bottles each containing 100 ml. of Phensedyl and 72 pieces of wooden mufflers. P.W.6, Abdul Awal, the chemical examiner, submitted report giving the opinion that the sample i.e. a bottle containing 100 ml. of Phensedyl sent to him for examination contained Chlorpheniramine Maleate and codeine phosphate. Though P.Ws.4 and 5 identified their signatures on the seizure list, they denied having witnessed any recovery and seizure of alleged articles mentioned in the seizure list.

41. It is well settled principle that if the prosecution case is proved otherwise beyond reasonable doubt based on evidence, the accused can be convicted despite the seizure list witnesses denied supporting the prosecution case i.e. recovery and seizure. The trial Court as well as the High Court Division successfully assessed that the prosecution had been able to prove beyond reasonable doubt that 250 bottles of Phensedyl amounting to 25 liters containing Chlorpheniramine Maleate and codeine phosphate have been recovered and seized from the possession of the accused-respondent.

42. Considering all the matters discussed above, we are of the view that the High Court Division committed an error of law not considering Phensedyl as narcotics substances and therefore, setting aside the judgment and order passed by the trial Court and acquitting the respondent. Hence, we are inclined to interfere.

43. On these above findings, the appeal is **allowed.**

44. Judgment and order passed by the High Court Division is set aside.

45. Judgment and order passed by the trial Court is maintained.

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APPELLATE DIVISION

PRESENT:
Mr. Justice Hasan Foez Siddique
-Chief Justice
Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim

CRIMINAL PETITION FOR LEAVE TO APPEAL NO.516 of 2017.
(From the judgment and order dated 12.04.2017 passed by the High Court Division in Criminal Miscellaneous Case No.4397 of 2008).

Dr. Zubaida Rahman, wife of Mr. Tarique Rahman. : ......Petitioner.

-Versus-

The State and another. : ......Respondents.

For the Petitioner.	:	Mr. A. J. Mohammad Ali, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.
For Respondent No.1.	:	Mr. A. M. Aminuddin, Attorney General (with Mr. Biswajit Debnath, Deputy Attorney General appeared with the leave of the Court)
For Respondent No.2.	:	Mr. Khorshed Alam Khan, Senior Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.
Date of Hearing	:	The 13th April, 2022.

Editors' Note
In this case, the Anti-Corruption Commission submitted a charge sheet under section 109 of the Penal Code, 1860 against the petitioner along with section 26(2), 27(1) of the Anti-Corruption Commission Act, 2004 for concealing assets in the wealth statement and account of assets. The petitioner filed criminal miscellaneous case seeking quashment of the proceeding under section 561A of the Code of Criminal Procedure and obtained a rule with stay order. Thereafter, a Division Bench of the High Court Division discharged the rule upon hearing. The petitioner being aggrieved preferred this leave to appeal before the Appellate Division. The Court held that submission of charge sheet cannot be treated as finality of investigation until cognizance of the offence is taken by the concerned court. The Court also held that the High Court Division exceeded its jurisdiction by issuing the rule at a stage when the cognizance was not taken and even charge sheet was not produced. Moreover, a fugitive cannot seek justice. In the result, the Appellate Division dismissed the petition with modification of the impugned judgment and order.

Key Words
Section 173, 190, 561A of the Code of Criminal procedure; 26(2), 27(1) of the Anti-Corruption Commission Act, 2004; Section 109 of the Penal Code; Fugitive;

Section 173 and 190 of the Code of Criminal procedure:
It is settled Principal of law that initiation of a criminal proceedings starts after taking cognizance of offence. Submission of charge sheet cannot be treated as finality of investigation until cognizance of the offence is taken by the appropriate court.
...(Para 18)

Section 561A of the Code of Criminal procedure:
The Rule issuing Bench of the High Court Division overstepped in its jurisdiction in not considering that the petitioner filed the application under section 561A of the Code of Criminal Procedure without surrendering to the jurisdiction of the appropriate court and thus illegally entertained the application under section 561A and stayed further proceedings of the case. (Para 21)

Section 561A of the Code of Criminal procedure:
It is well settled that when a person seeks remedy from a court of law either in writ jurisdiction or criminal appellate, revisional or miscellaneous jurisdiction under section 561A of the Code of Criminal Procedure, he/she ought to submit to due process of justice. The Court would not Act in aid of an accused person who is a fugitive from law and justice. (Para 22)

Article 27 of the Constitution of Bangladesh:
As per Article 27 of the constitution all citizens are equal before the law and are entitled to equal protection of law. The judges of the apex court have taken oath to administer justice in accordance with law without fear or favour. The judiciary must stand tall and unbend at all circumstances, even in adverse situation. The judiciary should not create a precedent which cannot be applicable for all. Each and all of the citizens are entitled to get equal treatment from the court of justice. There is no high or low before the court of law. (Para 24)

JUDGMENT

Borhanuddin, J:

1. This criminal petition for leave to appeal is directed against the judgment and order dated 12.04.2017 passed by the High Court Division discharging the Rule in Criminal Miscellaneous Case No.4397 of 2008.

02. Facts leading to disposal of the leave petition, in brief, are that the present petitioner filed the Criminal Miscellaneous Case under section 561A of the Code of Criminal Procedure for quashing the proceedings of Kafrul Police Station Case No.52 dated 26.09.2007 under section 26(2), 27(1) of the Anti-Corruption Commission Act, 2004 read with section 109 of the Penal Code and section 15(D)(5) of the Emergency Power Rules, 2007 pending before the Additional Chief Metropolitan Magistrate, Dhaka, contending interalia that the petitioner is a permanent citizen of Bangladesh and is a Physician having MD degree in Cardiology; The petitioner is an income tax payee; On 29.05.2007 the Anti-Corruption Commission sent a notice to the husband of the petitioner to submit his wealth statement and furnish the accounts

of assets of his wife and other dependents; In response to the notice, husband of the petitioner submitted his wealth statement on 07.06.2007 along with statement regarding his wife's assets; On 26.09.2007 first information report was lodged by one Mohammad Zahirul Huda, Assistant Director, Anti-Corruption Commission against the accused-petitioner and another and accordingly Kafrul Police Station Case No.52 dated 26.09.2007 was initiated.

03. The prosecution case, in short, is that Mr. Tarique Rahman son of Late President Ziaur Rahman, No.6, Shahid Moinul Road, Dhaka Cantonment in his submitted wealth statement concealed assets worth BDT 23,08,561.37 and submitted false statement thereof, and the Principal accused, in collusion with his wife Dr. Zubaida Rahman (nee Zubaida Khan) and Syeda Iqbal Mand Banu, wife of Late Rear Admiral Mahbub Ali Khan, Road No.5, House No.49, Dhanmondi R/A, Dhaka (Mother-in-law of Principal accused) misrepresented in his statement of wealth dated 27.06.2007 with regard to Tk.4,23,08,561.37 (Taka four crore, twenty three lakhs, eight thousand and five hundred and sixty one and thirty seven paisa only) and BDT 35,00,000/- worth of FDR, the source of which is undeclared and allegedly illegal and not shown in the Principal accused's statement of wealth and hence the case.

04. The petitioner in her petition stated that on 31.03.2008, vide a memo being No.4563 dated 27.03.2008 of the head office of Anti-Corruption Commission a charge sheet was submitted under section 109 of the Penal Code against the petitioner. It is further stated that the learned Additional Chief Metropolitan Magistrate kept the matter for further order on 07.04.2008 as is evident from the order dated 05.03.2008. The allegation as levelled against the petitioner with regard to FDR No.0046739 for BDT 10,00,000/- and FDR No.41006271 of BDT 25,00,000/- dated 31.07.2005 totalling Tk.35,00,000/- is false and fabricated as she inherited that money after her father's death from rental of family property. The explanation is given in paragraph no.8 of the writ petition. Excepting the FDR money as mentioned above there is no other specific allegation against the petitioner. It is further stated that tax for the aforesaid FDR money of Tk.25,00,000/- and Tk.10,00,000/- for the years 2005-2006 and 2006-2007 have been paid by the petitioner in her income tax returns.

05. Upon hearing learned Advocate for the petitioner, a Division Bench of the High Court Division issued Rule on 08.04.2008 and stayed further proceedings of the case.

06. Opposite party no.2 Anti-Corruption Commission filed counter affidavit.

07. After hearing the parties, a Division Bench of the High Court Division discharged the Rule vide judgment and order dated 12.04.2017 with a direction to the petitioner to appear before the court concern within 8(eight) weeks from the date of taking cognizance against her.

08. Feeling aggrieved, the petitioner preferred instant criminal petitioner for leave to appeal under Article 103 of the constitution.

09. Mr. A. J. Mohammad Ali, learned Advocate appearing for the petitioner after taking us through the impugned judgment and order and other relevant papers submits that the High Court Division wrongly discharged the Rule having failed to appreciate that the allegation against the petitioner in the FIR and the charge sheet are absolutely preposterous which is evident from a plain reading of the FIR inasmuch as the allegation against the petitioner is

"প্রমাণের চেষ্টা" but not aiding the Principal accused in committing of any offence and such allegation of "প্রমাণের চেষ্টা" does not constitute "abetment of an offence" within the meaning of sections 107 and 108 of the Penal Code, thus the FIR allegation against the petitioner, even if taken at their face value do not disclose any offence under section 109 of the Penal Code. He also submits that the High Court Division erred in law having failed to appreciate that the allegation levelled against the petitioner in the charge sheet that "the petitioner and her mother in collusion with Principal accused Tarique Rahman tried to prove that the two FDR amounting Tk. (25+10)=35 lacs are accrued from legal source through false statement and documents and thus committed offence under section 109 of the Penal Code" also do not attract the ingredients of an offence under section 109 of the Penal Code as such the allegation in the charge sheet against the petitioner is liable to be found preposterous.

10. He next submits that the High Court Division erroneously discharged the Rule without considering the materials on record and the fact that the petitioner had shown the FDRs in her personal income tax returns for the assessment year 2005-2006 and 2006-2007 and paid tax thereon which is evident from her income tax returns as such allegation against the petitioner abetting her husband by concealing truth about the said FDRs or the source thereof are entirely preposterous. In support of his submissions, learned Advocate referred to the case of Abdul Quader Chowdhury and others Vs. The State, reported in 28 DLR (AD) 38; The case of The State Vs. Mohammad Nasim, reported in 57 DLR (AD) 114; The case of Anti-Corruption Commission Vs. Nargis Begum and others, reported in 62 DLR (AD) 279 and the case of State Vs. Mohammad Mominullah and others, reported in 11 BLC (AD) 51.

11. On the other hand, Mr. Khorshed Alam Khan learned Advocate for the respondent no.2 submits that accused petitioner filed the application under section 561A and obtained Rule and stay without surrendering before the court of competent jurisdiction as such the petitioner is fugitive from justice when she filed and moved the application before the High Court Division. He again submits that it is a settled Principle of law that a fugitive from justice is not entitled to any relief from a court of law unless surrenders to the jurisdiction of the court. He also submits that since no cognizance has been taken against the petitioner, she cannot challenge the allegation brought against her by way of FIR and charge sheet at this stage. He further submits that the question of abetment is a question of fact which can only be decided at the time of trial by adducing evidence and as such the leave petition is liable to be dismissed. He further submits that the High Court Division erroneously directed 'the petitioner to appear before the concerned court within 8(eight) weeks from the date of taking cognizance of the offence, if any, so that she can defend herself in accordance with law' which is beyond the scope of law. In support of his submissions, learned Advocate referred to the case of Abdul Huque and others Vs. The State, reported in 60 DLR (AD) 1 and the case of Moudud Ahmed and others Vs. State and others, reported in 68 DLR (AD) 118.

12. Mr. A. M. Aminuddin, learned Attorney General appearing on behalf of the respondent no.1 submits that admittedly the petitioner was a fugitive when she moved the

application under section 561A before the High Court Division and obtained the Rule and stay inasmuch as a fugitive she has no locus standi to seek any remedy or relief from the court of law without surrendering before the competent court having jurisdiction. He also supports the contention of the learned Advocate of the Anti-Corruption Commission that since no cognizance has been taken against the petitioner as such she is debarred from filing the application under section 561A seeking quashment of the proceedings at this stage.

13. Heard the learned Advocate for the petitioner, learned Attorney General for the respondent no.1 and learned Advocate for the respondent no.2 Anti-Corruption Commission. We have gone through the impugned judgment and order passed by the High Court Division as well as the FIR, charge sheet and other papers/documents contained in the paper book.

14. We have thoroughly and meticulously perused the impugned judgment and order alongwith the FIR and charge sheet. It appears that the High Court Division discharged the Rule on the findings that: (i) no cognizance had yet been taken against the petitioner as per section 4(1) of the Criminal Law Amendment Act, 1958 (ii) the allegations brought against are not preposterous rather there are specific allegations in the FIR and the charge sheet and truthfulness thereof can only be determined by taking evidence in the trial and (iii) investigation report (charge sheet) having already been submitted recommending prosecution of the petitioner and the matter is at the stage of taking cognizance, it would not be just to interfere with the proceedings by exercising power vested in section 561A at this stage.

15. We are in conformity with the reasonings of the High Court Division in discharging the Rule. But we failed to understand that how a Division Bench of the High Court Division entertained the application under section 561A of the Code of Criminal Procedure by issuing Rule and granting order of stay at the stage when even cognizance was not taken against the petitioner and the petitioner did not surrender before the competent court of law.

16. From paragraph no.6 of the application under section 561A of the Code of Criminal Procedure the petitioner stated that 'on 31.03.2008 vide a memo being no.4563 dated 27.03.2008 of the Head Office of the Anti-Corruption Commission a charge sheet was submitted under section 109 of the Penal code against the petitioner.' It is further stated that 'the learned Additional Chief Metropolitan Magistrate kept the matter for further order on 07.04.2008 as is evident from the order dated 05.03.2008.'

17. From the above it is obvious that no cognizance of the offence against the petitioner was taken. It may be mentioned here that the Additional Chief Metropolitan Magistrate is not competent to take cognizance of an offence under section 109 of the Penal Code which is exclusive jurisdiction of a Special Judge under section 4(1) of the Criminal Law Amendment Act, 1958. Before the case records alongwith charge sheet could be forwarded to the Special Judge, the petitioner moved the High Court Division under section 561A of the Code of Criminal Procedure and Rule was issued staying proceedings of the case. The High Court

Division interfered in this case purporting to exercise its inherent power under section 561A of the Code of Criminal Procedure at the stage when only charge sheet was submitted by the Dudak, and from the records it does not appear nor is it the case of the petitioner that the case records has been sent to the Special Judge or cognizance of the offence has been taken against the petitioner.

18. It is settled Principal of law that initiation of a criminal proceedings starts after taking cognizance of offence. Submission of charge sheet cannot be treated as finality of investigation until cognizance of the offence is taken by the appropriate court.

19. In the case of Bangladesh Vs. Tan Kheng Hock and Bangladesh Vs. Rizal Bin Matnur, reported in 31 DLR (AD) 69, this Division observed that:

> *"From this it should not be presumed that we are expressing the view that the High Court Division is not competent to examine propriety of the charge sheet, but this can be done at a proper stage. Because, after cognizance is taken on the basis of the charge-sheet and on proper occasion for quashing the proceedings, certainly the High Court shall examine the charge sheet to ascertain as to whether the allegations made therein constitute a criminal offence. But before cognizance is taken by the appropriate court, there is hardly any scope for saying that charge sheet would lead to abuse of the process of the court, because, the court competent to try the case has ample power to refuse taking cognizance of the offence on the facts disclosed in the police report and pass an appropriate order."*

20. Before issuance of the Rule it was incumbent upon the High Court Division to look into the matter that the proceedings which is challenged is not initiated yet because no cognizance of offence has been taken by the appropriate court against the petitioner and even the charge sheet was not produced before the concerned court.

21. Furthermore, the Rule issuing Bench of the High Court Division overstepped in its jurisdiction in not considering that the petitioner filed the application under section 561A of the Code of Criminal Procedure without surrendering to the jurisdiction of the appropriate court and thus illegally entertained the application under section 561A and stayed further proceedings of the case.

22. It is well settled that when a person seeks remedy from a court of law either in writ jurisdiction or criminal appellate, revisional or miscellaneous jurisdiction under section 561A of the Code of Criminal Procedure, he/she ought to submit to due process of justice. The Court would not Act in aid of an accused person who is a fugitive from law and justice.

23. It is stated in paragraph no.6 of the application under section 561A by the petitioner that a charge sheet under section 109 of the Penal Code against the petitioner was submitted on 31.03.2008 and vide order dated 05.03.2008 the Additional Chief Metropolitan Magistrate kept the matter for further order on 07.04.2008. But it appears from the application under section 561A that the deponent, friend and tadbirkar of the petitioner, sworn affidavit on 06.04.2008 and the Rule issuing Bench of the High Court Division without considering that the petitioner did not surrender before the appropriate court and cognizance also was not taken by the appropriate court, entertained the application under section 561A. On 07.04.2008 the Rule issuing Bench ordered that “the petitioner appears in court in person. The application is heard-in-part. Mr. Anisul Huq, the learned Advocate for Dudak assisting the state prays for 1(one) day time. The prayer is allowed. The personal appearance of the petitioner Dr. Zubaida Rahman is dispensed with. Let this application come up in the list on 08.04.2008 for further hearing and order.” And on the following day i.e. on 08.04.2008 High Court Division interfered by issuing Rule and staying proceedings of the case which is palpably illegal and beyond the scope of law.

24. As per Article 27 of the constitution all citizens are equal before the law and are entitled to equal protection of law. The judges of the apex court have taken oath to administer justice in accordance with law without fear or favour. The judiciary must stand tall and unbend at all circumstances, even in adverse situation. The judiciary should not create a precedent which cannot be applicable for all. Each and all of the citizens are entitled to get equal treatment from the court of justice. There is no high or low before the court of law.

25. In the premises above, we are of the view that the petitioner was a fugitive in the eye of law when she filed the application under section 561A of the Code of Criminal Procedure.

26. That being so, direction of the High Court Division in the concluding portion of the impugned judgment and order that:

> *“However, since at the time of issuing the Rule this Court dispensed with the appearance of the petitioner, she should be allowed to appear before the concerned Court without any hindrance. The petitioner is directed to appear before the concerned Court within 08(eight) weeks from the date of taking cognizance of the offence, if any so that she can defend herself in accordance with law.”*

-is outside the purview of law and hence struck off.

27. Thus the impugned judgment and order is modified with the above observation.

28. Accordingly, the criminal petition for leave to appeal is dismissed.

29. No order as to costs.

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APPELLATE DIVISION

PRESENT:
Mr. Justice Hasan Foez Siddique, CJ
Mr. Justice M. Enayetur Rahim
Mr. Justice Jahangir Hossain

CRIMINAL APPEAL NO. 19 OF 2017
(From the judgement and order dated the 9th day of March, 2016 passed by the High Court Division in Criminal Appeal No. 6297 of 2013)

Mohammad Khorshed Alam alias Md. Khorshed Alam **... Petitioner**

=VERSUS=
The State and another **... Respondents**

For the Petitioner :Mr. Munsurul Hoque Chowdhury, Senior Advocate, with Mr. Subrata Chowdhury, Senior Advocate instructed by Ms. Sufia Khatun, Advocate-on-Record

For Respondent No. 1 :Mr. Mohammad Saiful Alam, Assistant Attorney General instructed by Mrs. Shirin Afroz, Advocate-on-Record

Respondent No. 2 :Mr. Md. Abdul Mannan Bhuyean, Advocate instructed by Mr. Moh. Abdul Hai, Advocate-on-Record

Date of hearing & judgment :The 25th of January, 2023

Editors' Note
The question came up for consideration in this case whether a fresh inquiry is required, when a complainant asserts with an affidavit before the Nari-O-Shishu Nirjatan Daman Tribunal that she went to the police station but police refused to accept her complaint, to ascertain if she actually went to the police station. The Appellate Division held that there is no legal necessity to make an inquiry whether the complainant went to the police station and he/she was refused by the police before submitting the complaint before the Tribunal, if the Tribunal is satisfied about the truthfulness of the claim. But the Tribunal can direct anybody other than a police officer to hold an enquiry to find out primarily whether the allegation of committing of offence made in the complaint is true. In such a situation if a police officer is directed to hold an enquiry, cognizance taken on the basis of such enquiry report vitiates entire proceeding. In the instant case the Tribunal convicted and sentenced the Appellant finding him guilty under section 11(Ga) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and the High Court Division affirmed the conviction but the Appellate Division found that the evidence adduced by

the prosecution was not enough to convict the Appellant beyond reasonable doubt and thus acquitted him of the charge.

Key Words:
Sections 11 (Ka), 11(Ga) and 27 of the Nari-O-Shishu Nirjatan Daman Ain, 2000;

Section 27 of the Nari-O-Shishu Nirjatan Daman Ain, 2000:
In the case in hand, the complainant filed the petition of complaint before the Tribunal supported by an affidavit stating that statements made in the complaint is true. And in the complaint it was asserted that she went to the police station but the police refused to accept her complaint and the concerned Tribunal being satisfied about the same, upon examining the complainant, directed to hold an inquiry into the allegation. Since the complainant by swear in an affidavit before the Tribunal asserted that the concerned police officer refused to accept her complaint and the Tribunal has also been satisfied about the said assertion, in our view, there is no legal necessity to make an inquiry into the said issue afresh, i.e. whether the complainant went to the police station and he/she was refused by the police before submitting the complaint before the Tribunal. Thus, the submissions of the learned Advocate for the appellant to the effect that the complainant in support of the complaint did not swear in any affidavit and did not make any statement that she went to the police station and the concerned police officer refused to accept her complaint and thus the learned Judge of the Tribunal has committed serious error of law in entertaining the complaint and sent it for inquiry have no leg to stand. (Para 17, 18 and 19)

Section 27 (1 Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000:
Enquiry must be made by any other person than police:
We are of the view that the Tribunal did not commit any illegality in entertaining the complaint filed by respondent No. 2. Section 27 (1 Ka) clearly speaks that if the learned Judge of the Tribunal is satisfied as to the filing of the complaint he can direct the Magistrate or any other person to make an inquiry with regard to the allegation. The expression "অন্য কোন ব্যক্তি" (any other person) does not include any police officer but, it includes any public officer or any private individual or any other responsible person of the locality upon whom the Tribunal may have confidence to conduct the inquiry in respect of the complaint logged before it. In the instant case the learned Judge of the Tribunal acted illegally in directing the Officer-in-Charge of Pahartoli Police Station to make an inquiry in respect of the complaint and, thereafter, taking cognizance on the basis of such inquiry report has vitiated the entire proceeding. (Para 24 and 25)

JUDGMENT

M. Enayetur Rahim, J:

1. This criminal appeal, by leave, is directed against the judgment and order dated 09.03.2016 passed by a Division Bench of the High Court Division in Criminal Appeal No. 6297 of 2013 dismissing the appeal.

2. The relevant facts for disposal of the present appeal are that Sajeda Hossain Rekha, present respondent No. 2 as complainant on 29.3.2005 filed a petition of complaint before the Nari-O-Shishu Nirjatan Daman Tribunal No.3, Chattogram, against the convict appellant for allegedly committing offence under Section 11(Ka) and 11(Ga) of the Nari-O-Shishu

Nirjatan Daman Ain, 2000(herein after referred to as Ain, 2000).

3. In the complaint it was alleged that the complainant got marriage with the present convict appellant on 13.11.1998 fixing dower money of Tk. 3(three) lakh. During their wedlock they were blessed with two sons. However, the convict appellant used to torture her for dowry and put pressure upon her father for the dowry. In the month of January, 2004 the appellant created pressure upon the complainant to bring dowry of Tk. 4 (four) lakh so he can start hatchery in his own village. However, the victim refused to pay the money. The appellant on 01.05.2004 assaulted the complainant and at one stage pressed her neck in order to kill her. However, the maid servant rescued her. The complainant along with her minor sons was driven away from the house and since then the complainant has been living at the house of her father. Eventually, on 06.02.2005 at noon the appellant went to her father's house and discussed for taking her to his house and the accused again demanded Tk. 4 lakh as dowry. The complainant refused to pay the money as a result the appellant again assaulted her and at one stage pressed her neck in order to kill her. However, the inmates of the house rescued her. The complainant received serious injury by such assault and on the following day she got treatment.

4. The learned Judge of the Tribunal after examining the complainant directed the Officer-in-Charge of Pahartoli Police Station, Chattogram to make an inquiry on the allegation and submit a report.

5. On the basis of the inquiry report, submitted by the police before the Tribunal, the learned Judge of the Tribunal accepted the same and took cognizance of the offence against the present appellant and ultimately framed charge against the appellant under Section 11(Ga) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 which was read over to the appellant on dock to which he pleaded not guilty and claimed to be tried.

6. To substantiate the charge against the appellant the prosecution examined 05 (five) witnesses while the defence examined 03(three).

7. The defence case as it transpires from the trend of cross-examination that the accused is innocent and has been falsely implicated in the instant case out of grudge due to divorce to the complainant.

8. The Tribunal by its judgment and order dated 08.09.2013 convicted the appellant under Section 11(Ga)of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and sentenced him to suffer rigorous imprisonment for 1(one) year and also to pay a fine of Tk. 50,000/-(fifty thousand).

9. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence, the appellant preferred Criminal Appeal No. 6297 of 2013 before the High Court Division, which upon hearing was dismissed. Then the convict filed Criminal Petition for Leave to Appeal No. 459 of 2016 before this Division. Leave was granted to consider the following grounds:

> I. That the High Court Division failed to appreciate that the complaint was not filed in compliance with the mandatory provision of Section 27 (Kha) of the Nari-O-Shishu Nirjatan Daman Ain, 2000(Amended in 2003) as no affidavit was sworn by the complainant at the time of filing the instant complaint before the Tribunal stating that the police refused to lodge the case and, therefore, the

subsequent proceeding being vitiated by law the judgment and order of conviction and sentence is liable to be set aside;

II. That the High Court Division failed to take into notice that the complainant received the divorce notice from the petitioner on 20.03.2005 and filed the complaint subsequently on 28.03.2005 out of grudge just to take revenge and harass the petitioner.

10. Mr. Munsurul Hoque Chowdhury and Mr. Subrata Chowdhury, learned Senior Advocates appearing on behalf of the appellant made submissions in line with the grounds upon which leave was granted. It was also submitted that according to the provision of Section 27 (Kha) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (amended in 2003) the Tribunal ought to have sent the case for holding inquiry either by a Magistrate or by any person rather than any police officer. The present case was allegedly inquired by a police officer, who submitted perfunctory report, and based on that report cognizance was taken by the Tribunal. It was further submitted that the alleged 1st occurrence took place on 01.05.2004 at 9:00 a.m. and 2nd occurrence took place on 06.02.2005 at noon, but the complaint was filed on 28.03.2005; i.e. after 10 (ten) months 28(twenty eight) days from the 1st occurrence and 1 (one) month 23(twenty three) days from the 2nd occurrence. Moreover, the complainant miserably failed to give any proper reason for committing such delay. The complaint after having notice of divorce on 20.03.2005 brought this case against the accused-appellant just to take revenge on him. It was further submitted that P.W.1 Sajeda Hossain Rekha is the alleged victim and complainant of this case; P.W.2 Md. Hossain is the father of the victim; P.W.3 Md. Belayet Hossain Majumder is the brother-in-law (dulabhai) of the victim; P.W.4 Nazma Hossain is the sister of the victim; all the witnesses are close relatives to the complainant, and all are very interested witnesses, so no credence can be given to their evidence and, as such, the impugned judgment and order is liable to be set aside. It was submitted that P.W.5 is an anesthetist and private practitioner, who treated the alleged victim and according to Section 32 of the Ain, 2000 his evidence cannot be considered as sustainable. Moreover, the description of the victim's injuries before the Tribunal totally contradict with the description of injuries mentioned in the Doctor's certificate. The complainant stated before the Tribunal that she felt pain in right teeth and left arms. However, doctor found abrasions on the right face and right elbow etc. and no injury was found in her any left organ. It was further submitted that according to the deposition of P.W.1 she was tortured by the appellant on 06.02.2005 at 7:00 p.m. but she received medical treatment on the following day at7:00 p.m. one day after the alleged occurrence. Whereas in case of alleged magnitude of torture, she was supposed to go to doctor immediately but she did not do so, rather on the following day i.e. 07.02.2005 at first she went to her work place i.e. at college took classes and she stayed all day in the college ipso facto suggest that she was not tortured at all. It was submitted that the complainant stated in her complaint that on the 1st date of occurrence i.e. 01.05.2004 while the appellant took an attempt to kill her by suffocation, a maid servant namely Nurun Nahar tried to rescue her from the grip of the appellant; allegedly she was also tortured by the appellant, but surprisingly, the prosecution has failed to examine her as a witness. Lastly it was submitted that Gazi Sharif Hossain (cited witness No.4 in the complainant), younger brother of the victim, who accompanied the alleged victim to the doctor for treatment, was not produced as a witness before the Tribunal even after non-bailable warrant was issued against him again and again, so non production of him as witness before the Tribunal goes against the victim. The High Court Division failed to consider the aforesaid vital aspects in dismissing the appeal and as such the impugned judgment and order is liable to be set aside.

Mr. Md. Abdul Mannan Bhuyan, learned Advocate appearing on behalf of respondent No. 2,

makes submissions in support of the impugned judgment. He submitted that the complaint was filed with an affidavit on 28.03.2005, before execution of divorce where the notice of divorce was given on 17.03.2005 which was received by the victim on 20.05.2005 and the alleged occurrence took place on 01.05.2004 and 06.02.2005 before giving the notice of divorce. In the facts and circumstances of the present case the High Court Division as well as the Tribunal rightly passed the judgment and order of conviction and sentence by considering relevant section of law as mentioned in Section 7(3) of Muslim Family Laws Ordinance, 1961 and established judicial principles reported in 13 MLR (AD)2008, page 278. Mr. Bhuyan further submitted that it is a cardinal and settled principle of law as enunciation in 46 DLR (AD) 1994, page 169 that the legislature has taken care to see that not only the taking or giving of dowry or abetment thereof before or at the time of marriage is made an offence but also the demand thereof after the marriage and by considering the aforesaid judicial principle the High Court Division as well as the Tribunal passed the judgment and order of conviction and sentence and, hence, there is no reason to interfere with the impugned judgment.

11. Mr. Mohammad Saiful Alam, learned Assistant Attorney General appearing for respondent No.1, adopted the submissions of the learned Advocate appearing for respondent No.2.

12. We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgment of the High Court Division as well the judgment passed by the Tribunal, evidence and other materials on record.

13. Let us first decide the issue, whether the Nari-O-Shishu Nirjatan Daman Tribunal took cognizance into the offence against the convict appellant in compliance of the provision of section 27 of the Ain, 2000.

14. To address the above issue it is needed to examine section 27 in particular sub-section 1 and (1 ka)(ka) (kha) of the Nari-O-Shishu Nirjatan Daman Ain, 2000, which runs as follows:

> "২৭। (১) সাব-ইন্সপেক্টর পদমর্যাদার নিম্নে নহেন এমন কোন পুলিশ কর্মকর্তা বা এতদুদ্দেশ্যে সরকারের নিকট হইতে সাধারণ বা বিশেষ আদেশ দ্বারা ক্ষমতাপ্রাপ্ত কোন ব্যক্তির লিখিত রিপোর্ট ব্যতিরেকে কোন ট্রাইব্যুনাল কোন অপরাধ বিচারার্থ গ্রহণ করিবেন না।
>
> (১ক) কোন অভিযোগকারী উপ-ধারা (১) এর অধীন কোন পুলিশ কর্মকর্তাকে বা ক্ষমতাপ্রাপ্ত ব্যক্তিকে কোন অপরাধের অভিযোগ গ্রহণ করিবার জন্য অনুরোধ করিয়া ব্যর্থ হইয়াছেন মর্মে হলফনামা সহকারে ট্রাইব্যুনালের নিকট অভিযোগ দাখিল করিলে ট্রাইব্যুনাল অভিযোগকারীকে পরীক্ষা করিয়া,-
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> (ক) সন্তুষ্ট হইলে অভিযোগটি অনুসন্ধানের (রহয়ঁরৎু) জন্য কোন ম্যাজিস্ট্রেট কিংবা অন্য কোন ব্যক্তিকে নির্দেশ প্রদান করিবেন এবং অনুসন্ধানের জন্য নির্দেশপ্রাপ্ত ব্যক্তি অভিযোগটি অনুসন্ধান করিয়া সাত কার্য দিবসের মধ্যে ট্রাইব্যুনালের নিকট রিপোর্ট প্রদান করিবেন;
>
> (খ) সন্তুষ্ট না হইলে অভিযোগটি সরাসরি নাকচ করিবেন।
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> (১খ) উপ-ধারা (১ক) এর অধীন রিপোর্ট প্রাপ্তির পর কোন ট্রাইব্যুনাল যদি এই মর্মে সন্তুষ্ট হয় যে,-
>
> (ক) অভিযোগকারী উপ-ধারা (১) এর অধীন কোন পুলিশ কর্মকর্তাকে বা ক্ষমতাপ্রাপ্ত ব্যক্তিকে কোন অপরাধের অভিযোগ গ্রহণ করিবার জন্য অনুরোধ করিয়া ব্যর্থ হইয়াছেন এবং অভিযোগের সমর্থনে প্রাথমিক সাক্ষ্য প্রমাণ আছে সেই ক্ষেত্রে ট্রাইব্যুনাল উক্ত রিপোর্ট ও অভিযোগের ভিত্তিতে অপরাধটি বিচারার্থ গ্রহণ করিবেন;
>
> (খ) অভিযোগকারী উপ-ধারা (১) এর অধীন কোন পুলিশ কর্মকর্তাকে বা ক্ষমতাপ্রাপ্ত ব্যক্তিকে কোন অপরাধের অভিযোগ গ্রহণ করিবার জন্য অনুরোধ করিয়া ব্যর্থ হইয়াছেন মর্মে প্রমাণ পাওয়া যায় নাই কিংবা অভিযোগের সমর্থনে কোন প্রথমিক সাক্ষ্য প্রমাণ পাওয়া যায় নাই সেই ক্ষেত্রে ট্রাইব্যুনাল অভিযোগটি নাকচ করিবেন।
>
> (১গ) উপ-ধারা (১) এবং (১ক) এর অধীন প্রাপ্ত রিপোর্টে কোন ব্যক্তির বিরুদ্ধে অপরাধ সংঘটনের অভিযোগ বা ততসম্পর্কে কার্যক্রম গ্রহণের সুপারিশ না থাকা সত্ত্বেও ট্রাইব্যুনাল, যথাযথ এবং ন্যায়বিচারের স্বার্থে প্রয়োজনীয় মনে করিলে, কারণ উল্লেখপূর্বক উক্ত ব্যক্তির ব্যাপারে সংশ্লিষ্ট অপরাধ বিচারার্থ গ্রহণ করিতে পারিবেন।

(২)----------------- ।
(৩)----------------- ।" (under line supplied).

15. In the instant case the learned Judge of the Tribunal after receiving the petition of complaint supported by an affidavit and examining the complainant having prima facie satisfied directed the Officer-in-Charge of the concerned police station to make an inquiry with regard to the complaint and to submit a report within a period of 7(seven) days. Pursuant to the said order Sub-Inspector Mohammad Khorshed Alam, Pahartoli Police Station, on 23.4.2005 submitted an inquiry report and on the basis of such report the learned Judge of the Tribunal took cognizance of the offence under section 11(Ka) and 11(Ga) of the Ain, 2000 against the appellant.

16. On a careful examination of section 27(1 ka) coupled with sub-section (ka) it becomes crystal clear that on receipt of a complaint supported by an affidavit if the Tribunal is satisfied upon examining the complainant that after being refused by the concerned police officer or the authorized person he/she directly came to the Tribunal in that event an order for holding inquiry on the complaint can be made.

17. In the case in hand, the complainant filed the petition of complaint before the Tribunal supported by an affidavit stating that statements made in the complaint is true. And in the complaint it was asserted that she went to the police station but the police refused to accept her complaint and the concerned Tribunal being satisfied about the same, upon examining the complainant, directed to hold an inquiry into the allegation.

18. Since the complainant by swear in an affidavit before the Tribunal asserted that the concerned police officer refused to accept her complaint and the Tribunal has also been satisfied about the said assertion, in our view, there is no legal necessity to make an inquiry into the said issue afresh, i.e. whether the complainant went to the police station and he/she was refused by the police before submitting the complaint before the Tribunal.

19. Thus, the submissions of the learned Advocate for the appellant to the effect that the complainant in support of the complaint did not swear in any affidavit and did not make any statement that she went to the police station and the concerned police officer refused to accept her complaint and thus the learned Judge of the Tribunal has committed serious error of law in entertaining the complaint and sent it for inquiry have no leg to stand.

20. The word "অভিযোগ অনুসন্ধানের জন্য" as contemplated in section 27 (1 ka) is very significant. It means that an inquiry should be done on the allegations brought against an accused. It does not mean that inquiry should be done to ascertain whether the complainant went to the police station and he/she was refused by the police.

21. In the Nari-O-Shishu Nirjatan Ain, 2000 the word 'অভিযোগ' (complaint) has not been

defined. However, in section 4(h) of the Code of Criminal Procedure, 1890 the word '**complaint**' has defined which is as follows:

> 4(h) "complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a police-officer."(Underline supplied).

22. In view of the above definition, 'complaint' means allegation made orally or in writing to the Magistrate or Tribunal as the case may be with a view to his/it's taking action under the Code or relevant law against the person(s) who committed an offence.

23. The intention of Section 27 (1 ka) is that before filing of the complaint before the Tribunal, the complaint should approach to the concerned police station and if he/she is refused in that event he/she can file the complaint before the Tribunal with an affidavit in regard to his/her refusal by the police. In our opinion it is a procedural matter and also not an offence and thus it cannot be treated as an allegation, i.e. complaint against which action could be taken.

24. Having considered and discussed above, we are of the view that the Tribunal did not commit any illegality in entertaining the complaint filed by respondent No. 2. Section 27 (1 Ka) clearly speaks that if the learned Judge of the Tribunal is satisfied as to the filing of the complaint he can direct the Magistrate or any other person to make an inquiry with regard to the allegation. The expression "অন্য কোন ব্যক্তি' (any other person) does not include any police officer but, it includes any public officer or any private individual or any other responsible person of the locality upon whom the Tribunal may have confidence to conduct the inquiry in respect of the complaint logged before it.

25. In the instant case the learned Judge of the Tribunal acted illegally in directing the Officer-in-Charge of Pahartoli Police Station to make an inquiry in respect of the complaint and, thereafter, taking cognizance on the basis of such inquiry report has vitiated the entire proceeding.

26. It was argued by the learned Advocate for the appellant that the complainant filed the case after getting the notice of divorce. We do not find any substance in the above submission because alleged occurrence took place prior to the alleged divorce and divorce had not been taken effect on the day of filing the complaint. Moreover, it is well settled that criminal offence never abates.

27. To sustain conviction under section 11 (Ga) of the Ain, 2000 the prosecution has to prove that the accused caused hurt on the victim demanding dowry. In the petition of complaint it is alleged that on 01.05.2004 and 06.02.2005 in two occasions the appellant assaulted the complainant demanding dowry and one stage of the occurrence he pressed her

neck in order to kill her.

28. On scanning of the evidence, we do not find an iota of evidence with regard to the alleged occurrence to have been committed by the appellant on 01.05.2004, i.e. the first occurrence; even no medical certificate was produced in support of the said allegation. Nurun Nahar, maid servant, who allegedly rescued the complainant, was not examined. As such we have no hesitation to hold that the prosecution has failed to prove the occurrence allegedly to have been taken place on 01.05.2004. P.W.1 deposed that on 2nd time she was tortured by the appellant on 06.02.2005 at 7:00 p.m.; but she received medical treatment on the following day, i.e. on 07.02.2005 at 7:00 p.m., one day after the alleged occurrence and on that day at first she went to her work place, i.e. at the college and, thereafter, she took treatment at the evening which creates doubt about the veracity of the prosecution case. P.W.1 in his cross-examination stated that Gazi Sharif Hossain, her younger brother accompanied her to the doctor for treatment, but he was not produced as a witness before the Tribunal and as such in view of section 114(g) of the Evidence Act an inference can be validly drawn that if he was examined he might have not supported the prosecution case. The complainant as P.W.1 deposed to the effect: "On hearing my refusal the accused started to kick me. He disfigured my face by his fist. He also tried to kill me by throttling." However, P.W.5, the doctor deposed that he found multiple abrasions on the right face, right elbow, nose, abdomen which were caused moderately by heavy blunt weapon (exhibit-2). This material contradiction between the evidence of P.W.1 and doctor, P.W.5 also creates doubt about the veracity of the prosecution case. P.W.2 the father of the complainant in his cross-examination stated that "on the date of occurrence (06.02.2005), these witnessed (P.W No. 3 and 4) were not present." P.W.3, in his cross-examination stated that he was called after the occurrence. P.W.4 also deposed that hearing the cry of the complainant she rushed to the place of occurrence. The evidence of P.Ws. 2, 3 and 4 do not convince and inspire us in finding the guilt of the appellant within the mischief of section 11(Ga) of the Ain, 2000. As such it is our considered view that the prosecution has failed to prove the charge under section 11(Ga) of the Ain, 2000 against the appellant beyond reasonable doubt.

29. Having considered and discussed as above, we find merit in the appeal.

30. Accordingly, the appeal is allowed. No order as to costs. The judgment and order of the High Court Division affirming the judgment and order of conviction and sentence passed by the Nari-O-Shishu Nirjatan Daman Tribunal, Chattogram in Nari-O-Shishu Nirjatan Case No. 126 of 2005 is hereby set aside. The appellant is acquitted of the charge and he be discharged from his bail bond.

17 SCOB [2023] AD 69

APPELLATE DIVISION

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

CRIMINAL REVIEW PETITION NO. 03 of 2020
(From the judgment and order dated 15.03.2020 passed by this Division in Criminal Appeal No. 95 2014)

Anowar Talukder **….. Petitioner**

-Versus-
The State, represented by the Deputy Commissioner, Madaripur **….. Respondents**

For the Petitioner	Mr. Munsurul Hoque Chowdhury, Senior Advocate with Mr. Md. Helal Uddin Mollah, Advocate instructed by Mrs. Syeda Maimuna Begum, Advocate-on-Record.
For the Respondent	Mr. A.M. Aminuddin, Attorney General with Mr. Mohammad Saiful Alam, Assistant Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.
Date of Hearing	The 12th January, 2023
Date of Judgment	The 19th January, 2023

Editors' Note
The petitioner of the case was sentenced to death for murdering his wife. The sentence was confirmed by the High Court Division and was upheld by the Appellate Division. Learned Counsel on behalf of the petitioner submitted during review hearing that death penalty was imposed upon the petitioner based on circumstantial evidence where there were several missing links. Further submission of the Counsel was that the petitioner is in condemned cell for more than 18 years. Therefore, considering his prolonged custody in the condemned cell he should be acquitted. The Appellate Division taking into consideration the prolonged custody in the condemned cell of the petitioner together with the fact that under the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 sentence of death was the only punishment for an offence committed by the petitioner but subsequently in the Nari-O-Shishu Nirjatan Daman Ain, 2000 imprisonment for life for the same offence was also included, commuted the sentence of the petitioner to

imprisonment for life from death.

Key Words:
Commutation of death sentence; prolonged custody in condemned cell; Nari-O-Shishu Nirjatan Daman Ain, 2000; sections 4 and 10 of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995

The law is well settled that there must be some circumstances of a compelling nature together with prolonged custody which would merit consideration for commutation.
(Para 13)

The condemned prisoner has been languishing with the agony of death in the condemned cell for almost 18 years not due to any fault of his own. That being the situation, the fact of prolonged incarceration together with the discussion that we made above fortified with the recently passed decision of this Division can be considered as a mitigating circumstances and for that reason we are inclined to modify the order of sentence and commute the sentence of death to that of imprisonment for life.
(Para 18, 19)

JUDGMENT

Md. Ashfaqul Islam, J:

1. This petition under Article 105 of the Constitution is for review of the judgment and order dated 15.03.2017 passed in Criminal Appeal No. 95 of 2014 arising out of judgment and order dated 07.11.2010 passed by the High Court Division in Death Reference No. 151 of 2005 along with Jail Appeal No. 1174 of 2005 confirming the judgment and order of conviction and sentence dated 02.10.2005 passed by the Nari-O-Shishu Nirjatan Daman Tribunal-2, Madaripur in Nari-O-Shishu Nirjantan Daman Case No. 49 of 1998 under sections 4 and 10 of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 (hereinafter referred to as Ain, 1995) and sentencing him to death and acquitting the other accused persons.

2. The relevant facts of the case are that on 02.04.1998, Abul Kahsem Kha, father of the victim, as informant, lodged the First Information Report (FIR) with the Rajoir Police Station, Madaripur, alleging that four years back the victim was married to Anwar Talukder, the condemned prisoner. At the time of marriage the condemned prisoner demanded tk. 75,000/- as dowry of which the informant was initially compelled to pay an amount of tk. 40,000/- thinking about his daughter’s peaceful married life. Thereafter, the condemned prisoner started insisting the victim to bring the remaining amount of dowry money but on her failure she was subjected to torture off and on. On 16.03.1998 at about 11.00 am his brother-in-law, Emarot Bepari, came to the informant who resides in Dhaka and informed him that the condemned prisoner and the members of his family burnt his daughter, Ranu Begum to death for dowry. The informant along with his brother-in-law and others went to the place of occurrence where they did not find anybody in the house. On inquiry it was revealed from the condemned prisoner’s neighbors that at around midnight of 13.03.1998 the condemned prisoner and his family members killed the victim by pouring kerosene and setting fire on her body.

3. After examination of investigation, police submitted charge sheet against the condemned prisoner and four other under sections 4, 10 and 14 of the Nari-O-Shishu Ain,

1995 and final report against the three other accused persons, who were also brought under the purview of the case on allowing the Naraji Petition filed by the informant.

4. The Tribunal framed charge against the convict-petitioner under sections 4 and 10 of the said Ain of 1995 and against the rest 7(seven) accused persons under sections 4/10/14 of the said Ain to which all the accused persons pleaded not guilty and prayed for trial. At the trial the prosecution examined as many as sixteen witnesses but the defence examined none.

5. After examination of the witnesses the convict petitioner and all the accused persons were examined under section 342 of the Code of Criminal Procedure whereupon all of them again pleaded not guilty and prayed for trial without adducing any witness. The trial court on consideration of the evidence on record found the condemned-petitioner guilty of the offence and convicted him under sections 4 and 10 of the Ain, 1995 and sentenced him to death by judgment and order of conviction and sentence dated 02.10.2005 and acquitted all other accused persons on the ground that the prosecution failed to prove the charge brought against them.

6. Pursuant to the aforesaid judgment and order of conviction a death reference was sent before the High Court Division under section 374 of the Code of Criminal Procedure for confirmation of the same which was registered as Death Reference No. 151 of 2005. Side by side the condemned prisoner also filed jail Appeal No. 1174 of 2005. The High Court Division heard the death reference along with the said jail appeal together and on consideration of the materials on record confirmed the death sentence and dismissed the jail appeal by judgment and order dated 07.11.2010.

7. Being aggrieved by and dissatisfied with the aforesaid judgment and order dated 07.11.2010, the condemned prisoner as appellant preferred Criminal petition for leave to appeal being No. 19 of 2011 and obtained leave giving rise to Criminal Appeal No. 03 of 2020 which upon hearing this Division dismissed the appeal holding that the conviction and sentence of death of the convict appellant was rightly affirmed by the High court Division against which the instant review petition has been filed by the condemned prisoner.

8. Mr. Munsurul Hoque Chowdhury, the learned Senior Advocate appearing with Mr. Md. Helal Uddin Molah, the learned Advocate for the petitioner made his submissions for reviewing the judgment of this Division mainly on the ground that the death penalty under section 4 and 10 of the Ain, 1995 have been inflicted totally depending on circumstantial evidence where there are several missing link. Therefore, in the absence of any eye witness or direct evidence as such, the convict petitioner should be acquitted.

9. He further submits that the petitioner voluntarily surrendered before the trial court on 13.10.2020 since then he has been languishing in jail. He has never been enlarged on bail by the trial court, High Court Division and this Division and he is in condemned cell from the

date of judgment passed by the Nari-O-Shishu Nirjatan Daman (Bishesh Bidahan) Adalat, Madaripur for more than 18 years. Therefore, he submits that considering his prolonged custody in the condemned cell for more than 18 years he should be acquitted.

10. Mr. A.M Aminuddin, the learned Attorney-General appearing for the State, submits that in view of the evidence and nature of offence committed by the petitioner, this Division rightly upheld the sentence of death of the petitioner and that there is no error of law apparent on the face of the record in the judgment of this Division.

11. Admittedly, the case is based on circumstantial evidence and there is no ocular witness/evidence or eye witness to the occurrence.

12. As regards of the conviction we are of the view that there is no scope to interfere with the same. Only thing that remains for consideration whether under the facts and circumstances of the case the sentence of death should be possible to commute.

13. The law is well settled that there must be some circumstances of a compelling nature together with prolonged custody which would merit consideration for commutation. From that point of view whether the inordinate incarceration of the condemned prisoner in the custody connected with the fact that the other co-accused of the instant case had been acquitted by the trial court may be considered as mitigating factor in this regard is one of the aspect to evaluate the issue.

14. In the case of Nazrul Islam vs. state 66 DLR AD 199 this Division unequivocally held where the period spend in the condemned cell is not due to any fault of the convict and where the period spend in the custody is inordinately long, it may be considered as a extenuating/compelling mitigating circumstances for commutation of sentence of death.

15. Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 has been subsequently repealed by the Nari-O-Shishu Nirjatan Domon Ain, 2000 (hereinafter referred to as Ain, 2000). In that repealed Ain section 34 provided for the trial of cases instituted or pending under the repealed Ain to be continued as if the Ain, 1995 has not been repealed. This section 34 of Ain, 2000 was declared ultra vires the Constitution in the decision of Bangladesh Legal Aid and Services Trust (BLAST) Vs. Bangladesh, represented by the Secretary, Ministry of Home Affairs, Dhaka and Ors. 67 DLR AD 185. This changed scenario of criminal jurisprudence certainly has an impact upon the instant case. The judicial pronouncements thus crystallized having a positive bearing in the instant case as well as in the administration of criminal justice.

16. Under the previous Ain, 1995 sentence of death is the only punishment for an offence under sections 4 and 10 of the Ain, but subsequently Ain, 2000 made provisions for imprisonment for life for the same offence. But the petitioner have been convicted and

sentenced to death. With the repeal of Ain of 1995, the sentences prescribed therein in respect of similar nature of offences are changed by the Ain of 2000, therefore, our judicial conscious pricks when we note that under the previous Ain, 1995, no option other then sentence of death was available to the court.

17. It is noted with care that in recently passed series of decisions such as Anowar Hossin vs. the State 74 DLR AD 55, Md. Humayun vs. the State 74 DLR AD 123, Samaul Haque Lalon vs. the State 74 DLR AD 151, Alaich Mahmud vs. the State 74 DLR AD 107, Noor Mohammad and Ors. vs. the State 74 DLR AD 170, Md. Mohasin Mollah vs. the State 74 DLR AD 212 and so on the principle as aforesaid for commutation of sentence of death to that of imprisonment for life have been considered.

18. The condemned prisoner has been languishing with the agony of death in the condemned cell for almost 18 years not due to any fault of his own.

19. That being the situation, the fact of prolonged incarceration together with the discussion that we made above fortified with the recently passed decision of this Division can be considered as a mitigating circumstances and for that reason we are inclined to modify the order of sentence and commute the sentence of death to that of imprisonment for life.

20. In the result, the Criminal Review Petition No. 03 of 2020 is dismissed. The sentence of death of the petitioner, Anowar Talukder is commuted to imprisonment for life and also to pay a fine of Taka 50,000/- (fifty thousand), in default, to suffer rigorous imprisonment for 5 (five) years more. He will get the benefit of section 35A of the Code of Criminal Procedure in calculation of his sentence and other remission as admissible under the Jail Code.

21. The concerned Jail Authority is directed to move the petitioner to the regular jail from condemned cell forthwith.

17 SCOB [2023] AD 74

APPELLATE DIVISION

PRESENT:
Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Mr. Justice Md. Abu Zafor Siddique

CIVIL PETITION FOR LEAVE TO APPEAL NO.210 OF 2019
(From the judgment and order dated 10.04.2017 passed by the High Court Division in Civil Rule No.84 (CON) / 2015).

Government of the People's Republic of Bangladesh represented by the Deputy Commissioner, Netrokona and others **... Petitioners**

= Versus=

Md. Abdul Jalil and others **... Respondents**

For the Petitioners	Mr. Md. Zahangir Alam, Deputy Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record
For the Respondents	Mr. Md. Moinul Islam, Advocate instructed by Mr. Mohammad Ali Azam, Advocate-on-Record
Date of hearing & judgment	The 8th day of January, 2023

Editors' Note
In this case the Government made a delay of 403 days in filing a revisional application before the High Court Division against the judgment and decree of the Appellate Court in which a bil (water body) recorded in Khas Khatian was decreed in favour of the respondents. The High Court Division, however, refused to condone the delay and discharged the Rule. The Government preferred this petition against the judgment and order of the High Court Division. Appellate Division held that the delay was made due to exhaustion of the official formalities which was beyond the control of the Government and it was not an inordinate delay which could not be condoned. Consequently, the Appellate Division set aside the judgment and order of the High Court Division and condoned the delay made by the Government.

Key Words:
Section 5 of Limitation Act, 1908; Condonation of delay; delay made by the government; Section 115(1) of the Code of Civil Procedure

Section 5 of Limitation Act, 1908;
The delay caused in filing the revisional application by the Government was due to the exhaustion of the official formalities which was beyond its control and it was not an inordinate one, so it should have been condoned:
The facts and circumstances clearly indicate that the different offices of the Government are so connected that one cannot work without co-operation and assistance

from the other. In the instant case, it appears that the office of the Deputy Commissioner, Netrokona, initiated the proposal to file a revisional application before the High Court Division but it could not do so without obtaining the necessary papers and the opinion of the Government pleader and concerned authority. However, it appears that the record was sent to the office of the Solicitor and thereafter, the record was sent to the office of the learned Attorney General and then an Assistant Attorney General was entrusted to take all necessary steps regarding filing of the same in the High Court Division under section 115(1) of the Code of Civil Procedure. In these circumstances, the reasons for delay of 403 days in filing the revisional application as stated in the application under section 5 of the Limitation Act by the defendant-petitioners cannot be disregarded and discarded simply because the individual would always be quick in taking the decision whether he would pursue the application for condonation of delay since he is a person legally injured. Whereas, the state being impersonal machinery has to work through different offices or servants and from one table to another table in different offices. In view of the facts and circumstances of the case it appears that the delay caused in filing the revisional application was due to the exhaustion of the official formalities and as such, the same is beyond the control of the defendant petitioners and moreover, the aforesaid delay of 403 days is not an inordinate one and as such, if the same is not condoned the defendant leave petitioners shall be led to irreparable loss and injury. (Para 16, 17, 18)

JUDGMENT

Md. Abu Zafor Siddique, J:

1. Delay of 12 days in filing the civil petition for leave to appeal is hereby condoned.

2. This civil petition for leave to appeal is directed against the judgment and order dated 10.04.2017 passed by the High Court Division in Civil Rule No.84(CON)/2015) thereby making the Civil Rule discharged.

3. Facts of the case, in brief, are that the respondents as plaintiffs, instituted Other Class Suit No.92 of 2007 in the Court of Senior Assistant Judge, Sadar, Netrokona which on transfer was renumbered as Other Class Suit No.120 of 2010 against the petitioners as defendants for mandatory injunction stating, *inter alia*, that one Abdul Motaleb and others instituted the Title Suit No.5 of 1983 in the Court of Sub-ordinate Judge, Netrokona, for declaration of the title of the suit property along with declaration that the R.O.R in the name of the Government is wrong and erroneous and ultimately got decree. Against which the Government preferred Other Class Appeal No.100 of 1985, which was dismissed on contest. Present respondent No.3, Siraj Ali, one of the plaintiffs, on 05.06.1995 sold 1.32 acres land to plaintiff No.1, Abdul Jalil. On 31.08.1996 Abdul Motaleb sold 12½ decimals land to plaintiff No.3 by registered deed, Suruz Ali sold 40 decimals land to plaintiff No.1 on 18.07.2001 and on 20.02.2003 one Abdul Kadir sold 1.60 acres land to plaintiff Nos.1 and 2 by registered deed and on 27.05.2003 Jamal Uddin sold his land to plaintiff No.1. In this way, plaintiff No.1 possessed 3.84½ acres scheduled land and went to pay rent but the defendants refused to accept the same on the plea that a case is pending in the High Court Division regarding the claim of the land and as such, the plaintiffs instituted the instant suit.

4. Defendant Nos.1-4 filed written statements denying all the material allegations made in the plaint contending, *inter alia,* that the suit is not maintainable as framed; there is no cause

of action in the suit; the plaintiffs have no title, possession in the suit land and the suit is barred by limitation. They stated that the land was correctly recorded in the name of Government khas khatian in 1962 as bill category, and one Abdul Motaleb did not take any step to get the record amended and rather he filed Other Class Suit No.53 of 1983 in the Court of Sub-ordinate Judge and illegally and fancy fully got decree of the suit. Local people have been using the water of the suit property from long time and the plaintiffs filed this suit on false statement with intent to grab the Government properties and as such, the suit is liable to be dismissed.

5. After hearing the parties and considering the materials on record, the Assistant Judge, Netrokona, by the judgment and decree dated 31.01.2011 dismissed the suit. Being aggrieved, the plaintiffs preferred Other Appeal No.99 of 2011 before the District Judge, Netrokona, which was heard by the Additional District Judge, Netrokona, who by his judgment and decree dated 18.06.2013 allowed the appeal, setting aside the judgment and decree passed by the trial Court.

6. Being aggrieved by and dissatisfied with the aforesaid judgment and decree of the appellate Court, the defendants as petitioners moved the High Court Division under section 115(1) of the Code of Civil Procedure causing a delay of 403 days and obtained Rule on delay, which upon hearing the parties was discharged. Hence, the defendants are now before us having filed the instant civil petition for leave to appeal for redress.

7. Mr. Md. Zahangir Alam, learned Deputy Attorney General appeared on behalf of the leave-petitioners submitted that the defendant-petitioners being the Government machinery it had to move different offices for necessary opinion and directions for filing a revisional application/appeal before the appropriate Court, and for such reasons delay in filing the revisional application has been caused which is *bona fide* and unintentional but the High Court Division without considering this aspect discharged the Rule by the judgment which is liable to be set aside. He submitted that the land in question had been recorded in the khas khatian in 1962 as bill category and the water of the bill is being used by local people in general and the plaintiffs filed the suit only to grab the Government khas land and the trial Court rightly dismissed the suit but the appellate Court reversed the same without considering the case of the defendants Government which is not maintainable in law, and as such, the High Court Division without considering the merit of the case discharged the Rule without condoning the delay. He submitted that even in the absence of any application for condonation of delay, the Court has the inherent power to condone the delay in an appropriate case for proper administration of justice and as such, he prays for the sake of justice in condoning the delay by setting aside the judgment and order impugned in this civil petition.

8. Mr. Md. Moinul Islam, learned Advocate appeared on behalf of the respondents made submissions in support of the impugned judgment and order passed by the High Court Division.

9. We have considered the submissions of the learned Deputy Attorney General for the leave-petitioners and the learned Advocate for the respondents, perused the impugned judgment and order along with other connected papers on record.

10. It appears that the scheduled land of the suit was recorded in khas khatian in the name of the Government in 1962. The present respondents instituted Other Class Suit No.92 of 2007 in the Court of Senior Assistant Judge, Sadar, Netrokona for mandatory injunction on

the suit land as described in schedules 1 and 2 of the plaint. Subsequently, the suit was transferred to the Assistant Judge, Khaliajuri, Netrokona and renumbered as Other Class Suit No.120 of 2010. Present leave petitioners as defendant Nos.1 to 4 filed written statements denying all the material allegations made in the plaint contending, *inter alia,* that the suit land has been recorded in khas khatian No.1 since 1962. Subsequently, S.A. and R.O.R records were prepared in the name of the Government as bill category and as such, the local people are using the water from the said bill for cultivating crops in the adjacent lands. However, the defendants prayed for dismissal of the suit.

11. After hearing the parties and on perusal of the materials on record, the learned Assistant Judge, Khaliajuri, Netrokona, by the judgment and decree dated 31.01.2011 dismissed the suit. Thereafter, the plaintiffs (respondents herein) preferred Other Class Appeal No.99 of 2011 before the learned District Judge, Netrokona, which was ultimately heard and allowed by the learned Additional District Judge, Netrokona, by the judgment and decree dated 18.06.2013 upon reversing the judgment and decree so passed by the learned Assistant Judge and thereby decreeing the suit.

12. Being aggrieved by and dissatisfied with the judgment and decree of the appellate Court, the leave petitioners moved to the High Court Division under section 115(1) of the Code of Civil Procedure but in filing the same, there had been a delay of 403 days and as such, an application under section 5 of the Limitation Act was filed along with the said revisional application.

13. It appears from the application under section 5 of the Limitation Act that on the day of passing the judgment and decree on 18.06.2013 the defendant petitioners applied for certified copies of the judgment and thereafter, they were notified for requisite on 21.08.2013. The defendant petitioners obtained the same on 22.08.2013.

14. Thereafter, the Additional Deputy Commissioner (Revenue), Netrokona, transmitted the file to the office of the Solicitor on 29.08.2013 and the learned Solicitor, after following the necessary formalities, sent the same to the office of the learned Attorney General on 25.09.2013. Thereafter, an Assistant Attorney General was entrusted with the file for drafting, who after exhausting the necessary formalities and preparing the draft, sworn in the affidavit on 30.11.2014 and, as such, in the meantime, delay of 403 days had occurred.

15. But the High Court Division upon hearing the learned Advocate dismissed the Rule without considering the explanation offered by the defendant petitioners in the application under section 5 of the Limitation Act and thereby, the High Court Division erred in law in not appreciating the cause for making the delay. Hence, the civil petition for leave to appeal has been filed for redress.

16. The facts and circumstances clearly indicate that the different offices of the

Government are so connected that one cannot work without co-operation and assistance from the other. In the instant case, it appears that the office of the Deputy Commissioner, Netrokona, initiated the proposal to file a revisional application before the High Court Division but it could not do so without obtaining the necessary papers and the opinion of the Government pleader and concerned authority.

17. However, it appears that the record was sent to the office of the Solicitor and thereafter, the record was sent to the office of the learned Attorney General and then an Assistant Attorney General was entrusted to take all necessary steps regarding filing of the same in the High Court Division under section 115(1) of the Code of Civil Procedure. In these circumstances, the reasons for delay of 403 days in filing the revisional application as stated in the application under section 5 of the Limitation Act by the defendant-petitioners cannot be disregarded and discarded simply because the individual would always be quick in taking the decision whether he would pursue the application for condonation of delay since he is a person legally injured. Whereas, the state being impersonal machinery has to work through different offices or servants and from one table to another table in different offices.

18. In view of the facts and circumstances of the case it appears that the delay caused in filing the revisional application was due to the exhaustion of the official formalities and as such, the same is beyond the control of the defendant petitioners and moreover, the aforesaid delay of 403 days is not an inordinate one and as such, if the same is not condoned the defendant leave petitioners shall be led to irreparable loss and injury.

19. Having gone through the application under section 5 of the Limitation Act, it appears that the petitioners have properly explained the reasons for which they could not prefer the instant revisional application before the High Court Division in time. And as such, we are of the view that there is no latches or negligence on the part of the petitioners and they have been able to explain the cause of delay in filing revisional application which in our view, fulfills the requirement as spelled out under section 5 of the Limitation Act upto the satisfaction of the Court and as such, we are inclined to condone the delay.

20. In such view of the matter, the High Court Division erred in not condoning the delay and as such, the impugned judgment is liable to be set aside disposing of the civil petition for leave to appeal.

21. Accordingly, the impugned judgment and order of the High Court Division is set aside. The delay of 403 days in filing the revisional application before the High Court Division is condoned. The High Court Division is directed to hear the substantive revisional application under section 115 (1) of the Code as In Re motion in accordance with law.

22. With the aforesaid directions, this civil petition for leave to appeal is disposed of. However, there will be no order as to costs.

17 SCOB [2023] AD 79

APPELLATE DIVISION

PRESENT:
Mr. Justice Hasan Foez Siddique, CJ
Mr. Justice M. Enayetur Rahim
Mr. Justice Jahangir Hossain

CRIMINAL PETITION FOR LEAVE TO APPEAL NO. 1176 OF 2021
(From the judgment and order dated 30.06.2021 passed by the High Court Division in Criminal Miscellaneous Case No.4354 of 2020)

Mst. Fatema .... **petitioner**

=Versus=

The State and others .... **Respondents**

For the Petitioner	Mr. Mohammad Bakir Uddin Bhuiyan, Advocate instructed by Mr. Mohammad Ali Azam Advocate-on-Record
For the Respondent No.01	Mr. S.M Monir Additional Attorney General (with leave of the Court)
For the Respondent Nos.2-3, 5-6, 10, 18 and 20	Mr. Md. Abdul Hye Bhuiyan Advocate-on-Record
Respondent Nos. 4, 7-9, 11-17, 19 and 21	Not represented

Date of hearing & judgment : The 18th of December, 2022

Editors' Note
In the instant case the Appellate Division elaborated when police should be given direction to give protection to the witnesses so that they can adduce evidence in the Court without fear. An FIR was lodged by the petitioner following murder of her husband in which police submitted charge sheet and the Court framed charge against the accused persons. But due to continuous threat from the accused persons to the informant and witnesses no witness came forward to adduce evidence in the Court. Rather, they filed several General Diaries in the concerned police station. Thereafter, informant filed a case in the High Court Division under section 526 of the Code of Criminal Procedure for transferring the case from Narayanganj to Dhaka. The High Court Division did not allow the application. Appellate Division, however, considering the fact that witnesses lodged several GDs mentioning the threat from the accused persons opined that High Court Division ought to have directed the law enforcing agency to take necessary steps for ensuring security of the informant and the witnesses of the case so that they could adduce their evidence in the court without any fear and accordingly, directed the police for ensuring the security of the witnesses.

Key Words:
Section 526 of the Code of Criminal Procedure; Witness protection

Security of the informant and the witnesses has to be ensured:
On perusal of the impugned judgment it reveals that the High Court Division came to a finding that both the parties forced each other to give false testimony or give testimony in favour of either of the parties. And as such the High Court Division ought to have directed the law enforcing agency to take necessary steps for ensuring security of the informant and the witnesses of the case so that they could adduce their evidence in court without any fear. (Para 11)

We are of the view that justice would be best served if we direct the Superintendent of Police, Narayangonj to take all necessary steps for ensuring security of the informant and witnesses of the case, so that they may adduce their evidence in the Court without any fear and interruption from any corner. Accordingly, the Superintendent of Police, Narayangonj is directed to take necessary steps in ensuring security of the informant [petitioner] and witnesses of the case so that they may adduce their evidence in the Court in accordance with law. (Para 13 and 14)

JUDGMENT

Jahangir Hossain, J:

1. This Criminal petition for leave to appeal is directed against the judgment and order 30.06.2021 passed by the High Court Division in Criminal Miscellaneous Case No. 4354 of 2020 discharging the Rule.

2. The facts leading to filing of this Civil Petition for Leave to Appeal, in short, are that while the victim Joynal Abedin was running business of supplying soil in the brick field, one month before the occurrence, the accused Samad demanded taka 10 lakh as subscription from the said Joynal Abedin who denied to give the same and thereby the accused threatened to kill him and disappear his dead body. On 09.08.2018 at 7.00 p.m in the evening Joynal Abedin left for his work-place 'Rahim brick field' by trawler and the moment he reached the bank of river, all the accused at the direction of accused Samad Ali, being armed with deadly weapons such as ballam, teta, ramda, chapati etc, demanded again money of Tk 10 lacs but Joynal Abedin refused to give and then all the accused in a pre-planned manner attacked him to kill; the accused No.02 let him fall on the ground and beat him with lathi and also ordered other accused to kill him with teta and sharp weapon; that the accused No.03 penetrated with the teta into the forehead of victim Joynal and thereby caused grievous blood stained injury; the accused No.04 dealt a ballom blow on the left eye of the victim while the accused No.07 gave blows on the body of the victim with ballom in order to kill him. On hearing hue and cry of the victim, the uncle of the informant- Israfil, labourer Raihan and Aslam came to rescue the victim, then the accused No.05 inflicted on the thigh of witness Raihan with a teta; that the accused No.08 attacked witness Aslam by teta which caused grievous injury in his thumb and forefinger; the accused No.12 inflicted witness Israfil by teta and thereby caused grievous bleeding injury in his left thumb and forefinger; that upon hearing hue and cry of the injured persons, the local people came to the spot while the accused left the place giving threat of dire consequences, if not meet up their demand and further threatened not to take any legal action in this regard. Thereafter, the victim Joynal Abedin was taken to Dhaka Medical College Hospital for treatment and on 10.08.2018 at 4.30 a.m. he died under treatment. Thus, the present case was started.

3. After holding investigation, police submitted charge-sheet against 13 FIR named accused and 7 others. The case was transferred to the court of Sessions Judge, Narayangonj where the same was re-numbered as Sessions Case No. 2104 of 2019. All the accused except Arif, Salam and Sohid obtained bail. The trial court fixed 03.09.2019 for charge hearing and on that date all the accused except absconded accused filed three separate applications for discharge under section 265C of the Code of Criminal Procedure. The trial court, after rejecting the said applications, framed charge against 20 accused including the fugitive accused under sections 147/323 /324/307/385/302 /506 /114/34 of the Penal Code by order dated 30.09.2019. Thereafter, the date was fixed for evidence and lastly on 15.01.2020, but none of the witnesses has been produced.

4. At this stage, the present petitioner filed an application under section 526 of the Code of Criminal Procedure alleging, inter alia, that after obtaining bail the accused along with absconded accused are continuously giving life threat to the informant and other vital witnesses of the case for not giving true testimony before the trial court. The eye witness Aslam, who made statement before the judicial magistrate, elaborately described as to how the accused in a preplanned manner with deadly weapon attacked the victim. On his alarming, local people came and then the accused left the place giving life threat to him that if he would give testimony in the present case they would kill him like Joynal Abedin. Thereafter, the said Aslam filed Petition Case No.130 of 2019 against the accused before the Executive Magistrate, Narayangonj under section 107 of the Code of Criminal Procedure and the accused Samad Ali, Osman Gani and Rajib appeared in the said petition case by filing written undertaking promising that they would not give any more threat to him and their written undertaking was treated as bond by order dated 04.08.2019.

5. It is also stated that on 19.08.2019 the accused threatened the informant to withdraw the present case. They also threatened the informant and other witnesses to give false testimony, otherwise, they would kill the informant and other vital witnesses. In this regard the informant lodged a GD Entry being No.944 dated 20.08.2019 with Fotulla Model Police Station, Narayangonj. It is further stated that on 19.08.2019 at 6.00 am the accused went to Tayeb Brick Field where they threatened the charge-sheeted witness, Md. Tajuddin not to give testimony. Thereafter, Md. Tajuddin lodged a G.D. Entry being No.892 dated 19.08.2019 with Fatullah Model Police Station, Narayangonj. Earlier on 26.02.2019, the informant went to the Narayangonj District Court in connection with this case where the accused assaulted her and other witnesses in the court premises. A case has been lodged with Fatullah Model Police Station Case No.15 dated 04/03/2019 under sections 143/323 /307/379/506 of Penal Code in this regard and subsequently the charge sheet has been submitted in the said case. In the above circumstances, the informant filed an application before the learned Sessions Judge for cancellation of bail of the accused on 25.08.2019 and the learned Sessions Judge directed the officer-in-charge of Fatullah Model Police Station to hold an inquiry in the matter. Accordingly, one Md. Arifur Rahman, Sub-inspector of Fatullah Model Police Station submitted an inquiry report wherein he found truthfulness of the allegation made by the informant. Under the compelling circumstances, the petitioner prayed to transfer the Sessions Case No. 2104 of 2019 pending in the court of Sessions Judge, Narayangonj to the Court of Sessions Judge, Dhaka but in vain.

6. The petitioner, thereafter, moved the High Court Division with an application for transfer of the aforesaid case under section 526 of the Code of Criminal Procedure and obtained a Rule. The High Court Division, upon hearing the parties and on perusal of the materials on record, discharged the Rule by the impugned judgment and order. Hence, this

Criminal Petition for Leave to Appeal has been filed for redress.

7. Mr. Mohammad Bakir Uddin Bhuiyan, learned Advocate instructed by Mr. Mohammad Ali Azam, Advocate-on-Record, appearing on behalf of the petitioner contends that although there was specific allegation of putting continuous life threat to the informant party which was supported by the inquiry report dated 02.09.2019 but most surprisingly the learned Sessions Judge, Narayangonj did not cancel the bail of the accused-opposite parties which is evident from the subsequent orders passed by the learned Sessions Judge, Narayangonj in the instant Sessions Case No. 2104 of 2019 and this position has not also been considered while passing the impugned judgment and order.

8. It is further submitted that one of the witnesses of the instant sessions case, namely Md. Tajuddin on 19.08.2019 lodged a GD entry being No. 892 dated 14.08.2019 with Fatullah Model Police Station, Narayangonj stating that on 19.08.2019, some accused came to his work-place and had given threat for not giving evidence in the case and the informant i.e, the wife of the victim on 20.08.2019 also lodged Fatullah Model Police Station G.D. Entry No. 944 dated 20.08.2019 stating that on 19.08.2019 while she went to the house of a relative at Fatullah, the principal accused directed her to withdraw the case upon taking some money, otherwise, dire consequence will occur to her and her son. The accused opposite party-respondent No.5 on 09.07.2019 had given a dirty, filthy status in his 'face book wall' regarding the fate of the case. Under the above facts and circumstances surrounding the sessions case in hand, if the instant case is not transferred from the Court of Sessions Judge, Narayangonj to the Court of Sessions Judge at Dhaka, the informant petitioner shall be highly prejudiced and as such the impugned judgment and order of the High Court Division is liable to be set aside.

9. Mr. S.M Monir, learned Additional Attorney General appearing on behalf of the Respondent No.01 submits that the High Court Division did not commit any illegality in passing the impugned judgment and order by which the Rule has been discharged since the informant-petitioner has failed to comply with the provision of sub-section (3) of section 526 of the Code of Criminal Procedure. He also submits that since there are allegations against the accused regarding continuous life threat to the informant-petitioner as well as the witnesses of the case for filing the case and giving evidence in the case and there was an inquiry report submitted by the Sup-Inspector, Fotullah Model Police Station following the Complaint Petition Case No. 130 of 2019 wherein the allegation of life threat to the informant has been found to be true, the High Court Division ought to have directed the law enforcing agency on the ensurement of the security of the informant and witnesses of the case for providing their evidence in Court.

10. Having heard the learned Advocates and perused the materials on record along with impugned judgment and order passed by the High Court Division it appears that the present petitioner as informant filed the case under sections 147/323 /324/307 /385/302 /506/114/34 of the Penal Code and the investigating officer after thorough investigation submitted charge sheet and thereafter, the case was transmitted to the learned Sessions Judge, Narayangonj where the case was registered as Sessions Case No. 2104 of 2019. The charge was framed on 03.09.2019 against 20 accused-persons under sections, noted above. It appears that one of the witnesses named Aslam filed Petition Case No. 130 of 2019 against accused Nos. 1, 2, 4 and 6 alleging that they threatened him not to give evidence against them. It further appears that another witness named Taj Uddin also lodged G.D. Entry dated 19.08.2019 against accused Nos. 2,3, 4, 5, 6, 10 and 14 alleging that they threatened him not to give testimony against

them and the informant also filed a G.D entry against accused No. 01 on the allegation that he threatened to withdraw the case. It also appears that the inquiry officer found the allegation of threat to be true. It is surprising that none of the prosecution witnesses has been examined till date in the said murder case although the charge was framed on 03.09.2019.

11. On perusal of the impugned judgment it reveals that the High Court Division came to a finding that both the parties forced each other to give false testimony or give testimony in favour of either of the parties. And as such the High Court Division ought to have directed the law enforcing agency to take necessary steps for ensuring security of the informant and the witnesses of the case so that they could adduce their evidence in court without any fear.

12. It appears from the inquiry report submitted by the inquiry officer to the learned Sessions Judge, Narayangonj that the informant went to the father-in-law's house of her daughter on 19.08.2019 and at the time of her return on the same date, the FIR named accused No.01 along with other accused stopped her Rickshaw and used abusive and filthy language and also threatened to withdraw the case filed against them, otherwise, they would kill her. The inquiry officer also stated in his report that the allegation of life threat to withdraw the case, has been found to be true. So this being the position of the case, the High Court Division ought to have considered the security concerns of the informant as well as witnesses of the case.

13. Under such circumstances, we are of the view that justice would be best served if we direct the Superintendent of Police, Narayangonj to take all necessary steps for ensuring security of the informant and witnesses of the case, so that they may adduce their evidence in the Court without any fear and interruption from any corner.

14. Accordingly, the Superintendent of Police, Narayangonj is directed to take necessary steps in ensuring security of the informant [petitioner] and witnesses of the case so that they may adduce their evidence in the Court in accordance with law.

15. In the Result, this Criminal Petition for Leave to Appeal is disposed of with the said observations.

17 SCOB [2023] HCD 1

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICITON)

WRIT PETITION NO. 9541 of 2021

Mohammed Faruk ul Azam
Vs.
The Election Commission of Bangladesh, represented by the Chief Election Commissioner, Election Commission Secretariat, Sher-E-Bangla Nagar, Dhaka.

Mr. Hassan M.S. Azim, with
Mr. Mohammad Zahed-ul-Anwar, and
Mr. Mohibullah Tanvir, Advocates
.... For the Petitioner.
Mr. Fayez Ahmed, with
Mr. Md. Abdur Rahman, Advocates
.... For the respondent No.7

Mr. Samarendra Nath Biswas, D.A.G. with
Mr. Md. Abul Kalam Khan (Daud), A.A.G. with
Mr. Md. Modersher Ali Khan (Dipu), A.A.G.with
Mr. Md. Taufiq Sajawar (Partho), A.A.G.
....For the Respondents-government.

Heard on: 02.11.2022 and 03.11.2022
Judgment on:17.11.2022

Present:
Ms. Justice Farah Mahbub
And
Mr. Justice Ahmed Sohel

Editors' Note:
The petitioner, who planned on running for office in the Union Parishad, submitted his nomination for the chairmanship before the pertaining Upazilla Returning Officer with all the required documents, including a declaration asserting that his candidacy was valid in accordance with the provisions enshrined in sections 26(1) and 26 (2) of the স্থানীয় সরকার (ইউনিয়ন পরিষদ) আইন, ২০০৯. After scrutinizing the petitioner's nomination paper, the concerned Upazilla Returning Officer annulled his candidacy solely on the premise that his name was enlisted in the list of the Bangladesh Bank's CIB (Credit Information Bureau) as a guarantor of a loan amount that had been defaulted upon. The petitioner being aggrieved by such a decision brought an appeal before the appropriate appellate authority in conformity with Rule 15 of the "স্থানীয় সরকার (ইউনিয়ন পরিষদ) বিধিমালা, ২০১০". The aforesaid authority dismissed the appeal upon hearing it on the same grounds, upholding the findings of the Upazilla Returning Officer. The petitioner then preferred this application to challenge that appellate decision. After hearing from both sides, the court held that "a guarantor to a defaulted loan amount is not disqualified to contest the respective election". The court further observed that unlike Paurashava election, Upazilla Parishad, City Corporation, and Parliamentary elections, an aspiring candidate is not required to disclose the necessary information by providing 'হলফনামা' in a prescribed form along with a declaration (ঘোষণা) when submitting a nomination paper (as per section 26(3) of the Ain, 2009 read with Rule 12 of the Rules, 2010). Hence, the only condition the candidate must meet to contest in the election of the Union Parishad is to make a declaration (ঘোষণা) that he is competent to serve as Chairman under the applicable laws. Giving 'হলফনামা' in a prescribed manner is not thus mandated by law for this election.

Key Words:
Union Parishad Election; Affidavit and Declaration in Election Application; Loan Defaulter; Guarantor to a Defaulted Loan.

Guarantor to a defaulted loan is not a disqualification:
It is now a settled principle of law that a guarantor to a defaulted loan amount is not disqualified to contest respective election. (Para 13)

Affidavit and declaration in the local government elections:
It is, however, the mandate of law that while submitting nomination paper for contesting Paurashava election, Upazilla Parishad election, City Corporation election and Parliamentary election the candidate is required to submit affidavit 'হলফনামা'in a prescribed from along with the nomination paper containing detail information on his/her educational qualification, his/her implication in any criminal case, if there be any, occupation, source of income, description of property owned by him/her, including family members and loan liability, if there be any, with declaration that all information of the respective documents so provided are correct and true to the best of his knowledge. Conversely, in Union Parishad election the candidate is relieved from making such disclosure. The only requirement is that vide Rule 12 of the "স্থানীয় সরকার (ইউনিয়ন পরিষদ) নির্বাচন বিধিমালা, ২০১০" (as amended in 2016) the candidate is to give certificate "প্রত্যায়নপত্র" although vide Section 26(3) of the Ain, 2009 the candidate is required to submit an affidavit 'হলফনামা' along with the nomination paper declaring that he is not disqualified vide Section 26(2) to contest the respective election. (Para-15, 16)

In Union Parishad election the respective candidate is not required to disclose those 7(seven) vital information, which are essential for the respective voters to know in order to assess, evaluate and ultimately to select their candidates who is going to represent them as the head of the respective rural administrative and local government unit for a prescribed period. Although, in Paurashava election, Upazilla Parishad election, City Corporation election and Parliamentary election those informations are required to be provided by the respective candidate while submitting nomination paper by giving 'হলফনামা' in a prescribed from along with declaration (ঘোষণা). (Para-19)

JUDGMENT

Farah Mahbub, J:

1. This Rule Nisi was issued under Article 102 of the Constitution of the People's Republic of Bangladesh, calling upon the respondents to show cause as to why the impugned order dated 25.10.2021 (Annexure-F) passed by the respondent No.4 in Election Appeal No.02 of 2021 dismissing the appeal and thereby affirming the order dated 21.10.2021(Annexure-C) passed by the respondent No.5, the Returning Officer concerned cancelling the nomination paper of the petitioner for the post of Chairman of 16 No. Bakhtapur Union Parishad General Election-2021, Upazilla-Fatickchari, District-Chattogram should not be declared to have been passed without lawful authority and hence, of no legal effect and also, as to why the respondents should not be directed to allow the petitioner to participate in Bakhtapur Union Parishad General Election-2021 for the post of Chairman of 16 No. Bakhtapur Union Parishad under Upazilla-Fatickchari, District-Chattogram and to allocate necessary election symbol to that effect.

2. Along with the Rule Nisi an ad-interim direction was accordingly given upon the respondent No.3 to allow the petitioner to contest the election for the post of Chairman of 16No. Bakhtapur Union Parishad General Election, 2021, Upazilla-Fatickchari, District-Chattogram by allocating respective symbol.

3. Being aggrieved with the ad-interim order, added respondent No.7 moved the Hon'ble Appellate Division by filing Civil Petition for Leave to Appeal No.2801 of 2021. The learned Judge-in Chamber of the Appellate Division after hearing the respective parties by passing necessary order directed the concerned authorities not to publish gazette notification declaring the added respondent No.7 as Chairman of the concern union Parished. Later, by disposing of said CPLA No.2801 of 2021 the Appellate Division vide order dated 06.03.2022 passed necessary order to have the order of stay and direction given by the learned Judge-in-Chamber continued till disposal of the Rule, with direction upon this Bench to hear and dispose of the Rule on merit.

4. Facts, are brief, as that the petitioner, in the year 2016 being aspirant to contest 16 No. Bakhtapur Union Parishad General Election, 2021 for the post of Chairman filed his nomination paper before the respondent No.5, Upazilla Returning Officer concerned on 15.10.2021 (Annexure-B) along with all required documents with declaration that -

"(১) এতদ্বারা ঘোষণা করিতেছি যে, আমি-

(ক) উপরোক্ত মনোনয়নে সম্মতি প্রদান করিয়াছি এবং স্থানীয় সরকার (ইউনিয়ন পরিষদ) আইন, ২০০৯ এর ধারা ২৬(১) অনুযায়ী চেয়ারম্যান হিসাবে নির্বাচিত হইবার যোগ্য।

(খ) স্থানীয় সরকার (ইউনিয়ন পরিষদ) আইন, ২০০৯ এর ধারা ২৬(২) অনুযায়ী চেয়ারম্যানরুপে নির্বাচিত হইবার বা থাকিবার জন্য অযোগ্য নহি।

(গ) একাধিক পদে নির্বাচনের জন্য মনোনয়নপত্র দাখিল করি নাই।"

5. However, after due scrutiny the respective nomination paper of the petitioner was cancelled by the respondent No. 5. Being aggrieved the petitioner filed an appeal before the concerned Appellate authority bearing No.02 of 2021 on 22.10.2021 under Rule 15 of the "স্থানীয় সরকার (ইউনিয়ন পরিষদ) বিধিমালা, ২০১০" (in short, Rules, 2010) (Annexure-E). After hearing the respective contending parties said authority vide order dated 25.10.2021 dismissed the appeal and thereby affirmed the findings of the respondent No.5 dated 21.10.2021 (Annexure-F). Challenging the same the petitioner has filed the instant application and obtained the present Rule Nisi along with interim direction.

6. Mr. Hasan M.S. Azim, the learned Advocate with Mr. Mohammad Zahed-Ul-Anwar, the learned Advocate appearing for the petitioner submits that on a plain reading of Section 26(2)(Ja) of the " স্থানীয় সরকার (ইউনিয়ন পরিষদ) আইন, ২০০৯" (in short, the Ain, 2009) it is apparent that said context is applicable only for the principal defaulter, not guarantor. In this regard, he also submits that the loan in connection with which the petitioner stood as a guarantor, has already been reimbursed by the successors of the principal borrower prior to filing appeal before the Appellate authority. Accordingly, he submits that in any view of the mater, the nomination of the petitioner cannot be cancelled for being the guarantor of the defaulted loan amount on the date of filing nomination paper. In support he has referred the decision of the case of ***Mrs. Farin Hossain –Vs- Bangladesh Election Commission and others*** in ***writ petition No.2042 of 2021.***

7. Conversely, Mr. Fayez Ahmed, the learned Advocate with Mr. Md. Abdur Rahman, the learned Advocate appearing for the added respondent No.7 at the very outset conceding to the legal position that a guarantor of a defaulted loan amount cannot be termed as a disqualified

candidate for contesting the Union Parishad General Election, 2021, goes to submit by filing affidavit in opposition that admittedly, the candidature of the petitioner was cancelled by the respondent No.5 only on the count that his name was enlisted in the list of CIB (Credit Information Bureau) of Bangladesh Bank as being the guarantor of a defaulted loan amount, but fact remains that the petitioner personally took loan from the respective bank in connection with M/S Faruque Ul Azam and having defaulted to pay off the loan amount within time the bank concerned instituted Artha Rin Suit No.12 of 2005 before the Adalat concerned. However, for realization of the decretal amount the decree holder bank filed Artha Execution Case No. 20 of 2006 before the executing Adalat against the petitioner, the judgment debtor, which he did not disclose while filing his nomination paper before the authority concerned.

8. In this regard drawing attention to Annexure-B to the writ petition, he submits that while annexing the copy of the nomination paper, the petitioner did not enclose the 'হলফনামা', which is a part and parcel of the said nomination paper in view of Section 26(3) of the Ain, 2009. In the given context, he goes to submit that for not making such disclosure while filing nomination paper renders him disqualified under Section 26 of the Ain, 2009. Consequently, the petitioner has no legal right to contest the election for the post of Chairman of 16 No. Bakhtapur Union Parishad. Accordingly, he submits that this Rule is liable to be discharged.

9. Controverting the said assertions the learned Advocate for the petitioner by filing a supplementary affidavit submits that said loan has already been re-scheduled by the bank concerned and accordingly, Artha Execution Case No. 20 of 2006 has been disposed of by the executing Adalat vide order dated 09.05.2011 (Annexure- H to the supplementary affidavit of the writ petition). As such, he submits that it cannot be said that the petitioner is a loan defaulter. He also submits that it is fact that 'হলফনামা' is a part and parcel of nomination paper in connection with Paurashava election, Upazilla Parishad election, City Corporation election and Parliamentary election, but for the election of Union Parishad it is not a requirement of law, the only requirement the candidate is required to fulfill is to give a declaration (ঘোষণা) that he is qualified to be elected as Chairman under Section 26(1) and is not disqualified under Section 26(2), which the petitioner has duly given in the prescribed form as been supplied by the authority concerned.

10. He further submits that the nomination paper of the petitioner was cancelled on the plea that he was a guarantor of the defaulted loan amount, not on the context of Artha Rin Suit No.12 of 2005. Hence, he submits that since said suit is not the subject matter of the impugned order as such, considering the same the petitioner cannot be declared as disqualified and hence, the instant Rule cannot fail on the score.

11. Being aspirant to contest the Union Parishad General Election, 2021 for the post of Chairman as independent candidate the petitioner filed his nomination paper before the Returning Officer concerned, respondent No.5 on 15.10.2021 (Annexure-B). However, after due scrutiny his nomination paper was ultimately cancelled on 21.10.2021 (Annexure-C) on the ground, *inter-alia-*

> *"বাংলাদেশ ব্যাংক (ক্রেডিট ইনফরমেশন ব্যুরো) (গোপনীয়) এর স্মারক নং-সিআইবি- ৫(১)/২০২১-৩৮৭৯ তাং -১৯/১০/২০২১ ইং মোতাবেক ঋন খেলাপীয় জামীনদাতা। "*

12. Said findings was also affirmed by the Appellate authority vide order dated 25.10.2021 (Annexure-F) by dismissing the appeal preferred by the petitioner. Relevant portion of the said order is quoted below:

"যেহেতু জনাব মোঃ ফারুক উল আযম বাংলাদেশ ব্যাংক, প্রধান কার্যালয়, মতিঝিল, ঢাকা-১০০০ এর সূত্র নম্বর সিআইবি-৫(১)/২০২১/৩৮৭৯, তারিখঃ ১৯/১০/২০২১ খ্রিঃ মোতাবেক চেয়ারম্যান পদে মনোনয়ন দাখিলকারী জনাব মোঃ ফারুক উল আযম, ইসলামি ব্যাংক লিঃ, জুবিলি রোড শাখা, চট্টগ্রাম জামিনদার হিসেবে ঋণ খেলাপী। যা স্থানীয় সরকার (ইউনিয়ন পরিষদ) নির্বাচন বিধিমালা ২০১০ এর বিধি ১৪ এর ৩ উপবিধি অনুসারে বাতিলযোগ্য।

সেহেতু দাখিলকৃত দলিলাদি পরীক্ষা নিরীক্ষায় এবং শুনানীকালে আপিলকারীর বক্তব্যের প্রেক্ষিতে ও নথি পর্যালোচনায় জনাব মোঃ ফারুক উল আযম এর আপিল আবেদনটি নামঞ্জুর করা হলো।"

13. It is now a settled principle of law that a guarantor to a defaulted loan amount is not disqualified to contest respective election, as has been observed by one of Benches of this Division in ***Mrs. Farin Hossain –Vs- Bangladesh Election Commission and others*** in connection with ***writ petition No.2042 of 2021***(in which one of us was a party), which is quoted herein below:-

"From a plain reading of the aforesaid provisions of law it appears that in none of those provisions the guarantor(s) has/have been included in the criteria of "খেলাপী ঋণ গ্রহিতা" in Section 19(2) (ঝ) and (ঞ) of the "স্থানীয় সরকার (পৌরসভা) আইন, ২০০৯", in Section 26(2) (জ) of the "স্থানীয় সরকার (ইউনিয়ন পরিষদ) আইন, ২০০৯", in Section 8(2)(ঞ)(ট) of the "স্থানীয় সরকার (উপজেলা পরিষদ) আইন, ১৯৯৮" and in Section 6(2)(ঝ) of the "জেলা পরিষদ আইন- ২০০০". The only exception has been made in Section 19(2) (ঝ) and (ঞ) of the "স্থানীয় সরকার (সিটি কর্পোরেশন) আইন, ২০০৯", wherein the mortgagor or guarantor (বন্ধকদাতা বা জামিনদার) shall be treated as "খেলাপী ঋণ গ্রহিতা" if, his interested company or firm has become loan defaulter.

Thus, it is abundantly clear that the Legislature with intention has not included the guarantor as "খেলাপী ঋণ গ্রহিতা" in Section 19(2) (ঝ)(ঞ) of the "স্থানীয় সরকার (পৌরসভা) আইন, ২০০৯".

Be that as it may, since the guarantor has not been included in the definition of "খেলাপী ঋণ গ্রহিতা" in "স্থানীয় সরকার (পৌরসভা) আইন, ২০০৯" hence, relying on the definition of "খেলাপী ঋণ গ্রহিতা" as provided in Section 5(GaGa) of the Bank Companies Act, 1991 the petitioner cannot be found as a disqualified candidate for the post of Mayor of Dewangonj Pourashava, P.S- Dewangonj, District- Jamalpur as per Section 19(2) (ঝ)(ঞ) of the "স্থানীয় সরকার (পৌরসভা) আইন, ২০০৯".

14. At this juncture, the added respondent No.7, the other contesting candidate raised objection to the candidature of the petitioner on the claim that the petitioner himself took loan from the bank concerned in the name of M/S Faruque Ul Azam; however, having defaulted to pay off the loan amount within time the bank instituted Artha Rin Suit No.12 of 2005 before the Adalat concerned, which was ultimately decreed and in order to realize the decretal amount Artha Execution Case No.20 of 2006 had been filed by the decree holder bank (Annexures- Ka and Kha respectively to the affidavit-in-opposition). However, from order No.57 dated 09.05.2011 (Annexure-H to the supplementary affidavit of the writ petition) it appears that said execution case has been disposed of on account of amicable settlement between the respective contending parties. Considering the above, the assertion so made by the added respondent No.7 to that effect falls through.

15. As to the other assertion of the added respondent No.7 with regard to filing nomination paper without 'হলফনামা', we have minutely examined the photo copy of the nomination paper of the petitioner submitted before the respondent No.5 on 15.10.2021

(Annexure-B). It is, however, the mandate of law that while submitting nomination paper for contesting Paurashava election, Upazilla Parishad election, City Corporation election and Parliamentary election the candidate is required to submit affidavit 'হলফনামা'in a prescribed from along with the nomination paper containing detail information on his/her educational qualification, his/her implication in any criminal case, if there be any, occupation, source of income, description of property owned by him/her, including family members and loan liability, if there be any, with declaration that all information of the respective documents so provided are correct and true to the best of his knowledge.

16. Conversely, in Union Parishad election the candidate is relieved from making such disclosure. The only requirement is that vide Rule 12 of the "স্থানীয় সরকার (ইউনিয়ন পরিষদ) নির্বাচন বিধিমালা, ২০১০" (as amended in 2016) the candidate is to give certificate "প্রত্যায়নপত্র" although vide Section 26(3) of the Ain, 2009 the candidate is required to submit an affidavit 'হলফনামা' along with the nomination paper declaring that he is not disqualified vide Section 26(2) to contest the respective election.

17. In this regard, Mr. Tawhidul Islam, the learned Advocate by filing affidavit-in-opposition on behalf of the respondent No.1 goes to contend that subject to Section 26 of the Ain, the respective candidate is required to submit, amongst others, the respective documents in compliance of Rule 12(3) namely:

> *"১৪। মনোনয়নপত্র ও তার সাথে দাখিলকৃত কাগজাদিঃ আইনের ধারা ২৬ এর বিধান সাপেক্ষে, বিবিমালার বিধি ১২ এর উপবিধি (৩) অনুসারে-*
> *(ক)...........................*
> *(খ)...........................*
> *(গ)...........................*
> *(অ) বিধি ১৩ অনুসারে জামানতের টাকা জমাদানের প্রমাণ হিসেবে রিটার্নিং অফিসারের অনুকূলে প্রদেয় ব্যাংক ড্রাফট অথবা ট্রেজারি চালান বা পে-অর্ডার;*
> *(আ) উক্ত মনোনয়নে সংশ্লিষ্ট প্রার্থী সম্মত আছেন এবং নির্বাচনে অংশগ্রহণের ক্ষেত্রে আইনের ধারা ২৬(২) বা আপাতত বলবৎ অন্য কোন আইনে তিনি অযোগ্য নন মর্মে তার স্বাক্ষরিত প্রত্যয়নপত্র এবং*
> *(ই) প্রস্তাবকারী ও সমর্থনকারীদের কেহ প্রস্তাবকারী বা সমর্থনকারী হিসেবে একই পদে অন্য কোন মনোনয়নপত্রে স্বাক্ষর দান করেন নাই;*
> *(ঈ) চেয়ারম্যান পদের ক্ষেত্রে নিবন্ধিত রাজনৈতিক দলের প্রার্থী হলে সংশ্লিষ্ট রাজনৈতিক দলের সভাপতি বা সাধারণ সম্পাদক বা সমপর্যায়ের পদাধিকারী বা তাদের নিকট হতে ক্ষমতাপ্রাপ্ত ব্যক্তির নাম, স্বাক্ষর ও সিলমোহরযুক্ত দলীয় মনোনয়ন।"*

18. In other words, he submits, in Union Parishad election the candidate is not required to disclose those informations, which are required to be submitted by the respective candidate who aspires to contest the Paurashava election, Upazilla Parishad election, City Corporation election and Parliamentary election.

19. In view of the said contention of the respondent No.1 and also, considering the position of law as provided in Section 26(3) of the Ain, 2009 read with Rule 12 of the Rules, 2010 (as amended in 2016), it is apparent that in Union Parishad election the respective

candidate is not required to disclose those 7(seven) vital information, which are essential for the respective voters to know in order to assess, evaluate and ultimately to select their candidates who is going to represent them as the head of the respective rural administrative and local government unit for a prescribed period. Although, in Paurashava election, Upazilla Parishad election, City Corporation election and Parliamentary election those informations are required to be provided by the respective candidate while submitting nomination paper by giving 'হলফনামা' in a prescribed from along with declaration (ঘোষণা). Said view of ours finds support in the case of ***Md. Abu Safa Vs. Abdul Momen Chowdhury, Civil Appeal No. 57 of 2007,*** as well as the case of ***People's Union for Civil Liberties Vs. India, (2009) 3SCC 200.***

20. In the instant case, the petitioner, however, appears to have given due "ঘোষণা" in compliance of the Rule 12(3) (আ) of the Rules, 2010(Annexure-B). Considering the above, it can clearly be discerned that since the petitioner is not a disqualified candidate; hence, cancelling his nomination paper by the Returning Officer and being affirmed by the Appellate authority is liable to be declared to have been passed without lawful authority and hence, of no legal effect.

21. In the result, the Rule is made absolute.

22. The impugned order dated 25.10.2021 passed by the respondent No.4 in Election Appeal No. 02 of 2021 dismissing the appeal (Annexure-F) and thereby affirming the order dated 21.10.2021 passed by the respondent No. 5 cancelling the nomination paper of the petitioner for the post of Chairman of 16 No. Bakhtapur Union Parishad General Election-2021, Upazilla-Fatickchari, District-Chattogram (Annexure-C) is hereby declared to have been passed without lawful authority and hence, of no legal effect.

23. The respondent No.1 is accordingly directed to proceed with the process of election of the respective union Parishad in accordance with law.

24. However, considering the greater public interest the respondent No. 1 is hereby directed to look into the loopholes as are apparent in the "স্থানীয় সরকার (ইউনিয়ন পরিষদ) আইন, ২০০৯" as well as in the "স্থানীয় সরকার (ইউনিয়ন পরিষদ) নির্বাচন বিধিমালা, ২০১০" with regard to giving 'হলফনামা' by the respective candidate containing the respective information and to take necessary steps to that effect in due compliance of law.

25. There will be no order as to costs.

26. Communicate the judgment and order to the respondent No.1 along with other respondents concerned at once.

17 SCOB [2023] HCD 8

HIGH COURT DIVISION
(CIVIL REFERENCE JURISDICTION)
CIVIL MISCELLANEOUS NO. 11 OF 2022 (REFERENCE)

A reference under Section 113 read with Order XLVI rule 1 of the Code of Civil Procedure, 1908.

Mr. A.M. Amin Uddin, Attorney General with
Mr. A.F. Hassan Arif, Senior Advocate with
Mr. Probir Neogi, Senior Advocate with
Mr. Devasish Roy (Raja Devasish Roy), Advocate
……As Amici Curiae.

Mr. Pratikar Chakma, D.A.G with
Mr. Zahid Ahammad (Hero), A.A.G with
Mr. Mohammad Shafayet Zamil, A.A.G with
Mr. Md. Sultan Uddin, Advocate with
Mr. Md. Jamal Uddin, Advocate
…..As Interveners

Heard on 31.10.2022, 07.11.2022 and 14.11.2022
Judgment on 21.11.2022

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice S M Kuddus Zaman

Editors' Note:
Reference was sent to the High Court Division by the Court of Additional District Judge, Bandarban Hill District in view of the provisions under Section 113 read with Order XLVI, rule 1 of the Code of Civil Procedure, 1908 seeking opinion of the High Court Division of the Supreme Court of Bangladesh on two legal questions as regards interpretation of Section 6 of the Chittagong Hill-Tracts Regulation (Amendment) Act, 2003 (Act No. 38 of 2003), namely, whether the civil appeal cases pending before the Divisional Commissioner, prior to the said amending Act coming into force should be transferred to the Court of District Judge of the respective Hill Districts, and, if the same are so transferred, whether the District Judge or the Additional District Judge of the respective districts, as the case may be, should dispose of the same. Examining the relevant provisions of the Chittagong Hill Tracts Regulation, 1900 (Regulation No. I of 1900) and the Chittagong Hill-Tracts Regulation (Amendment) Act, 2003 (Act No. 38 of 2003) and considering the historic perspective of the Hill Tracts Districts and opinions of the *amici curiae* the High Court Division held that it is clear from the text of the 'special provision' under Section 6 of the amending Act of 2003 that the Legislature deliberately did not mention anything about the pending civil appeals and the proceedings of civil nature as was pending before the Divisional Commissioner of Chattogram before the said amending Act came into force and according to amended section 8 of the Regulation the District Judges have been given appellate jurisdiction only against the orders, judgments and decrees of the Joint District Judges of the respective districts and not against any order of the Deputy Commissioner of the district concerned or any other officer. Therefore, the High Court Division decided the answers to both the aforesaid legal questions to be "IN THE NEGETIVE" and ordered civil appeals and the proceedings of civil nature pending before the Divisional

Commissioner and Additional Commissioners of Chattogram not to be transferred to the District Judges of the respective hill districts and, if the same have in the meantime been transferred to the District Judges concerned, the same should be returned back immediately if the same have not been disposed of yet. However, the High Court Division excepted any such proceeding disposed of by the District Judges and Additional District Judges from the order treating those as past and closed matters.

Key Words:
Reference under Section 113 read with Order XLVI, rule 1 of the Code of Civil Procedure, 1908; Chittagong Hill Tracts Regulation, 1900; Chittagong Hill-Tracts Regulation (Amendment) Act, 2003; Civil Jurisdiction

Chittagong Hill Tracts Regulation, 1900, Section 8(3), 8(4), 8(5):
The District Judges of the respective districts shall only have jurisdiction to entertain appeals from the orders, judgments and decrees of the respective Joint District Judges of the said districts:
Although three separate civil jurisdictions have been created and Joint District Judges of the said districts have been given the jurisdiction to try civil cases, such civil cases shall have to be tried or disposed of in accordance with the existing laws, customs and usages of the district concerned and not in accordance with the Code of Civil Procedure. On the other hand, the said Joint District Judges, exercising original jurisdiction, shall not have jurisdiction in trying or disposing of cases arising out of family laws or other customary laws of the tribes of the district concerned and such matters shall be triable by the respective Mouza Headmen and Circle Chiefs. Finally, the District Judges have been given appellate jurisdiction only against the orders, judgments and decrees of the Joint District Judges of the respective districts and not against any order of the Deputy Commissioner of the district concerned or any other officer. It has long been settled by long line of decisions of this Court that the jurisdiction as well as the appellate jurisdiction of a Court is the creature of Legislation and such jurisdiction can be exercised by such appellate forum only to the extent of such power given by the Legislature by the said legislation conferring such jurisdictions. This being so, in the instant matter, it appears that the District Judges of the respective districts shall only have jurisdiction to entertain appeals from the orders, judgments and decrees of the respective Joint District Judges of the said districts. ...(Para 4.11)

Establishment of Civil Courts under special law:
Unlike the civil courts in rest of the country, the civil courts in CHT area have not been established under the Civil Courts Act, 1887 (Act No. XII of 1887). Rather, they have been established under the amended provision of the said Regulation. Therefore, they are the special types of civil courts established under the said special law. ...(Para 4.12)

Applicability of the customary law of the land in Chittagong Hill Tracts:
Historically Chittagong Hill Tracts area was governed by distinctive law and administrative procedure. Particularly, in matters of civil disputes, the customary law of the land in Chittagong Hill Tracts area has always been made applicable. Such historic recognition of customary law and non-application of Code of Civil Procedure has again been recognized by the Legislature by inserting sub-section (4) in Section 8 of the said Regulation providing, thereby, that the Joint District Judge, as Court of original jurisdiction, shall try all civil cases in accordance with the existing laws, customs and usages of the district concerned. Not only that, the Legislature, by this amending Act, has also kept the cases arising out of family laws and other customary

laws of the tribes out of the jurisdiction of the Joint District Judges and, in respect of those matters, the jurisdiction of the Mouza Headmen and Chief Circles concerned of the triable people have been recognized. ...(Para 4.15)

Presumption as to awareness of the Legislature:
While interpreting an amending law enacted by parliament, it cannot be presumed that the Legislature was unaware of the existing law or that the Legislature has committed any mistake by not mentioning a particular matter in the amending law. ...(Para 4.17)

Chittagong Hill-Tracts Regulation (Amendment) Act, 2003, Section 6 and 8:
Therefore, if we read this added sub-section (5) of Section 8 along with the said special provision under Section 6 of the amending Act, we have no option but to hold that it is the Legislature, which does not want those pending civil appeals and proceedings of civil nature to be transferred to the District Judge of the respective districts and, because of that, the Legislature remained silent in respect of the said pending civil appeals and proceedings.

...(Para 4.19)

JUDGMENT

Sheikh Hassan Arif, J:

1. This reference has been sent to us by the Court of Additional District Judge, Bandarban Hill District in view of the provisions under Section 113 read with Order XLVI, rule 1 of the Code of Civil Procedure, 1908 seeking opinion of the High Court Division of the Supreme Court of Bangladesh on two legal questions.

2. Background facts:

2.1. Short background facts, as stated by the said Court, leading to such reference are that before amendment of some provisions in “The Chittagong Hill Tracts Regulation, 1900 (Regulation No. I of 1900)” (“the said Regulation”) vide “The Chittagong Hill-Tracts Regulation (Amendment) Act, 2003 (Act No. 38 of 2003)”, the disputes in civil nature in Chittagong Hill Tracts area were adjudicated by the Deputy Commissioners of Hill District concerned and the appeals therefrom were being disposed of by the Divisional Commissioner or Additional Divisional Commissioner, Chattogram Division under the said Regulation and Rules made pursuant to the same. Accordingly, one eviction case, namely Eviction Case No. 56 (D) of 2003, was disposed of by the then Deputy Commissioner of Bandarban Hill District and, thereby, the defendants therein were directed to vacate the disputed land. The defendants, being aggrieved, then preferred appeal against the said order of eviction before the Divisional Commissioner, Chattogram vide Eviction Appeal No. 68 of 2008 in view of Rule 10 of the ‘Rules for the Administration of Chittagong Hill Tracts’ (“the said Rules”) made under Section 18 of the said Regulation. While the said appeal was pending before the Divisional Commissioner for disposal, the aforesaid amending Act of 2003, namely Act No. 38 of 2003, came into force vide gazette dated 04th June, 2008. Pursuant to the said amending Act of 2003 (“the said amending Act”), the Deputy Commissioner of Bandarban Hill District and Divisional Commissioner of Chattogram Division sent all the criminal and civil cases pending before them to the respective Joint District Judge (or Assistant Sessions Judge) and District Judge concerned purportedly in view of the special provisions as provided by Section 6 of the said amending Act. In sending those cases, the Divisional Commissioner, Chattogram also sent the civil appeal cases to the District Judges of the respective Hill District including the aforesaid Eviction Appeal No. 68 of 2008 to the District Judge,

Bandarban. The District Judge, Bandarban then sent the said appeal to the Court of Additional District Judge, Bandarban for disposal.

2.2. Thereupon, the Court of Additional District Judge, Bandarban heard the parties in the said appeal and fixed the same for delivery of judgment. However, two legal questions then came up before the said Court as regards interpretation of Section 6 of the said amending Act, in particular whether the civil appeal cases pending before the Divisional Commissioner, prior to the said amending Act coming into force should be transferred to the Court of District Judge of the respective Hill Districts, and, if the same are so transferred, whether the District Judge or the Additional District Judge of the respective districts, as the case may be, should dispose of the same. The Court of Additional District Judge, Bandarban then heard one of the learned advocates of Bandarban Court as Amicus Curiae, who opined that after the establishment of civil Courts in Bandarban, the Divisional Commissioner was not in a position to dispose of such civil appeals or other proceedings of civil nature. However, the said Court prima-facie opined that such pending civil appeals and proceedings of civil nature should be disposed of by the Divisional Commissioner, Chattogram. The said Court then referred the matter to the Supreme Court of Bangladesh seeking opinion of the High Court Division in view of the aforesaid provisions of the Code of Civil Procedure. The Hon'ble Chief Justice of Bangladesh then constituted this Special Division Bench of the High Court Division and sent the said reference to this bench for disposal of the same.

2.3. The legal questions sent by the said Court of Additional District Judge, Bandarban seeking opinion of this Court are reproduced herein below for our ready reference:

প্রশ্ন সমূহ

প্রশ্নঃ ১

The Chittagong Hill Tracts Regulation (Amendment) Act, 2003 [Act XXXVIII of 2003] এর ৬ নং ধারার বিধান মতে চট্রগ্রাম বিভাগের ডিভিশনাল কমিশনার এবং এডিশনাল ডিভিশনাল কমিশনারের নিকট নিষ্পন্নাধীন সকল ফৌজদারী আপীলসহ অন্যান্য ফৌজদারী প্রকৃতির মামলাসমূহ সংশ্লিষ্ট জেলার দায়রা আদালতে স্থানান্তরিত হওয়ার বিধান থাকলেও উক্ত ডিভিশনাল কমিশনার এবং এডিশনাল ডিভিশনাল কমিশনারের নিকট নিষ্পন্নাধনি (pending) দেওয়ানী প্রকৃতির আপীল, রিভিশন ও অন্যান্য আইনগত কার্যধারা জেলা জজ আদালতে স্থানান্তরিত হওয়ার কোন বিধান না থাকায় অত্র জেলায় সরকারী গেজেট বিজ্ঞপ্তির মাধ্যমে বিগত ০১/০৭/২০০৮ খ্রিঃ তারিখে জেলা জজ আদালত প্রতিষ্ঠার পূর্বে তৎকালীন জেলা প্রশাসকের দেওয়ানী এখতিয়ার বলে প্রদত্ত দেওয়ানী প্রকৃতির মামলার রায় বা আদেশের বিরুদ্ধে চট্রগ্রাম বিভাগের ডিভিশনাল কমিশনার অথবা ক্ষেএ বিশেষে এডিশনাল ডিভিশনাল কমিশনারের নিকট দায়েরকৃত নিষ্পন্নাধীন (pending) আপীল কিংবা রিভিশন বা অন্যকোন আইনগত কার্যধারা অত্র আদালতে তথা অত্র জেলার জেলা জজ আদালতে আইনগতভাবে স্থানান্তরিত হতে পারে কিনা?

প্রশ্নঃ ২

অত্র জেলায় জেলা জজ আদালত স্থাপনের পূর্বে জেলা প্রশাসকের দেওয়ানী এখতিয়ারে প্রদত্ত কোন রায় বা আদেশের বিরুদ্ধে দায়েরকৃত এবং নিস্পন্নাধীন দেওয়ানী প্রকৃতির কোন আপীল বা রিভিশন চট্রগ্রাম বিভাগের বিভাগীয় কমিশনার কিংবা অতিরিক্ত বিভাগীয় কমিশনার অত্র আদালত তথা জেলা জজ আদালতে বিচার ও নিস্পত্তির জন্য প্রেরণ করলে তা অত্র আদালতে (শুনানী ও নিষ্পত্তির জন্য) আইনগতভাবে রক্ষণীয় হবে কিনা?

2.4. This Special Bench of the High Court Division then heard the matter primarily on 31.10.2022, wherein Mr. Pratikar Chakma, learned Deputy Attorney General, Mr. Zahid

Ahammad (Hero), learned Assistant Attorney General, Mr. Mohammad Shafayet Zamil, learned Assistant Attorney General along with Mr. Md. Sultan Uddin and Mr. Md. Jamal Uddin, learned Advocates, present in Court, made submissions covering relevant issues, particularly by making reference to different decisions of this Court on different issues arose from disputes in Chittagong Hill Tract area. Considering the delicacy of the matter as well as the questions of interpretation of law and Constitution being involved therein, we have requested Mr. A.M. Amin Uddin, learned Attorney General for Bangladesh, Mr. A.F. Hassan Ariff, senior advocate, Mr. Rokanuddin Mahmud, senior advocate, Mr. Probir Neogi, senior advocate and Mr. Devasish Roy (Raja Devasish Roy), learned advocate, to assist this Court as Amici Curiae. Accordingly, Mr. A.M. Amin Uddin, Mr. A.F. Hassan Ariff, Mr. Probir Neogi and Mr. Raja Debashis Roy have made extensive submissions on the issues involved therein. We have also heard the aforementioned learned advocates, namely Mr. Pratikar Chakma, Mr. Zahid Ahammad (Hero), Mr. Mohammad Shafayet Zamil, Mr. Md. Sultan Uddin and Mr. Md. Jamal Uddin, who have assisted this Court as interveners.

3. Submissions:

3.1. All the learned amici curiae, (except Mr. A.F. Hassan Ariff, learned senior counsel), have made submissions almost in same line in that the said civil appeal cases and the proceedings of civil nature should be disposed of by the Divisional Commissioner or the Additional Divisional Commissioner, Chattogram, as they may be, on the ground that the said special provision under Section 6 of the said amending Act did not mandate or contemplate the transfer of those appeals and proceedings to the Court of District Judge of the respective hill districts.

3.2. A.M. Amin Uddin, learned Attorney General, has specifically pointed out the absence of the specific words in Section 6 of the said amending Act as regards transfer of such civil appeals and proceedings of civil nature. According to him, when the Legislature has deliberately remained silent in the amending Act as regards a particular matter, the Court cannot become vocal on that matter as the Court does not act as legislating body. Rather, according to him, the duty of the Court is limited to interpreting the words used by the Legislature. In this regard, he has referred to a decision of Privy Council in **Magor and St. Mellons Rural District Council and Newport Corporation, 1952 A.C.-189**.

3.3. Mr. Probir Neogi, learned senior counsel, has, at the outset, referred to Section 4 of the Code of Civil Procedure. According to him, the Code itself has provided that nothing of the Code shall be deemed to limit or otherwise affect any special law in force or any special jurisdiction, unless such provision is specifically provided in the Code itself. He submits that since the CHT Regulation of 1900 is a special law, thereby, providing special procedure for adjudication of civil disputes as well as civil appeals by special forum, namely Deputy Commissioner of the hill district concerned and Divisional Commissioner of Chattogram in view of the Rules made under Section 18 of the said Regulation, such special procedure and forum should be allowed to continue unless it is specifically amended by the Legislature by any amending Act. By referring to the special provisions as provided by Section 6 of the said amending Act, Mr. Neogi submits that since Section 6 has made provision for transfer of criminal appeals only and the said provision is completely silent about transfer of pending civil appeals and the proceedings of civil nature, the said pending appeals and/or proceedings of civil nature cannot be transferred to the Court of District Judge of the respective hill districts, as that would be beyond the scope of the amending Act itself. By referring to different Chapters of the book authored by late lamented Mr. Mahmudul Islam, namely the book titled "Interpretation of Statutes and Documents," Mullick Brothers, Mr. Neogi argues that the established Rule of interpretation of statutes is that the Legislature does not intend alteration in the existing law except what is expressly provided, as, according to him, Legislature is presumed to have been aware of the existing law.

3.4. By referring to the same Chapter-3 of the said book, Mr. Neogi submits that the other cardinal principle of interpretation of statute is that the Legislature does not make any

mistake and that it cannot be presumed by the Court that the Legislature has committed mistake in amending a particular law by not mentioning some matters therein. In support of his such submissions, he has referred to various decisions of the superior Courts of this subcontinent and some English cases, namely the decisions in **Shafiqur Rahman vs. Isris Ali, 37 DLR (AD)-71 [Para 26], Ramphal vs. Kamal Sharma, AIR, 2004 SC 1647, Shamsuddin Ahmed vs. Registrar, 19 DLR (SC) 483, Dinesh Chandra vs. Assam, AIR 1978, SC-17, Md. Abdus Sattar vs. Sub-Registrar, 29 DLR-320, Riverwear Commissioner vs. Adamson, (1877) 1QBD 546, Leach vs. R (1912) AC 305, National Assistants Board vs. Wilkinson, [1952] 2 QB 648, Rabnewaz Vs. Jahana, PLD 1947 SC 210, Bristol Guardians vs. Bristol Waterworks, [1914] AC 379 and Commissioner of Income Tax vs. Pemsel, [1891] AC 531**. Accordingly, he submits that the answers to the legal questions sent by the Court of Additional District Judge, Bandarban should be "IN THE NEGATIVE".

3.5. Mr. Debashis Roy (Raja Debashis Roy) learned advocate, has also made elaborate submissions particularly covering the legislative and administrative history of the Chittagong Hill Tracts area. According to him, even before the Regulation of 1900, the Chittagong Hill Tracts area did always have a separate status in respect of its administration and judicial matters and that the Regulations of 1900 maintained that separate and distinctive administrative and judicial nature in clear way. By referring to different provisions of the said Regulations of 1900 and the Rules made thereunder, he submits that in adjudicating the civil disputes, the application of the Code of Civil Procedure has been ousted and that some provisions of Code may only be applicable by the Deputy Commissioners of the respective hill districts while executing the process of the Court and decrees in that area. He then referred to some provisions of the Public Gambling Act, 1867, Public Demand Recovery Act, 1913 and some other laws in order to establish his point. In this regard, he has also referred to Section 4 of the Code of Civil Procedure and submits that this provision itself has provided non-application of the Code in case of existence of special procedure by any special law or special jurisdiction conferred by law, unless such provision is specifically provided by the said law.

3.6. Opposing the above contention, Mr. A.F. Hassan Ariff, learned senior counsel, submits that after the separation of judiciary from the executive organ and after the changing scenario in 2003 with the amending Act of 2003, which came into effect in 2008, there cannot be any parallel forum run by the executives in Chittagong Hill districts in order to exercise parallel power of District Judge for adjudicating civil appeals or any proceedings of civil nature. According to him, such existence of parallel forum run by the executives, namely the Divisional Commissioner or Additional Divisional Commissioner is unconstitutional and the same directly hit the constitutional provision providing for separation of judiciary.

4. Deliberations of the Court:

Historic perspective:

4.1. It appears from the above submissions of the learned amici curiae and learned advocates that the main issue involved in this matter is basically with regard to the interpretation of the special provision as provided by Section 6 of the amending Act of 2003 (Act No. XXXVIII of 2003), as came into force in 2008. However, before giving such interpretation, we need to keep in mind the historic perspective of the area concerned as against the applicable laws therein. The admitted position is that historically Chittagong hill tract area was governed by separate legislative instruments and Rules made thereunder. According to the 'introduction' to a book written by the then Deputy Commissioner of Khagrachori Hill District,[1] three hill districts in Chittagong hill tracts area, namely Rangamati, Bandarban and Khagrachori, were administrative part of Chittagong District and

[1] মোহাম্মদ হুমায়ুন কবীর, জেলা প্রশাসক, খাগড়াছড়ি পার্বত্য জেলা, 'পার্বত্য জেলা আইন সংকলন', জেলা প্রশাসন, ০৭ নভেম্বর, ২০০৫

they directly became under British administration on 20th June, 1860. Thereafter, the said area was distinctively governed by the British by virtue of Act No. XXII of 1860, Act No. IV of 1863, Rule 3 of 1873 and Rule 3 of 1881. Subsequently, the said area was governed by British by virtue of the Chittagong Hill Tracts Regulation, 1900 (Regulation No. 01 of 1900). A book published by the Association for Land Reform and Development (ALRD) under the title "The Chittagong Hill Tracts Regulation, 1900" (Second Edition), as edited by Raja Debasish Roy and Pratikar Chakma (both advocates of the Bangladesh Supreme Court), also mentions that before 1860 neither Mughols nor the British are known to have had any direct influence or rule over CHT and that the status of the CHT peoples as tributaries was retained at least as late as 1829. The said book has referred to different authorities supporting such history. The book also mentions that as a small number of Chittagonean-speaking bengali wet-rice farmers are known to have immigrated into CHT sometime during the 19th century and that, subsequently, the number of settlers increased to such extent that the same has made huge demographical change and the percentage of Bengali population in the region rose from about 2% in 1872 to about 47% in 2011 (according Bangladesh Government official census).

4.2. However, it appears, Regulation 1 of 1900 remained one of the colonial Special Regulations which provided restricted operation of other laws of the main land in the area and the Rules made thereunder have provided procedures and forum to be used for administration of such area by the government officials, traditional Chiefs and Headmen, particularly on matters related to land disputes as well as disputes regarding the customary law of the hilly people. Some provisions of the said Regulation No. 1 of 1900 and Rules made thereunder regarding administration of civil and criminal justice system will make the scenario much clearer. In this regard, we may examine some of the provisions of the said Regulation as existed immediately before its amendment in 2003.

4.3. Apart from providing in the preamble to the said Regulation that the said Regulation was made to declare the law applicable and provide for the administration of Chittagong Hill Tracts in Bangladesh, Section 3 of the same provides that subject to the provisions of the Regulation, the administration of Chittagong Hill Tracts shall be carried on in accordance with the Rules for the time being in force under Section 18. Section 4, on the other hand, specifically provides that the enactments specified in the Schedule, to the extent that they are not inconsistent with the Regulation, are declared to be in force in Chittagong Hill Tracts and that no other enactment shall be deemed to be applied in Chittagong Hill Tracts. However, the said Section 4 has conferred power on the government to declare, by gazette, as to the application of any other enactments. Section 7 has provided, amongst others, that the Chittagong Hill Tracts shall constitute a district for the purpose of criminal and civil jurisdiction, and the Deputy Commissioner shall be District Magistrate and that the general administration of the said Tracts in criminal, civil and revenue and all other matters shall be vested in the Deputy Commissioner.

4.4. Section 8 has further provided that Chittagong Hill Tracts shall constitute a Sessions Division and the Divisional Commissioner and the Additional Commissioner of Chattogram shall be the Sessions Judge and Additional Sessions Judge respectively. Section 8 has also conferred power on the Divisional Commissioner as Sessions Judge to take cognizance of any offence as a Court of original jurisdiction and, while taking cognizance, he shall follow the procedure prescribed by the Code of Criminal Procedure, 1898 as applicable for the trial of warrant cases by the Magistrates. Finally, Section 9 has provided that the High Court Division of Bangladesh shall exercise the powers of the High Court Division for all purposes of the Code of Criminal Procedure, 1898. In addition to above provisions, on examination of Section 18 of the said Regulation, it appears that it has empowered the government to frame

Rules for carrying into effect the objects and purposes of the said Regulation including the power to make Rules for providing for the administration of civil justice in Chittagong Hill Tracts. Sub-rule (3) of Section 18 has provided that all Rules made by the government under the said Section shall have effect as if enacted by the said Regulation.

4.5. Therefore, it appears from the above provisions of the said Regulation that although the said provisions have provided specific forum and procedure for criminal justice system in Chittagong Hill Tracts, it has not made specific provision for civil justice system except the provisions under Section 7 to the extent that the Chittagong Hill Tracts shall constitute a district for the purpose of civil jurisdiction and that the general administration of civil matters shall be vested in the Deputy Commissioner. However, the admitted position is that the then government framed various "Rules under Section 18 of the said Regulation including the "Rules for the Administration of the Chittagong Hill Tracts", as published by notification No. 123 P-D dt. the 1st May, 1900 at page 429 Part 1 of the Calcutta Gazette Dt. the 2nd May, 1900 ("the said Rules").

4.6. Rule 1 of the said Rules provides that the administration of civil justice shall be conducted in the most simple and expeditious manner compatible with the equal disposal of the matters or suits. Rule 2 even provides that the officer dealing with the matter or suit will first endeavour to resolve such matter or suit through viva voce examination of the parties, and the witnesses should not be called except when the officer is unable without them to come to a decision upon facts of the case. The said Rules have, amongst others, given some benefits to the tribal people, or hill men, in respect of Court fees etc. Rule 10 has made specific provisions creating appeal forum. According to this provision, all orders passed in civil suits shall be appealable to the Divisional Commissioner, who may decide by whom the costs in any such appeal shall be paid. Rule 11 even debarred the presence of legal practitioners except in certain cases. Thus, it appears from the above provisions that in respect of civil matters, the provisions under the Code of Civil Procedure have a very minimum application only in respect of service of process and execution of decrees as provided by Rule 6 of the said Rules.

4.7. Therefore, it cannot be denied that the governments from the British era, time to time, recognized this simplest procedure for disposal of civil disputes in the CHT area and such disputes were adjudicated by the Deputy Commissioner, at the first instance, and the Divisional Commissioner, on appeal, again without application of the provisions of the Code of Civil Procedure. Such separate special provision for disposal of civil disputes has also been recognized by the Code of Civil Procedure itself under Section 4 of the same. This being so, it cannot be said that after separation of judiciary in 2007, the Chittagong Hill Tracts had parallel judicial authority run by executives, particularly when such special procedure and forum created by special law has always been recognized by the Code of Civil Procedure itself. Our Constitution has also recognized special law for the backward Section of people of this country. From that point of view as well, this separate judicial system cannot be termed as contrary to the provisions of the Constitution. We find recognition of such distinctive status of the Chittagong hill tract area and the hill men residing therein indifferent judicial pronouncements of our superior Court. As for example, see the decisions in **Bangladesh vs. Rangamati Food Products, 69 DLR (AD)-432, Wagachara Tea Estate vs. Md. Abu Taher, 69 DLR (AD)-381, Bikram Kishore Chakma vs. Land Appeal Board, 6BLC-436 (to some extent), Abu Taher vs. Land Appeal Board, 8 BLC-453 and Shefalika Khisa vs. Land Appeal Board, 25 BLC-428.**

4.8. It may also be noted that with the passage of time, the Government of Bangladesh has repeatedly recognized such distinctive administrative and judicial system in Chittagong Hill Tracts Area and that the laws of the main land may only be applicable if they are not inconsistent with the provisions of the Regulation No.1 of 19000. Such recognition of the Government has become more entrenched after the Peace Accord signed between CHT National Committee constituted by the Government of Bangladesh and Janosonghoti Samity. Terms of such agreement are reflected in various subsequent legislations enacted by our Parliament, namely CHT Regional Council Act, 1998 (Act No. XII of 1998), CHT Land Dispute Resolution Commission Act, 2001 (Act No. 53 of 2001), Small Ethnic Groups Cultural Organization Act, 2010 and so on.

4.9. Therefore, after so many such developments having taken place subsequent to the signing of aforesaid Peace Accord, thereby, repeatedly recognizing the customary law of the hill men in Chittagong Hill Tracts as well as the distinctive legislative status of Regulation No. 1 of 1900, the separate procedure in the CHT area with regard to the resolution of their civil disputes is nothing new or foreign in our jurisprudence. This being so, any subsequent legislative change by way of amendment through the Acts of Parliament has to be examined from that point in view.

Amending Act of 2003:

4.10. Let us now examine the amending Act of 2003 (Act No. 38 of 2003) (came into effect on 04th June, 2008). It appears from the said amending Act that by amending Section 2 of the said Regulation, the terms "District Judge" and "Joint District Judge" have been defined to the effect that the said Judges are appointed by the Government in consultation with the Supreme Court of Bangladesh. By amending Section 7 of the said Regulation, the Legislature created three separate districts in place of one district for the purpose of criminal jurisdiction. By amending Section 8 of the Regulation, the Legislature has created three separate Sessions Divisions for the Chittagong Hill Tract Area, namely Rangamati, Khagrachori and Bandarban Sessions Divisions, and also provided that the District Judges concerned shall be the Sessions Judges of the respective Sessions Division and that the Joint District Judges of the respective districts shall be the Assistant Sessions Judges in the respective Sessions Division. By the same amendment, three sub-sections, namely sub-sections (3), (4) and (5), have been added to Section 8 of the said Regulation. By such sub-sections, civil jurisdictions as well as appellate forum have been created in the following terms:

> *"(3) The Rangamati, Khagrachory and Bandarban districts of the Chittagong Hill-Tracts shall constitute three separate civil jurisdictions under three District Judges.*
> *(4) The Joint District Judge, as a court of original jurisdiction, shall try all civil cases in accordance with the existing laws, customs and usages of the districts concerned, except the cases arising out of the family laws and other customary laws of the tribes of the districts of Rangamati, Khagrachory and Bandarban respectively which shall be triable by the Mauza Headmen and Circle Chiefs.*
> *(5) An appeal against the order, judgment and decree of the joint District Judge shall lie to the District Judge."*

4.11. It appears from the above added sub-sections that by such provisions, three separate civil jurisdictions for three hill districts, namely Rangamati, Khagrachori and Bandarban, have been created. The Joint District Judge of each district shall be the Court of original jurisdiction. However, such Joint District Judges shall try all civil cases in accordance with

the existing laws, customs and usages of the district concerned and that the said Joint District Judges shall not dispose of cases arising out of family laws and other customary laws of the tribes of the said districts and that such mattes shall be triable by the Mouza Headmen and Circle Chiefs concerned. By adding sub-section (5), appellate jurisdiction has been created and the District Judges of the respective districts have been given the appellate power as against orders, judgment and decrees of the respective Joint District Judges. Therefore, it is evident from this very added provisions under sub-sections (3), (4) and (5) that although three separate civil jurisdictions have been created and Joint District Judges of the said districts have been given the jurisdiction to try civil cases, such civil cases shall have to be tried or disposed of in accordance with the existing laws, customs and usages of the district concerned and not in accordance with the Code of Civil Procedure. On the other hand, the said Joint District Judges, exercising original jurisdiction, shall not have jurisdiction in trying or disposing of cases arising out of family laws or other customary laws of the tribes of the district concerned and such matters shall be triable by the respective Mouza Headmen and Circle Chiefs. Finally, the District Judges have been given appellate jurisdiction only against the orders, judgments and decrees of the Joint District Judges of the respective districts and not against any order of the Deputy Commissioner of the district concerned or any other officer. It has long been settled by long line of decisions of this Court that the jurisdiction as well as the appellate jurisdiction of a Court is the creature of Legislation and such jurisdiction can be exercised by such appellate forum only to the extent of such power given by the Legislature by the said legislation conferring such jurisdictions. This being so, in the instant matter, it appears that the District Judges of the respective districts shall only have jurisdiction to entertain appeals from the orders, judgments and decrees of the respective Joint District Judges of the said districts.

4.12. Besides, unlike the civil courts in rest of the country, the civil courts in CHT area have not been established under the Civil Courts Act, 1887 (Act No. XII of 1887). Rather, they have been established under the amended provision of the said Regulation. Therefore, they are the special types of civil courts established under the said special law.

4.13. Given the above position, let us now examine the 'special provision' as provided by Section 6 of the said amending Act of 2003. The said 'special provision' under Section 6 is quoted below:

> ৬। **বিশেষ বিধান** ।- এই আইন কার্যকর হইবার অব্যবহিত পূর্বে-
> (ক) রাঙ্গামাটি, খাগড়াছড়ি ও বান্দরবান জেলায় Deputy Commissioner এর নিকট নিস্পন্নাধীন (pending) <u>সকল দেওয়ানী মামলা এবং দেওয়ানী প্রকৃতির অন্যান্য আইনগত কার্যধারা</u> তাৎক্ষণিকভাবে সংশ্লিষ্ট জেলার যুগ্ন-জেলাজজের (Joint District Judge) নিকট স্থানান্তরিত হইয়াছে বলিয়া গণ্য হইবে;
> (খ) চট্রগ্রাম বিভাগের Divisional Commissioner এবং Additional Divisional Commissioner এর নিকট নিষ্পন্নাধীন (pending) <u>সকল ফৌজদারী মামলা, আপীল এবং ফৌজদারী প্রকৃতির অন্যান্য আইনগত কার্যধারা</u> তাৎক্ষণিকভাবে সংশ্লিষ্ট জেলার দায়রা আদালতে (Sessions Court) স্থানান্তরিত হইয়াছে বলিয়া গণ্য হইবে। (Underlines supplied)

4.14. It appears from the above 'special provision', particularly from Clause-'Ka' of the same that with the amending Act coming into force, all the civil cases or the proceedings of civil nature pending before the Deputy Commissioner of the said three districts shall be deemed to have been transferred to the Joint District Judges of the respective districts. According to Clause-'Kha' of the said 'special provision', all pending criminal cases, appeals and proceedings of criminal nature, pending before the Divisional Commissioner and the Additional Divisional Commissioner of Chattogram, shall be deemed to have been transferred to the Sessions Court concerned of the respective districts. However, this 'special

provision' under Section 6 is completely silent about pending civil appeals or proceedings of civil nature, as was pending before the Divisional Commissioner or Additional Divisional Commissioner of Chattogram, before the said amending Act came into force.

4.15. In this regard, a submission has been put-forward by Mr. A.F. Hassan Ariff that there cannot be any parallel civil appellate jurisdiction run by the Divisional Commissioner, Chattogram after separation of judiciary. Similar submission has been made before the Additional District Judge, Bandarban. We have already observed hereinbefore that historically Chittagong Hill Tracts area was governed by distinctive law and administrative procedure. Particularly, in matters of civil disputes, the customary law of the land in Chittagong Hill Tracts area has always been made applicable. Such historic recognition of customary law and non-application of Code of Civil Procedure has again been recognized by the Legislature by inserting sub-section (4) in Section 8 of the said Regulation providing, thereby, that the Joint District Judge, as Court of original jurisdiction, shall try all civil cases in accordance with the existing laws, customs and usages of the district concerned. Not only that, the Legislature, by this amending Act, has also kept the cases arising out of family laws and other customary laws of the tribes out of the jurisdiction of the Joint District Judges and, in respect of those matters, the jurisdiction of the Mouza Headmen and Chief Circles concerned of the triable people have been recognized.

4.16. Therefore, we fully endorse the submission of Mr. A.M. Amin Uddin, learned Attorney General, and Mr. Probir Neogi, learned senior counsel, to the affect that this Court can only interpret a law and cannot fill up the gap, if any, in the law as because such act of the Court will amount to legislation by the Court. In this regard, the Rule of interpretation as described by late lamented Mr. Mahmudul Islam in his famous book "Interpretation of Statutes and Documents" Mullick Brothers, page-51 may be reproduced below:

> *"The legislature is presumed to have been aware of the existing law and there is a presumption that the legislature does not intend to make a change in the existing law beyond what is expressly provided or which follows by necessary implication from the language of the statute in question. A statute is prima facie to be construed as changing the law to no greater extent that its words or necessary intendment requires."*

4.17. It may be noted that the said author has described such Rule by referring to several authorities including Maxwell's-Interpretation of Statutes, 12th Edition, page-214. Again, while interpreting an amending law enacted by parliament, it cannot be presumed that the Legislature was unaware of the existing law or that the Legislature has committed any mistake by not mentioning a particular matter in the amending law. In this regard, Mr. Mahmudul Islam observed in his book at page-53 in the following terms:

> *"It is not competent for any court to proceed upon the assumption that the legislature has made a mistake; whatever the real fact may be, a court of law is bound to proceed on the assumption that the legislature is an ideal person that does not make mistakes."*

4.18. The cases cited by Mr. A.M. Amin uddin, learned Attorney General and Mr. Probir Neogi, learned senior counsel, have also elaborately established the said Rules of interpretation.

4.19. Be that as it may, it is clear from the said 'special provision' under Section 6 of the amending Act of 2003 that the Legislature in fact has not committed any mistake. It is apparent that the Legislature deliberately did not mention anything about the pending civil appeals and the proceedings of civil nature as was pending before the Divisional

Commissioner of Chattogram before the said amending Act came into force. There may be various reasons within the wisdom of the Legislature for not mentioning the same. One of such reasons, as suggested by learned advocates, may be that the civil disputes from which the said appeals arose were originally disposed of by an executive, namely the Deputy Commissioner of the respective district. Therefore, it was thought within the wisdom of the Legislature that those should be disposed of by the Divisional Commissioner of Chattogram, another executive in the same hierarchy, as before. On the other hand, since added sub-section (5) of Section 8 of the Regulation does not confer any appellate jurisdiction on the District Judge of the hill districts to hear appeals arising out of an order or judgment of the Deputy Commissioners, no question arises as to the transfer of the said pending civil appeals and proceedings. Therefore, if we read this added sub-section (5) of Section 8 along with the said special provision under Section 6 of the amending Act, we have no option but to hold that it is the Legislature, which does not want those pending civil appeals and proceedings of civil nature to be transferred to the District Judge of the respective districts and, because of that, the Legislature remained silent in respect of the said pending civil appeals and proceedings.

4.20. In view of above discussions of law and facts, our considered view is that the answers to both the aforesaid legal questions should be "IN THE NEGETIVE", meaning, thereby, that the civil appeals and the proceedings of civil nature, as was pending before the Divisional Commissioner and Additional Commissioner of Chattogram before coming into force of the amending Act of 2003, shall not be transferred to the District Judges of the respective hill districts and, if the same have in the mean time been transferred to the District Judges concerned, the same should be returned back immediately if the same have not been disposed of yet. However, if any such appeals or proceedings have already been disposed of by the District Judges and Additional District Judges of the respective districts, the same should not be disturbed on the ground that the said District Judges, or the Additional District Judges, did not have jurisdiction to hear and dispose of the same. Accordingly, the same should be treated as "past and closed matters". However, the said judgments of the District Judges and Additional District Judges may be called in question, in accordance with law, on other grounds.

4.21. Accordingly, the learned District Judges in all three hill districts, namely Rangamati, Khagrachori and Bandarban hill districts, are directed to return immediately all the civil appeals and/or other proceedings of civil nature, as received by them from the office of the Divisional Commissioner, Chattogram, back to the said Commissioner if they are not disposed of yet. The said Divisional Commissioner shall then take steps for disposal of the said appeals and proceedings, as before, within the shortest possible time.

4.22. However, the civil appeals and/or other proceedings of civil nature, which have already been disposed of by the Courts of District Judges and Additional District Judges in the said hill districts, shall be treated as "past and closed matters" and the same cannot be challenged, or called in question, on the ground that the said Courts did not have jurisdiction to hear and dispose of the same.

4.23. Registrar General of the Supreme Court of Bangladesh is directed to send copies of this judgment, containing above opinion and directions of this Court, to all the learned District Judges of the said three hill districts, namely Rangamati, Khagrachori and Bandarban, the Court of Additional District Judge of Bandarban Hill District and the Divisional Commissioner of Chattogram for compliance.

4.23 Let an advanced order be issued containing the above opinion and directions of this Court.

17 SCOB [2023] HCD 20

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICITON)

Writ Petitions No. 6846 of 2016

Md. Jahirul Hoque
..... Petitioner
Vs.
Judge, Artha Rin Adalat, Chattogram and others
..... Respondents

Ms. Afroza Nazneen Akter, Advocate
....For the petitioner
Mr. Tushar Kanti Roy, DAG
.....For the respondent No.1
Mr. Khondaker Iqbal Ahmed, Advocate
......For the respondent No.3.
Heard and Judgment on 09.06.2022.

Present:
Mr. Justice J. B. M. Hassan
And
Mr. Justice Razik Al Jalil
And
Mr. Justice Md. Zakir Hossain

Editors' Note:
The petitioner, a guarantor to the loan in question, filed this writ petition without surrendering before the court, when the learned Judge of the Artha Rin Adalat, in an execution case, awarded civil detention against him under section 34 (1) of the Artha Rin Adalat Ain, 2003. The petitioner claimed that the decree holder bank had not filed the application as per requirement of section 34 of the act and the adalat had issued the impugned order of detention without exhausting all process against the principal borrower for realizing decretal dues. On the other hand, the respondent no 3-decree holder bank claimed that being fugitive from justice the petitioner couldn't claim relief. Moreover, he has alternative remedy of appeal and so the writ is not maintainable. The High Court Division held that the writ petition is maintainable on the ground that a Judgement Debtor cannot be treated as a fugitive accused and the order of detention being an interlocutory order, appeal cannot be preferred against the same. On the claim of the petitioner the Court held that the execution case can proceed against all the judgment debtors simultaneously and privilege of a guarantor to become liable to repay after borrower's default remains valid only before instituting the suit. The Court has made the rule absolute on the ground that decree holder bank has not filed the application, with verification or affidavit, under section 34 of the Artha Rin Adalat Ain, 2003 in accordance with law.

Key Words:
Section 2, 4, 5, 6(1), 6(5), 34, 41 and 44 of the Artha Rin Adalat Ain, 2003; Section 35 of the Code of Criminal Procedure,1898; Liability of principal borrower and guarantor

Difference between "the Accused" and "the Judgment Debtor:
In this case, a fundamental difference exists between two classes of justice seekers i.e "the Accused" and "the Judgment Debtor". The term "Accused" has not been specifically defined in the Code of Criminal Procedure (Cr.PC). But the common

parlance of 'Accused' is, a person who is charged with the commission of 'Offence'. On the other hand, an 'Offence' is defined in the Code of Criminal Procedure as an act or omission made punishable by any law for the time being in force. On the other hand, under the Act, 2003 the term "Judgment Debtor" means a person against whom a decree has been passed ordering him to repay the decretal dues and it remains unsatisfied. In this particular case, the warrant of arrest was issued against a person who is, admittedly not an Accused person but a Judgment Debtor. The impugned order was passed against the Judgment Debtor (petitioner) awarding him civil detention under section 34 of the Act, 2003. (Para -21, 22)

Sections 2(kha), 4(1), 4(4), 5(2), 6(1) and 26 of the Artha Rin Adalat Act, 2003:
By no means, we can treat a Judgment Debtor as an Accused person or criminal suspect:
It is crystal clear that the legislature has incorporated this provision in the statute to compel a judgment debtor to repay decretal dues and so, the Adalat can pass any term of civil detention to a Judgment Debtor not more than 6(six) months. But certainly, the order of civil detention is not a sentence which is defined in the Black's Law Dictionary 8th Edition, page 1393 as "the judgment that a court formally pronounces after finding a criminal defendant guilty" Or "a punishment imposed on a criminal wrongdoer". From all the legal provisions of the Act, 2003 as referred to by the learned Deputy Attorney General (DAG) viz sections 2(kha), 4(1), 4(4), 5(2), 6(1) and 26 of the Act, 2003 it appears that the Artha Rin Adalat adjudicated the artha rin suit as a civil dispute by a civil Court following the provisions of the Code of Civil Procedure. Although, in sections 6(1) and 26 of the Act, 2003 it has been provided that the Code (CPC) shall be applied subject to not being inconsistent with the provisions of the Act, 2003, but the provisions of the Act, 2003 are also similar and supplementary to the provisions of the Code (CPC). Further, after adjudication of the suit, the petitioner has been determined as a Judgment Debtor which is substantially different from the term of an Accused person in a criminal case. Therefore, by no means, we can treat a Judgment Debtor as an Accused person or criminal suspect. There must have distinction between the Accused in a criminal case and the Judgment Debtor in a civil suit. (Para 23, 24)

Section 34(1) of the Artha Rin Adalat Act, 2003,
We find that the Artha Rin Adalat as a civil Court itself can pass order of civil detention under section 34(1) of the Act, 2003 against the Judgment Debtor and to execute/effect the civil detention, the Adalat is issuing warrant of arrest in order to make him available for serving out the awarded civil detention. Section 35 only provides that in issuing warrant of arrest, the Adalat shall be deemed to be a Magistrate of a 1st class. But nowhere in the provision, the applicability of the Code of Criminal Procedure is provided. However, in the last part of section 35 although the Code of Criminal Procedure, 1898 is mentioned but it is related to prescribed Form of warrant of arrest and other matters for the time being until prescribed Form is prepared by the Artha Rin Adalat. It does not mean that the applicability of the Code of Criminal Procedure has been provided in issuing warrant of arrest. (Para-26)

Ratio requiring to surrender as laid down by our apex Court, is applicable only for the accused or convict in criminal proceeding not for a judgment debtor:
We consider that the petitioner's civil liability was adjudicated by a civil Court under the Artha Rin Adalat Ain and the Code of Civil Procedure. Thereby he is determined as a Judgment Debtor and not an Accused or convict for criminal offence. According to

section 34 of the Act, 2003, the civil detention has been awarded only for the purpose of compelling the judgment debtor to repay the decretal dues. As such, he does not require to surrender inasmuch as referred ratio requiring to surrender as laid down by our apex Court, is applicable only for the accused or convict in criminal proceeding.

(Para-27)

We are led to hold that the petitioner, a Judgment Debtor can not be treated as a fugitive accused and so, he did not require to surrender to the concerned Court before challenging the impugned order awarding civil detention under section 34 of the Act, 2003. Therefore, the writ petition is quite maintainable. (Para-29)

Order under section 34 of the Act, 2003 is an interlocutory order in the execution proceeding and so, appeal cannot be preferred against such order in view of section 44(2) of the Act, 2003. (Para-30)

Execution case shall proceed simultaneously against all the judgment debtors:

A 3rd party guarantor involved with the loan shall also be impleaded in the suit as defendant alongwith the principal borrower and the mortgagor and that the decree, if any, shall be effective against all defendants jointly and severally and the execution case shall proceed simultaneously against all the judgment debtors. Therefore, section 34(1) applies to all the judgment debtors to compell them to repay the decretal dues. However, in disposing of the property of the judgment debtors, by the 1st proviso to section 6(5), the legislature put a condition to the effect that the property of the principal borrower shall attract first and thereafter, the property of 3rd party mortgagor and the 3rd party guarantor respectively. But in awarding civil detention under section 34(1) of the Act, 2003 to compel the judgment debtors to satisfy decree, there is no such provision and here the condition is, absence of property or failure to sell mortgaged property. In this case, according to the application filed by the Bank, there is no property belong to the judgment debtors, considering which the Adalat awarded civil detention against both the principal borrower and the guarantor as well.

(Para-32, 33)

Section 6(5) of the Artha Rin Adalat Act, 2003:

Guarantor's property shall be attracted after the property of principal borrower:

Privilege of a guarantor to become liable to repay after borrower's default, remains only before instituting the suit. In other words, on failure to repay by the principal borrower, the guarantor had to pay the liability on demand. But both being failed to repay, the matter has been brought before the Court seeking relief against both of them liable and under section 6(5) of the Act, the decree being passed, both of them are liable jointly and severally and execution case shall proceed simultaneously against both of them. However, due to 1st proviso to section 6(5) of the Act, only guarantor's property shall be attracted after the property of principal borrower. (Para-34)

Chapter-1, Rule 19 of the Civil Rules and Orders (CRO) read with Order VI, Rule 15 of the Code of Civil Procedure and Section 34 (1) of the Artha Rin Adalat Act, 2003:

Filing the application under section 34 (1) of the Act, 2003 civil detention of judgment debtor is sought for by the decree holder applicant. As such, the Adalat has to dispose of it awarding civil detention or rejecting the prayer. Hence, the applicant needs to substantiate the facts in the application for determination by the Adalat. Thus, considering facts of the application, judicial determination has to make by the Adalat

awarding civil imprisonment or not. Therefore, the Bank requires to file the application in accordance with Chapter-1, Rule 19 of the Civil Rules and Orders (CRO) read with Order VI Rule 15 of the Code of Civil Procedure. But from the application (Annexure-C and C1) filed by the decree holder Bank, we do not find this compliance. In the circumstances, we are of the view that without verification or affidavit, putting signature at the top of the application alone is not enough to consider an application under section 34(1) of the Act, 2003. (Para 38)

JUDGMENT

J.B.M. Hassan, J:

1. By filing an application under article 102 (2) of the Constitution, the petitioner obtained this Rule Nisi calling upon the respondents to show cause as to why the impugned order bearing No. 56 dated 04.11.2015 passed by the learned Judge (Joint District Judge), Artha Rin Adalat, Chattogram in Artha Rin Execution Case No. 23 of 2010 awarding civil detention to the petitioner under section 34(1) of the Artha Rin Adalat Ain, 2003 for a period of 04(four) months (as contained in Annexure-E) should not be declared to have been passed without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. **Petitioner's Case:**
Respondent No.3-Sonali Bank Limited instituted Artha Rin Suit No. 107 of 2004 before the Artha Rin Adalat, Chattogram against the petitioner and others for realization of loan amounting to Tk. 1,17,67,296.00 along with up to date interest till realization of decretal dues.

3. Eventually, the suit was decreed against the defendant petitioner on contest and ex-parte against other defendants by the judgment and decree dated 09.06.2009 (decree signed on 15.06.2009) for Tk. 1,17,67,296.00 with interest and cost.

4. Decretal dues having not been paid by the judgment debtors, the decree holder bank filed Artha Execution Case No. 23 of 2010 against the petitioner and others (judgment debtors). In the process of execution, the decree holder bank filed an application on 23.05.2010 under section 34 of the Artha Rin Adalat Ain, 2003 **(the Act, 2003)** stating that there being no property owned by the judgment debtors, they may be detained by civil imprisonment under section 34 of the Act, 2003 in order to compell them to repay the decretal dues. After hearing, the Adalat by the impugned order dated 04.11.2015 awarded civil imprisonment to the petitioner along with another judgment debtor, namely, Mahabubul Alam for a period of four months and accordingly, issued warrant of arrest. In this backdrop, challenging the said order of civil imprisonment, the petitioner filed this writ petition and obtained the present Rule Nisi.

5. **Case of Respondent-Bank:**
The decree holder bank appearing in the Rule as respondent No.3 has filed an affidavit in opposition contending, *inter alia,* are that after conclusion of trial, the Adalat decreed the suit in favour of the plaintiff-respondent No. 3, bank on 15.06.2009. But due to non payment of decretal dues, the bank filled Execution Case No. 23 of 2010 against the judgment-debtors. In the execution case, the Bank filed an application under section 34 of the Act, 2003 for

awarding civil detention to the judgment-debtor-petitioner and considering all aspects of the case, the Adalat allowed the application by the order No. 56 dated 04.11.2015.

6. Admittedly, the petitioner was a guarantor to the loan and there is no mortgaged property in the plaint of the suit. As such, in accordance with section 6(5) of the Act, 2003, decree will be executed against the principal borrower as well as the guarantor, jointly and severally. The petitioner is trying to delay disposal of the execution case and the respondent No. 1 rightly and legally passed the impugned order dated 04.11.2015 for upholding the rule of law and justice. Further, pursuant to order of civil detention and issuance of warrant of arrest, the petitioner did not surrender before the concerned Court. Thus, he became fugitive from justice. Therefore, without surrendering before the Adalat as per warrant, the petitioner filed this writ petition and so, it is not maintainable.

7. Submissions of Petitioner:

In support of the Rule Nisi, Ms. Afroza Nazneen Akter, learned Advocate for the petitioner submits as follows:

(i) Application under section 34 of the Act, 2003 (Annexures-C and C1 to the writ petition) does not reflect any verification or affidavit to be affirmed by the decree holder bank as per requirement of section 34 of the Act, 2003. As such, there being no application in accordance with law, the impugned order can not sustain in the eye of law. In support of her submission, learned Advocate refers to the case of Golam Haider Kabir Vs Government of the People's Republic of Bangladesh and others reported in 15 BLC (HCD) 831 and the case of AKM Tofazzal Hossain and others Vs Rupali Bank Ltd and others reported in 64 DLR (HCD) 435.

(ii) The petitioner is a guarantor to the loan in question and that without exhausting all process against the principal borrower for realizing decretal dues, the Adalat issued the impugned civil detention against the petitioner which is not tenable in accordance with section 6(5) of the Act, 2003. To substantiate the submission, learned Advocate refers to the case of ABM Liton Vs Bangladesh and others reported in 66 DLR (HCD) 207.

8. **Contentions of Decreeholder-bank (Respondent No. 3):**

Firstly, At the very out set, Mr. Khondaker Iqbal Ahmed, learned Advocate appearing for the respondent No.3-bank raises the question of maintainability of the writ petition in that the warrant of arrest having been issued against the petitioner he ought to have surrendered to the concerned Court before seeking any relief from the Court of law. But having not been done so, he became fugitive from justice. As such, the petitioner is not entitled to get any relief under this writ petition and so the writ petition is not maintainable. In support of his submission, learned Advocate refers to the case of Anti-Corruption Commission Vs Dr. HBM Iqbal Alamgir and others reported in 15 BLC (AD) 44, the case of State Vs Dr. Fazlur Rahman reported in 20 BLC (AD) 243, the case of Anti Corruption Commission Vs ATM Nazimullah Chowdhury and others reported in 62 DLR (AD) 225, the case of Bashir Ullah Master Vs. Bangladesh and others reported in 61 DLR (HCD) 760, the case of Nitai Kumar Mondol Vs. Judge, Artha Rin Adalat and another reported in 62 DLR (HCD) 446 and an unreported judgment and order dated 25.02.2013 passed in writ petition No. 6312 of 2012.

Secondly, the petitioner had alternative remedy by preferring appeal under section 41 of the Act, 2003 against the impugned order. But without availing the same, he filed this misconceived writ petition which is not maintainable. Learned Advocate refers to the case of Bangladesh Agricultural Development Corporation (BADC) Vs Artha Rin Adalat and others reported in 59 DLR (AD) 6.

Thirdly, the authorized representative of the decree holder bank put the signature at the top of the application and so it can be treated as an application filed by the decree holder bank within the meaning of section 34 of the Act, 2003.

Fourthly, section 6(5) of the Act, 2003 attracts in respect of disposal of the property of the judgment debtors. Here, there being no property belong to the judgment debtors, the Adalat rightly awarded civil imprisonment against all the judgment debtors including the petitioner and the principal borrower as well.

9. **Submissions of the respondent No. 1:**

Mr. Tushar Knati Roy, the learned Deputy Attorney General (DAG) appearing for the respondent No.1 has drawn our attention to the relevant provisions under the Act, 2003, in particular, sections 2(Kha), 4(1), 4(4), 5(2), 6(1) and 26 of the Act, 2003. Referring to those provisions, finally, he submits that the Artha Rin Adalat, in fact, is a civil Court functioning in accordance with the provisions of the Code of Civil Procedure (the Code). Therefore, the Adalat following the Code and the Act, 2003 passed the order of civil imprisonment in order to compell the judgment debtor to repay the decretal dues.

10. **Petitioner's reply:**

Question of maintainability of the writ petition being raised, learned Advocate replies that the cited cases on this issue as referred to by the respondent No.3 (bank), in particular, the cases of the Appellate Division, are all related to the accused persons under the criminal proceedings, where the apex Court required surrender of those accused persons in the criminal proceeding. But here the petitioner has been awarded civil detention in a civil dispute under the civil Court. He is not an accused and that the Adalat issued the warrant to make him available as judgment debtor in order to compell him to repay the decretal dues. Therefore, the cited cases of the Appellate Division are not applicable in this particular case. Against cited decisions of the High Court Division, learned Advocate submits that there are two reported cases where the High Court Division laid down ratio that the judgment debtors need not surrender before the Court concerned in filing writ petition challenging order of civil detention. In this regard, she has drawn our attention to the case of Ziaur Rahman (Md) Vs Artha Rin Adalalt and others reported in 64 DLR (HCD) 189 and the case of Mirza Ahsan Habib Vs the Judge Artha Rin Adalat and another reported in 65 DLR (HCD) 579. Further, the petitioner had alternative remedy of preferring appeal against the impugned order and so, the writ petition is not maintainable.

11**. Court's deliberations:**

We have gone through the writ petition, supplementary affidavit thereto, affidavit in opposition filed by the respondent No. 3 **(the Bank)** and other materials on record as well as the cited cases as referred to by both the parties.

12. Maintainability of the writ petition having been questioned in this Rule, let us first decide the said issue, which is, precisely, whether the petitioner can maintain this writ petition challenging the order of civil detention under section 34 of the Act, 2003 without surrendering before the concerned Court pursuant to warrant of arrest following the order of civil detention awarded in an execution proceeding arose out of a money decree of the Artha Rin Adalat.

13. In this regard, first of all we have gone through the cited cases as referred to by the learned Advocate for the respondent Bank. In the case reported in 62 DLR (HCD) 446, the High Court Division observed as follows:

> "9. On close appraisal of the materials on record it further transpires to us that after awarding sentence dated 09.08.2006, the judgment debtor petitioner did not appear in the Court below. He remained fugitive since 09.08.2006 and being fugitive he obtained the present Rule. It is well settled that a fugitive has no right to seek any kind of redress as against his grievance of awarding sentence. In this regard, reliance is being placed in the cases of Mansur Ali Vs State 55 DLR (AD) 131, Khalilur Rahman Vs State 33 DLR 12 and Abdul Baset Chowdhury Vs State 13 BLC 713.
> 10. In view of the discussions made above and the preponderant judicial views emerging out of the authorities referred to above, we are of the view that since 09.08.2006, the petitioner being fugitive from justice is not entitled to get any relief from the High Court Division in this writ petition. Consequently, the Rule is liable to be discharged as not being maintainable."

14. Both the cited judgments reported in 61 DLR (HCD) 760 and 62 DLR (HCD) 446 have been passed by the same Bench of the High Court Division relying upon the cases of Mansur Ali Vs State reported in 55 DLR (AD) 131, the case of Khalilur Rahman Vs State reported in 33 DLR 12 and the case of Abdul Baset Chowdhury Vs State reported in 13 BLC 713. The unreported cited judgment passed in writ petition No. 6312 of 2012, was passed by another Division Bench relying upon the case of Anti Corruption Commission Vs ATM Nazimullah Chowdhury and others reported in 62 DLR (AD) 225. In these three judgments, the High Court Division held that without surrendering before the concerned Court, the writ petition challenging order of civil detention under section 34 of the Act, 2003 and warrant of arrest thereto, is not maintainable. To come to the decision in those cited cases, the High Court Division relied upon two cases of the High Court Division and two cases of the Appellate Division, in particular, the case of Mansur Ali Vs State reported in 55 DLR (AD) 131 and the case of Anti-Corruption Commission Vs. ATM Nazimullah Chowdhury and others reported in 62 DLR (AD) 225. Besides, the learned Advocate for the Bank has also referred to the case of Anti-Corruption Commission Vs. Dr. HBM Iqbal Alamgir and others reported in 15 BLC (AD) 44, the case of State Vs. Dr. Fazlur Rahman reported in 20 BLC (AD) 243 wherein the apex Court held that a fugitive from justice has no right to seek legal redress before any Court of law.

15. Now let us examine the aforementioned cases as referred to by the learned Advocate for the Bank. Both the cited cases of the High Court Division (i.e 33 DLR (HCD) 12 and 13 BLC (HCD)713), are related to the accused person in the criminal proceeding. In the case reported in 55 DLR (AD) 131. The apex Court held as under:

> "2. The convicts' appeal having been dismissed they preferred aforementioned Criminal Revision before the High Court Division and obtained the Rule. The High Court Division at the time of issuance of Rule enlarged the convicts, who were sentenced to imprisonment, on bail for 6 months but the convicts later on did not take any step for extension of the period of bail.
> 3. In the background thereof the High Court Division upon the view that convicts being fugitive from justice they are not entitled to get relief from the High Court Division in any manner and consequent thereupon discharged the Rule without entering into the merit of the Rule. The High Court Division by the same order directed the convicts to surrender before the trial Court to serve out the unserved portion of the imprisonment.
> 4. Mr. Md. Nawab Ali, learned Advocate on Record for the petitioners, submits that the learned Judge of the High Court Division instead of

> discharging the rule on technical ground ought to have disposed of the Rule on merit since the legality of the judgment of the Court of Additional Sessions Judge affirming the judgment and order of conviction of the petitioners were challenged.
> 5. The submission of the learned Advocate on Record of the petitioner merits no consideration since the law is settled now that a fugitive has no right to seek any kind of redress as against his grievance, if any, against the judgment and order of a Court convicting him to imprisonment."
>
> (Underlines supplied)

16. In the case reported in 62 DLR (AD) 225 the Appellate Division held as under:

> "8. Mr. Rafique-ul-Huq, on the other hand, contends that since the Government has recommended for withdrawal of the case from the prosecution against the writ petitioner, no fruitful purpose will be served if the order of the High Court Division is interfered with.
> 9. In the writ petition the petitioner stated that he is "presently being in abroad is not in a position to swear the Affidavit of the instant writ petition. The petitioner through a Power of Attorney dated 11.09.2008 authorized his son namely Samir Chowdhury to file this Writ Petition before this Hon'ble Court and for taking all necessary step in connection herewith". The petitioner is a fugitive from justice when he moved the petition and obtained the Rule Nisi. This Court repeatedly argued that a fugitive from justice is not entitled to obtain a judicial order defying the process of the Court. When a person wants to seek remedy from Court of law, he is required to submit to the due process of the Court and unless he surrenders to the jurisdiction of the Court, the Court will not pass any order in his aid. In view of the above, the learned Judges of the High Court Division illegally entertained the writ petition and stayed further proceedings of the case. The order of stay passed by the learned chamber Judge will continue till the disposal of the rule. The writ petitioner is directed to surrender before the Special Judge, Court No. 9, Dhaka within 6 (six) weeks from date failing which, the learned Special Judge shall take proper steps for the apprehension of the writ petitioner."

17. We have also gone through the decisions of the Appellate Division (cited on behalf of the Bank) wherein our apex Court defined the fugitive and legal right of a fugitive as to whether a fugitive can seek legal remedy from the Court of law without surrendering under the required process. All the cases of the apex Court are related to criminal proceeding, in particular, in the case reported in 20 BLC (AD) 243 his Lordship, Mr. Justice Imman Ali defined the word fugitive in the following manner:

> "It is by now a well-established principle of law that an accused person who avoids the process of any court is a fugitive from justice and cannot seek justice without surrendering before a court of law"
>
> (Underlined)

18. On a plain reading of the above, it is clear that the principle of law was applied in respect of an accused person and at the very next paragraph, his Lordship held as under.

> "In this regard we may refer to the decision in Anti-Corruption Commission Vs Mahmud Hossain, 61 DLR (AD) 17, where Mohammad Fazlul Karim, J (as his lordship then was) observed as follows:

> "Cardinal principle of the criminal jurisprudence is that the person concerned should submit to the process of justice before he can claim the right of audience provided in law as well as the judicial convention, which is very much effective in the Court of law. Enunciating the age old maxim that a man who seeks justice from the Court of law must come before the Court to agitate his grievance and must surrender first to the process of justice, otherwise he remains to be fugitive from justice and could not seek aid or assistant of the process of justice in order to claim right of audience against the process of the court issued against him"
>
> "In the instant case, the petitioner having not surrendered to the process of the Court could not file any application or put his grievance before a Court of law far less before the Appellate Division of the Supreme Court of Bangladesh. In the absence of any surrender before the process of law, the Court of law is incompetent to issue any order or stay any process at its behest and if done so that would be illegal and without jurisdiction."

19. To make the above ratio more clear, we have also gone through the details judgment of the above cited case reported in 61 DLR (AD) 17 wherein regarding the term fugitive, the apex Court observed as follows:

> 23. The word "fugitive" is not defined any-where in our law. The expression "fugitive offender" is however defined in section 2(1)(d) in the Extradition Act, 1974 and means the person who, being accused or convicted of an extradition offence is, or is suspected to be, in any part of Bangladesh. The expression "fugitive from justice" is defined in Black's Law Dictionary, 7th Edition, page 680 as "A criminal suspect who flees, evades or escapes arrest, prosecution, or imprisonment, especially by fleeing the jurisdiction or by hiding".
>
> (Underlines supplied)

20. On perusal of the aforesaid decisions as referred to by the learned Advocate for the respondent Bank, it is clear that those are all related to Accused persons in criminal proceedings, in other words "criminal suspect". Relying upon these decisions, the Division Bench of the High Court Division in the cited cases of respondent-Bank decided that without surrender, the judgment debtor can not maintain writ petition against an order of civil detention passed under section 34 of the Act, 2003.

21. It is no more a res-integra, rather well settled in our jurisprudence that an accused in a criminal proceeding, without surrendering before the concerned Court, can not seek any sort of legal remedy and we are not differing with this established ratio decidendi of our jurisprudence. But, in this case, a fundamental difference exists between two classes of justice seekers i.e "the Accused" and "the Judgment Debtor". The term "Accused" has not been specifically defined in the Code of Criminal Procedure (Cr.PC). But the common parlance of 'Accused' is, a person who is charged with the commission of 'Offence'. On the other hand, an 'Offence' is defined in the Code of Criminal Procedure as an act or omission made punishable by any law for the time being in force. On the other hand, under the Act, 2003 the term "Judgment Debtor" means a person against whom a decree has been passed ordering him to repay the decretal dues and it remains unsatisfied.

22. In this particular case, the warrant of arrest was issued against a person who is, admittedly not an Accused person but a Judgment Debtor. The impugned order was passed

against the Judgment Debtor (petitioner) awarding him civil detention under section 34 of the Act, 2003. Now, let us read the section 34(1) of the Act, 2003 which runs as follows:

> "৩৪। (১) উপ-ধারা (১২) এর বিধান সাপেক্ষে, অর্থ ঋণ আদালত, ডিক্রীদার কর্তৃক দাখিলকৃত দরখাস্তের পরিপ্রেক্ষিতে, ডিক্রীর টাকা পরিশোধে বাধ্য করিবার প্রয়াস হিসাবে, দায়িককে ৬ (ছয়) মাস পর্যন্ত দেওয়ানী কারাগারে আটক রাখিতে পারিবে।"

23. From the above provision, it is crystal clear that the legislature has incorporated this provision in the statute to compel a judgment debtor to repay decretal dues and so, the Adalat can pass any term of civil detention to a Judgment Debtor not more than 6(six) months. But certainly, the order of civil detention is not a sentence which is defined in the Black's Law Dictionary 8th Edition, page 1393 as "the judgment that a court formally pronounces after finding a criminal defendant guilty" Or " a punishment imposed on a criminal wrongdoer".

24. From all the legal provisions of the Act, 2003 as referred to by the learned Deputy Attorney General (DAG) viz sections 2(kha), 4(1), 4(4), 5(2), 6(1) and 26 of the Act, 2003 it appears that the Artha Rin Adalat adjudicated the artha rin suit as a civil dispute by a civil Court following the provisions of the Code of Civil Procedure. Although, in sections 6(1) and 26 of the Act, 2003 it has been provided that the Code (CPC) shall be applied subject to not being inconsistent with the provisions of the Act, 2003, but the provisions of the Act, 2003 are also similar and supplementary to the provisions of the Code (CPC). Further, after adjudication of the suit, the petitioner has been determined as a Judgment Debtor which is substantially different from the term of an Accused person in a criminal case. Therefore, by no means, we can treat a Judgment Debtor as an Accused person or criminal suspect. There must have distinction between the Accused in a criminal case and the Judgment Debtor in a civil suit.

25. Argument raised by the learned Advocate for the respondent bank that according to section 35 of the Act, 2003, the Code of Criminal Procedure is applicable in the execution process for civil detention and issuance of warrant of arrest. As such, due to issuance of warrant of arrest, the petitioner has to be treated as an accused under the Code of Criminal Procedure and thereby he became a fugitive in the eye of law. To appreciate his submission, we have gone through the provision of section 35 of the Act, 2003 which runs as follows:

> "৩৫। এই আইনের অধীনে জারীর কার্যক্রম পরিচালনাকালে আদালত গ্রেফতারী পরোয়ানা জারী ও দেওয়ানী কারাগারে আটকের উদ্দেশ্যে প্রথম শ্রেণীর ম্যাজিস্ট্রেট মর্মে গণ্য হইবে এবং এই আইনের অধীনে উপযুক্ত ফরমসমূহ তৈরী না হওয়া পর্যন্ত, উক্ত আদালত উক্ত বিষয়ে The Code of Criminal Procedure, 1898 এবং প্রাসংগিক ফরমসমূহ, প্রয়োজনীয় সংশোধন সাপেক্ষে (Mutatis Mutandis), ব্যবহার করবে।"

26. On a plain reading of the aforesaid provision as well as section 34(1) of the Act, 2003, we find that the Artha Rin Adalat as a civil Court itself can pass order of civil detention under section 34(1) of the Act, 2003 against the Judgment Debtor and to execute/effect the civil detention, the Adalat is issuing warrant of arrest in order to make him available for serving out the awarded civil detention. Section 35 only provides that in issuing warrant of arrest, the Adalat shall be deemed to be a Magistrate of a 1st class. But nowhere in the provision,the applicability of the Code of Criminal Procedure is provided. However, in the last part of section 35 although the Code of Criminal Procedure, 1898 is mentioned but it is related to prescribed Form of warrant of arrest and other matters for the time being until prescribed Form is prepared by the Artha Rin Adalat. It does not mean that the applicability of the Code of Criminal Procedure has been provided in issuing warrant of arrest. Therefore, we are unable to accept the submission of Mr. Khandaker, learned Advocate for the Bank.

27. Regard being had to the above, we consider that the petitioner's civil liability was adjudicated by a civil Court under the Artha Rin Adalat Ain and the Code of Civil Procedure. Thereby he is determined as a Judgment Debtor and not an Accused or convict for criminal offence. According to section 34 of the Act, 2003, the civil detention has been awarded only for the purpose of compelling the judgment debtor to repay the decretal dues. As such, he does not require to surrender inasmuch as referred ratio requiring to surrender as laid down by our apex Court, is applicable only for the accused or convict in criminal proceeding. This view of ours finds support in the case of Ziaur Rahman (Md) Vs Artha Rin Adalat and others reported in 64 DLR (HCD) 189 wherein another Division Bench of the High Court Division held as under:

> "12. But we are unable to accept this contention of the learned Advocate in the present case. In this case the petitioner is not an accused of any criminal case. The civil imprisonment which can be imposed on him under section 34(1) of the Artha Rin Adalat Ain, 2003 is only for the purpose of making him compelled to pay the decreetal amount and not for punishing him for committing any criminal offence.
>
> Section 34(1) of the Artha Rin Adalat Ain, 2003 has stated thus:
>
> উপধারা (১২) এর বিধান সাপেক্ষে, অর্থঋন আদালত, ডিক্রীদার কর্তৃক দাখিলকৃত দরখাস্তের পরিপ্রেক্ষিতে, ডিক্রীর টাকা পরিশোধে বাধ্য করিবার প্রয়াস হিসাবে, দায়িককে ৬ (ছয়) মাস পর্যন্ত দেওয়ানী কারাগারে আটক রাখিতে পারিবে।
>
> This very section 34(1) itself clearly tells that the civil imprisonment which is imposed on the judgment-debtors under this section is not any punishment for committing any offence, rather it is only for the purpose of making them compelled to pay the decreetal money.
>
> 13. In this case, as we have already mentioned above, no such civil imprisonment was at all imposed on this petitioner by any order of the Adalat concerned. However, even if any such civil imprisonment under section 34(1) of the Artha Rin Adalat Ain, 2003 was imposed on this petitioner then also his right to challenge that order before this Court could not be denied on the plea that he did not surrender before the Court which passed that order. There must be a distinction between the accused of a criminal case and the judgment-debtor of any civil proceeding. In our opinion the right of a judgment-debtor to challenge the legality of the order of this civil imprisonment passed under section 34(1) of the Artha Rin Adalat Ain, 2003 cannot be denied on the ground that he did not surrender before the Adalat which passed that order."
>
> (Underlines supplied)

28. In the case of Mirza Ahsan Habib Vs The Judge, Artha Rin Adalat and another reported in 65 DLR (HCD) 579 their Lordships of a Division Bench held as under:

> "9. Moreover the term 'fugitive' disqualifying a person to get any relief from the Court is applicable for criminal proceedings. But the Artha Rin Suit is a clear and simple suit of civil nature and in execution of the decree passed therein the present execution case is also a proceeding of civil nature. Therefore, a judgment-debtor against whom an warrant of arrest is pending in a case of civil nature, cannot be termed as a fugitive and the door of justice is not closed for him. The submission of the learned Advocate for the respondent on this point bears no substance and we find substance in the Rule."
>
> (Underlines supplied)

29. In view of above discussions and the referred ratio, we are led to hold that the petitioner, a Judgment Debtor can not be treated as a fugitive accused and so, he did not require to surrender to the concerned Court before challenging the impugned order awarding civil detention under section 34 of the Act, 2003. Therefore, the writ petition is quite maintainable.

30. The learned Advocate for the respondent Bank next submits that the petitioner had alternative remedy of appeal against the impugned order and so writ petition is not maintainable. In this regard we are of the view that the impugned order under section 34 of the Act, 2003 is an interlocutory order in the execution proceeding and so, appeal can not be preferred against such order in view of section 44(2) of the Act, 2003. The cited case reported in 59 DLR (AD) 6 is relating to judgment and decree of the artha rin suit and hence, it is not applicable in this case.

31. Now on merit of the Rule Nisi, learned Advocate for the petitioner submits that the petitioner is a guarantor and so, in accordance with section 6(5) of the Act, 2003 the civil imprisonment can not be awarded against him without exhausting all process against the principal borrower. To appreciate her submission, we have gone through the section 6(5) of the Act, 2003 which runs as follows:

> "৫। আর্থিক প্রতিষ্ঠান মূল ঋণগ্রহীতার (Principal debtor) বিরুদ্ধে মামলা দায়ের করার সময়, তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) বা তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) ঋণের সহিত সংশ্লিষ্ট থাকিলে, উহাদিগকে বিবাদী পক্ষ করিবে; এবং আদালত কর্তৃক প্রদত্ত রায়, আদেশ বা ডিক্রী সকল বিবাদীর বিরুদ্ধে যৌথভাবে ও পৃথক পৃথক ভাবে (Jointly and severally) কার্যকর হইবে এবং ডিক্রী জারীর মামলা সকল বিবাদী-দায়িকের বিরুদ্ধে একই সাথে পরিচালিত হইবে:
>
> তবে শর্ত থাকে যে, ডিক্রী জারীর মাধ্যমে দাবী আদায় হওয়ার ক্ষেত্রে আদালত প্রথমে মূল ঋণগ্রহীতা-বিবাদীর এবং অতঃপর যথাক্রমে তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) ও তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) এর সম্পত্তি যতদুর সম্ভব আকৃষ্ট করিবে:
>
> আরো শর্ত থাকে যে, বাদীর অনুকূলে প্রদত্ত ডিক্রীর দাবী তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) অথবা তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) পরিশোধ করিয়া থাকিলে উক্ত ডিক্রী যথাক্রমে তাহাদের অনুকূলে স্থানান্তরিত হইবে এবং তাহারা মূল ঋণগ্রহীতার (Principal debtor) বিরুদ্ধে উহা প্রয়োগ বা জারী করিতে পারিবেন।"
>
> (Underlined)

32. On a plain reading of the aforesaid provision, it is clear that a 3rd party guarantor involved with the loan shall also be impleaded in the suit as defendant alongwith the principal borrower and the mortgagor and that the decree, if any, shall be effective against all defendants jointly and severally and the execution case shall proceed simultaneously against all the judgment debtors. Therefore, section 34(1) applies to all the judgment debtors to compell them to repay the decretal dues.

33. However, in disposing of the property of the judgment debtors, by the 1st proviso to section 6(5), the legislature put a condition to the effect that the property of the principal borrower shall attract first and thereafter, the property of 3rd party mortgagor and the 3rd party guarantor respectively. But in awarding civil detention under section 34(1) of the Act, 2003 to compel the judgment debtors to satisfy decree, there is no such provision and here the condition is, absence of property or failure to sell mortgaged property. In this case, according to the application filed by the Bank, there is no property belong to the judgment debtors, considering which the Adalat awarded civil detention against both the principal borrower and the guarantor as well.

34. Therefore, let us see the status of a guarantor in the loan of the Bank or any financial institution. Admittedly, the petitioner is a guarantor being an executant in the Guarantee Form, a Contract. According to section 126 of the Contract Act, 1872, liability of a guarantor under a Contract is, to perform the promise, or discharge the liability, of a third person in case of his default. Here the petitioner executed Guarantee Form and thereby promised to discharge the liability of principal borrower in case of his default. Indisputably, the principal borrower defaulted in repaying the liability and on his default, the guarantor-petitioner also did not perform his obligation making repayment as per contract providing guarantee to the liability. In the circumstances, the Bank had to institute the suit wherein both the principal borrower and the guarantor were impleaded as defendents. Eventually, the suit was decreed and thereby both the principal borrower and the guarantor became judgment debtors making liable to repay the liability jointly and severally and the decree is executable simultaneously in accordance with section 6(5) of the Act, 2003. Therefore, privilege of a guarantor to become liable to repay after borrower's default, remains only before instituting the suit. In other words, on failure to repay by the principal borrower, the guarantor had to pay the liability on demand. But both being failed to repay, the matter has been brought before the Court seeking relief against both of them liable and under section 6(5) of the Act, the decree being passed, both of them are liable jointly and severally and execution case shall proceed simultaneously against both of them. However, due to 1st proviso to section 6(5) of the Act, only guarantor's property shall be attracted after the property of principal borrower.

35. Be that as it may, we have gone through the application filed by the decree holder bank (Annexures-C and C1 to the writ petition). The application seeking civil detention under section 34 of the Act, 2003 requires the decree holder to file the application by himself. In this particular case, showing the signature of Bank's representative placed at the top of the application, the learned Advocate for the respondent Bank submits that the decree holder Bank filed the application through its proper representative and it met the requirement of section 34 of the Act, 2003.

36. Now question arises whether this Annexure-C and CI can be treated as application in order to meet the requirement of section 34(1) of the Ain, 2003. Civil Rules and Orders (CRO) provides as to how the application shall be filed before the Court. In this regard, Rule 19, chapter I, Volume-I of the C.R.O runs as under:

> "19. All petitions requiring judicial investigation or determination unless filed with an affidavit in support thereof should be verified in the manner prescribed by Or. 6, r. 15"

37. The said provisions clearly require to file an application for judicial determination either by verification in accordance with Order VI Rule 15 of the Code of Civil Procedure or by swearing affidavit by the applicant.

38. Filing the application under section 34 (1) of the Act, 2003 civil detention of judgment debtor is sought for by the decree holder applicant. As such, the Adalat has to dispose of it awarding civil detention or rejecting the prayer. Hence, the applicant needs to substantiate the facts in the application for determination by the Adalat. Thus, considering facts of the application, judicial determination has to make by the Adalat awarding civil imprisonment or not. Therefore, the Bank requires to file the application in accordance with

Chapter-1, Rule 19 of the Civil Rules and Orders (CRO) read with Order VI Rule 15 of the Code of Civil Procedure. But from the application (Annexure-C and C1) filed by the decree holder Bank, we do not find this compliance. In the circumstances, we are of the view that without verification or affidavit, putting signature at the top of the application alone is not enough to consider an application under section 34(1) of the Act, 2003. High Court Division in the case of AKM Tofazzal Hossain and others Vs Rupali Bank Ltd. and others reported in 64 DLR (HCD) 435 and the case of Md. Ohiduzzaman Mia alias Mukul Mia Vs Government of the People's Republic of Bangladesh and others reported in 2 ALR (HCD) 117, also decided the issue earlier holding that the application for civil detention under section 34 of the Act, 2003 has to be filed by the decree holder either by swearing affidavit or making verification in accordance with Order VI Rule 15 of the Code of Civil Procedure.

39. In particular, in the case reported in 2 ALR (HCD) 117 a Division Bench of the High Court Division (one of us was a party) held as under:

> "10. On an application under section 34(1) of the Ain, 2003 the Adalat may pass an order for civil detention and as such, it has to be filed substantiating facts in support of the claim for issuing warrant of arrest to detain the judgment debtor (petitioner) by awarding civil detention. Therefore, the application requires judicial determination and as per Rule 19, chapter-I, Volume-I of the C.R.O, the said application should be filed with an affidavit or in the alternative it should be verified by the authorized person of the applicant (decree holder bank) in the manner as prescribed by Order VI Rule 15 of the Code of Civil Procedure. In view of legal requirement, we hold that Annexure-D to the writ petition, is not a proper application in the eye of law and as such, the impugned order issuing warrant of arrest has been passed without any lawful application on behalf of the decree holder."

40. Considering the above ratio and in view of observations made above, we are led to hold that the present application praying for civil detention of the judgment debtor has not been filed in accordance with section 34(i) of the Act, 2003 and so the impugned order issued on the basis of this application, can not sustain in the eye of law.

41. **Decision of the Court:**

In view of above discussions. The Rule Nisi finds merit.

42. **In the result, the Rule Nisi is made absolute.** The order No. 56 dated 04.11.2015 passed by the learned Judge (Joint District Judge), Artha Rin Adalat, Chattogram in Artha Rin Execution Case No. 23 of 2010 awarding civil detention to the petitioner for a period of 04 (four) months (Annexure-E) is hereby declared to have been passed without lawful authority and of no legal effect.

43. However, the decree holder Bank is at liberty to file a fresh application under section 34 of the Act, 2003 before the Adalat following the observations made above and the Adalat shall consider the same in accordance with law.

44. Communicate a copy of this judgment and order to the respondents at once.

17 SCOB [2023] HCD 34

HIGH COURT DIVISION

Civil Revision No. 449 of 2020

Chattogram Port Authority
... Petitioner
Vs.
Md. Mehedi Hasan
... Opposite party

Mr. Tanjib-Ul-Alam with
Mr. Saquibuzzaman, Advocates
... for the petitioner

Mr. NAM Abdur Razzak, Advocate
... for the opposite party

Judgment on 06.03.2022

Present:
Mr. Justice Md. Ruhul Quddus
And
Mr. Justice Kazi Ebadoth Hossain

Editors' Note:
The question came up for consideration in the instant petition is whether a suit can be brought against the Chittagong Port Authority without service of a prior notice under section 49 of the Chittagong Port Ordinance,1976 and whether issue of maintainability for non service of aforesaid notice can be realized after joining the issue. The High Court Division held that after joining the issue and on completion of the hearing plaint cannot be rejected. The Court also held that as there is no alternative remedy in the Chittagong Port Ordinance,1976 regarding land dispute between the authority and the private individual the service of summon along with a copy of plaint upon the authority will be deemed as sufficient. In the result, the High Court Division discharged the rule.

Key Words:
Section 49 of the Chittagong Port Ordinance,1976; Order VII, Rule 2;Order XIV, Rule 2; Order XV, Rule 3 and Section 151 of the Code Of Civil Procedure; Rejection of plaint, Service of Notice

Purpose of serving notice prior to the institution of the suit under section 49 of the Chittagong Port Ordinance, 1976:
Service of notice under Section 49 thereof prior to institution of any suit against the Chattogram Port authority has been incorporated for its smooth functioning and discharging its regular routine activities. Another purpose of such notice is to save public time and litigants' expenditure in the cases where any person aggrieved serves notice upon the port authority and the authority by itself addresses his grievance realizing the right course of action before going to the court. In such view of the matter, if a person already institutes a suit under whatever notion and the summon with a copy of the plaint is served upon the port authority, the purpose of notice under Section 49 of the Ordinance would be sufficiently served inasmuch as no alternative remedy is provided in the Ordinance for dissolving any land dispute between the Port Authority and a private individual. (Para-24)

Objection regarding rejection of plaint to be raised before joining the issues:
Even in case of proceedings of a suit without prior notice, where such notice is legally required, the objection must be raised before fling of written statement by the defendant concern. After joining the issues by filing written statement, settlement of all issues and completion of hearing, a plaint cannot be rejected under Order VII, rule 11 of the Code especially when two other suits between the parties on the selfsame subject matter are pending in the same court and one of them is fixed for simultaneous hearing with the present suit. (Para-26)

JUDGMENT

Md. Ruhul Quddus, J:

1. This rule was issued challenging order number 82 dated 21.10.2019 passed by the Joint District Judge, Second Court, Dhaka in Title Suit Number 766 of 2018 rejecting an application filed by defendant number 4 (petitioner herein) under Order VII, rule 11 read with Section 151 of the Code of Civil Procedure for rejection of plaint.

2. The plaintiff-opposite party filed Title Suit Number 189 of 2015 in the Fifth Court of Joint District Judge, Dhaka for declaration of title over the land as described in Schedule Ka of the plaint and for recovery of possession thereof with a further declaration that the registered sale deeds as described in Schedule Kha of the plaint were illegal, ineffective, collusive and not binding upon him. On transfer for the second time to the Second Court of Joint District Judge, Dhaka the suit was lastly renumbered as Title Suit Number 766 of 2018.

3. Chatogram Port Authority being defendant number 4 was contesting the suit by filing a written statement denying the material allegations of the plaint and claiming its tile and possession over the suit land.

4. In course of hearing, evidence of both the parties was completed and the suit was fixed for argument. At that stage, defendant number 4-Chattagram Port Authority (petitioner herein) filed an application under Order VII, rule 11 read with Section 151 of the Code for rejection of the plaint on the ground that the plaintiff had not served any notice under Section 49 of Chittagong Port Authority Ordinance, 1976 (in brief "the Ordinance, 1976"). Learned Judge of the trial court rejected the application by the impugned order, challenging which the petitioner moved in this court and obtained the rule with an order of stay.

5. The plaintiff-opposite party contests the rule by filing a counter-affidavit stating, *inter alia*, that Title Suit Number 237 of 2015 brought by Chattogram Port Authority on the selfsame subject matter was being simultaneously heard with the present suit. Another suit on the same subject matter being Title Sui Number 245 of 2019 brought by a third party on the same suit land is also pending in the same Court, where the port authority and the present plaintiff are impleaded as defendants number 7 and 8 respectively. Certified copies of the written statement filed by the defendant number 4, plaints in Title Suit Number 237 of 2015 and 245 of 2019 have also been annexed with the counter-affidavit (vide Annexures: 1, 2 and 6 respectively to the counter-affidavit).

6. Mr. Tanjib-Ul-Alam, learned advocate for the petitioner submits at the very outset that the suit was instituted by the plaintiff without service of any notice under Section 49 of the Ordinance, 1976 which makes a clear bar against bringing of a suit against the Port Authority

without service of a prior notice. Since this is a question of law, it cannot be waived and at any stage of the proceedings the question can be raised. When the Port Authority brought it into the notice of the trial Court by filing an application, it was incumbent upon the Judge to reject the plaint on clear law point. Learned Judge without doing so observed that such notice was not applicable in a suit of present nature and thereby committed error of law resulting in an error in the decision occasioning failure of justice. In support of his submission Mr. Alam refers to the case of *Bangladesh Agricultural Development Corporation vs Md. Mannaf Hossain Khan and others*, 36 DLR (AD) 69 and an unreported decision of the Appellate Division passed in Civil Appeal Number 618 of 2009 (*Chairman, Bangladesh Agricultural Development Corporation vs Abedunnessa and others).*

7. Mr. N A M Abdur Razzak, learned advocate for the sole opposite party on the other hand submits that Section 49 of the Ordinance, 1976 does not impose a precondition of institution of a title suit over a land dispute in Dhaka against the Chattogram Port Authority, but this is a special law of limitation in case of bringing suit by a person somehow involved in the regular activities of Chattogram Port Authority. For the sake of argument, even if it is held that service of notice prior to institution of the suit is required, the notice demanding justice as mentioned in paragraph number 20 of the plaint would fulfill the purpose of such notice.

8. Mr. Razzak further submits that there are two more suits pending on the selfsame subject matter. In one of the suits, the Port Authority itself is the plaintiff and the present plaintiff is the principal defendant and in another suit brought by a third party, both the Chattogram Port Authority and the present plaintiff are made defendants. Of them Title Suit Number 237 of 2015 brought by the Port Authority is being heard simultaneously with the present suit. The Port Authority as defendant in the present suit has been contesting the same by filing written statement and has also examined witnesses and adduced documentary evidence. It did not raise the issue of maintainability of the suit for non-service of notice under Section 49 of the Ordinance, 1976 at initial stage. After closing the evidence and fixing both the suits for argument, the port authority has brought this application for rejection of the plaint only to drag the litigation by adopting delaying tactics.

9. We have considered the submissions of the learned advocates and gone through the record as well as the decision cited and another decision of the Appellate Division on rejection of plaint on the point of maintainability. The statements regarding pendency of two other suits are not controverted by the petitioner. The learned advocate rather admits it in course of his submission.

10. In the case reported in 36 DLR (AD) 69 as cited by the learned advocate for the petitioner, **an employee of Bangladesh Agricultural Development Corporation (in brief BADC) instituted the suit** in declaratory form against his dismissal from service, **where BADC itself was not made a defendant. The said suit was premature inasmuch the cause of action was yet to arise there.** Moreover, in the cited case, **the court concluded the trial and finally disposed of the suit on interpretation of law on the basis of finding of facts**.

11. In the present case, **the plaintiff is not an employee of the port authority, and not involved with its activities in any manner**. It is already stated that **the port authority has been made defendant number 4 in the suit**. The **cause of action for institution of the suit clearly arose, upon which as many as three suits are pending and in one suit the port**

authority itself is the plaintiff. The **trial has not yet been concluded by pronouncement of judgment**.

12. The facts, circumstances and law involved and the relief sought for in that suit were quite distinguishable with the case in hand.

13. In another case of Chairman, BADC (Civil Appeal Number 618 2009), the land was admittedly acquired in LA Case Number 30 of 1958-59 by the Government. The plaintiffs instituted suit on the grounds that the suit land was not utilized by the Government, the plaintiffs being original owners did not receive the compensation and they had no other land in Dhaka City. The Chairman, BADC was made defendant number 3, but BADC itself was not made a party. The suit was decreed ex-parte on rejection of an application filed by the defendant. An appeal filed by defendant number 3 (Chairman, BADC) was dismissed by the Joint District Judge, Dhaka and the High Court Division also discharged the rule that was issued on a civil revisional application. Defendant number 3 took the matter to the Appellate Division where leave was granted. Ultimately the Appellate Division dismissed the suit as being barred by Section 14A of the (Emergency) Requisition of Property Act, 1948.

14. In the latter, the Appellate Division did not take its decision on the basis of Section 74 of the Agricultural Development Corporation Ordinance, 1961 but Section 14A of the (Emergency) Requisition of Property Act, 1948 that was in force at the material time. The Act, 1948 provided for alternative remedy by way of compensation against acquisition of land by the Government for public purpose under Sections 5B, 6, 7, 7B and 7F thereof. It further provided the forum of appeal and revision under Section 4A (1) (2), objection hearing under Section 5 (5), arbitration by a Judicial Officer under Section 7 (aaa)(i), (b), civil suit for dissolving dispute regarding apportionment of compensation under Section 7A. Any such provision of alternative remedy, or arbitration, or settlement of dispute is absent in the Chittagong Port Authority Ordinance, 1976 and as such the decision of the Appellate Division taken in that case would not mechanically apply in this case.

15. In order to appreciate the submission of Mr. Razzak, we brought the record of Writ Petition Number 12321 of 2014 that has been referred to in paragraph number 20 of the plaint (Annexure-A to the revisional application) and found that a notice demanding justice for mutation of record was served upon the Assistant Commissioner of Land, Demra Circle, Dhaka with copy to the Chairman, Chattogram Port Authority and the Secretary, Ministry of Shipping and two others (Annexure-G to the Writ Petition). They have been also made respondents in that writ petition, which is now pending in the High Court Division.

16. The written statement filed by the port authority (Annexure-1 to the counter-affidavit) does not show that any specific objection regarding maintainability of the suit in view of Section 49 of the Ordinance, 1976 was taken except a general objection in respect of maintainability in a stereo type manner. It further appears from the contents of the counter-affidavit [see paragraph number 9 (f)] that “maintainability of the suit” was framed as issue number 1 in the suit. Since the matter is fixed for argument, defendant number 4 has got ample opportunity to argue its case on the point of maintainability in view of Section 49 of the Ordinance, 1976 as well if it is yet not satisfied with the point of maintainability.

17. In the case of *Ismat Jerin Khan vs The World Bank and others* 11 MLR (AD) 58, an application for rejection of plant filed under Order VII, rule 11 of the Code on the ground of maintainability was rejected. The defendant moved in the High Court Division and got the rule absolute. The plaintiff took the matter to the Appellate Division. After granting leave, the

Appellate Division heard the civil appeal and allowed the same directing the trial Court to decide all the issues including that of maintainability. In so doing the Appellate Division observed:

> *"The question of immunity is a mixed questions of law and fact and the material has to be produced by way of averments in the written statement and thereafter the materials are required to be considered in the light of the evidence in the suit and a decision should be arrived at accordingly…."Paragraph 18)*

18. In the above cited case of *Ismat Jerin Khan*, the Appellate Division further observed:

> *"… we are of the view that the issues of law impliedly arose therefrom as to whether the suit is barred under section 42 of the Specific Relief Act read with section 56 (f) of the Specific Relief Act could be conveniently decided by the trial Court upon filing of the written statement containing certain material averments on behalf of the defendant which are vital for consideration of the issues as to maintainability and evidence is required to be led in support thereof. Ends of justice would best be served if we remain confined ourselves to the leave granting order instead of exercising our power under Article 104 of the Constitution and allowing the respondents to take resort of Order 41, rule 33 of the Code of Civil Procedure…." (Paragraph 21)*

19. We have also got the case of *Salahuddin Khan and others vs Md. Abdul Hai Bahar and others*, 63 DLR (AD) 138 where the full court of the Appellate Division comprising of eight Hon'ble Judges dismissed a civil appeal that was field against an order of rejection of plaint at a belated stage, when the suit was fixed for peremptory hearing.

20. For a better understanding of the law of rejection of plaint as being barred by law under rule 11 of Order VII, it must be read with Order XIV, rule 2; Order XV, rule 3 and Order XX, rule 5 of the Code and interpreted in a harmonious manner. According to XIV, rule 2 the issue of maintainability only on law point can be decided first in a suitable case to save public time and expenses of the litigants, but it must be decided finally once for all. When two other suits are admittedly pending between the same parties on the self-same subject matter, question of disposal of one suit by rejection of plaint will not arise at the concluding stage.

21. Order XV, rule 3 of the Code makes an exception to the general rule of deciding all the issues together 'where the Court may after settlement of all the issues take up the hearing of certain issues which may be of fact or of law, on the basis of the evidence which may be produced by the parties at once and leave aside the hearing of other issues, if the Court is of the view that the decision on such of the issues will be sufficient to dispose of the entire suit without causing prejudice to any of the parties' [30 DLR (AD) 30]. It appears that the Court has a kind of discretion in taking up any issues for hearing under Order XV, rule 3. The general rule of hearing and deciding all the issues together is provided in Order XX, rule 5 of the Code which says that if the issues are already framed in a suit, the court shall state its finding or decision with a reason therefore upon each separate issues.

22. The scope of rejection of plaint under Order VII, rule 11 of the Code and hearing of any issue of law under Order XIV, rule 2 thus appears to be narrow in a suit where the issues are already framed. The scope of hearing of any certain issues under Order XV, rule 3 in the midst of hearing is similarly narrow and after amendment of Order XX, rule 5 of the Code by the Ordinance Number XLVIII of 1983, it has become narrower.

23. In view of the above, a general proposition of law can reasonably be drawn that after settlement of the issues and completion of hearing, Court should decide all the issues

together, and at that stage, there would be no scope to entertain an application under Order VII, rule 11 of the Code at the instance of a party who already joined the issues. In the present case, where the defendant-petitioner filed written statement and joined the issues, adduced evidence and the suit is fixed for argument simultaneously with another suit brought by the petitioner, there is no scope to split up one suit and reject the plaint under Order VII, rule 11 of the Code even to decide any issues under Order XV, rule 3 inasmuch as it will not finally end the litigations between the parties.

24. If the Ordinance, 1976 is carefully read over, it would be easily understood that service of notice under Section 49 thereof prior to institution of any suit against the Chattogram Port authority has been incorporated for its smooth functioning and discharging its regular routine activities. Another purpose of such notice is to save public time and litigants' expenditure in the cases where any person aggrieved serves notice upon the port authority and the authority by itself addresses his grievance realizing the right course of action before going to the court. In such view of the matter, if a person already institutes a suit under whatever notion and the summon with a copy of the plaint is served upon the port authority, the purpose of notice under Section 49 of the Ordinance would be sufficiently served inasmuch as no alternative remedy is provided in the Ordinance for dissolving any land dispute between the Port Authority and a private individual.

25. From a plain reading of the pleadings of the parties, it appears that the port authority purchased land in Dhaka for construction of its Guest House and started construction there. The plaintiff also claimed title over the same land by way of purchase through registered sale deed from its recorded tenant and prayed for recovery of possession. Now the civil court is to adjudicate the dispute. On receipt of summon accompanied by the plaint, the port authority could have done the same thing what it would do after receiving the notice under Section 49, if served upon it. Section 46 of the Ordinance, 1976 provides requisition and acquisition of land for carrying out the purpose of the Ordinance. But it does not appear that the port authority made any requisition for land to the Deputy Commissioner, Dhaka and got the suit land by way of acquisition, but itself purchased the land for reason best known to its officials. Procurement of land and construction of Guest House outside the limit and navigable approaches of port and bypassing the legal process of acquisition of land as provided in the Ordinance is not a regular routine activity on the part of Chattogram Port Authority and as such no prior notice is required to be served to seek relief against such extra ordinary activity. Learned Judge of the trial court did not commit any error of law in arriving at his decision and rejecting the application under Order VII, rule 11 of the Code.

26. Even in case of proceedings of a suit without prior notice, where such notice is legally required, the objection must be raised before fling of written statement by the defendant concern. After joining the issues by filing written statement, settlement of all issues and completion of hearing, a plaint cannot be rejected under Order VII, rule 11 of the Code especially when two other suits between the parties on the selfsame subject matter are pending in the same court and one of them is fixed for simultaneous hearing with the present suit. If the plaint is rejected at this stage, what would be its legal consequence? Will the plaintiff be barred by res-judicata and law of limitation and by hyper technicality will he be non-suited? In our opinion, certainly not. Then will he serve a notice under Section 49 of the Ordinance, 1976 and after expiry of the time-limit as prescribed there, be at liberty to begin the legal battle afresh, and do the same thing what he already did in the present suit? Law does not provide any meaningless things to be done.

27. We, therefore, do not find any merit in the rule. Accordingly, the rule is discharged however without any order as to cost. The trial court is directed to conclude the hearing of the suit within 2 (two) months from receipt of this judgment.

17 SCOB [2023] HCD 40

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICITON)

Suo Motu Rule No. 04 of 2021

The State
....Petitioner.
Vs.
The Anti-Corruption Commission, represented by its Chairman and others
.......Respondents.

Mr. A.K.M. Amin Uddin, D.A.G with
Ms. Anna Khanom Koli, A.A.G
…..For the Respondents.

Mr. Md. Khurshid Alam Khan, Senior Advocate,
.....For the Anti-Corruption Commission.
Mr. Mohammad Shishir Manir, Advocate
.....For the Respondent No. 02.
Mr. Md. Shahidul Islam Khan Liton, Advocate,
…..For the Respondent No.03.

Heard on: The 21st day of June, 2022
Judgment on: The 21st day of June, 2022

Present:
Mr. Justice Md. Nazrul Islam Talukder
And
Mr. Justice Kazi Md. Ejarul Haque Akondo

Editors' Note:
In the instant suo motu rule questions came up for consideration whether court can punish journalists for the publication of defamatory, false and fabricated news report touching the Anti-Corruption Commission and whether the journalists are protected by the laws in not disclosing the sources of information. The High Court Division held that the Media and the Journalist are authorized to publish news report on corruption and if anyone is aggrieved by the report, they can lodge complaint before the Press council for redress. Analyzing various provisions of laws like the Constitution, the Press Council Act 1974, the Public-interest Information Disclosure Act (Provide Protection), 2011 etc. the High Court Division also held that laws have given protection to the Journalists in not disclosing the sources of information.

Key Words:
Article 39 of the Constitution of the People's Republic of Bangladesh; The Press Council Act,1974; The Public-interest Information Disclosure Act (Provide Protection), 2011 and Rules, 2017; The Anti-Corruption Commission Act, 2004; Disclosure of the source of information; fourth pillar of democracy;

Article 39 of the Constitution:
It is worthwhile to mention that Article 39 of the Constitution has guaranteed freedom of thought and conscience. More specifically, Article 39 (2)(b) has clearly mentioned about the term of 'freedom of the press'. Furthermore, Article 39 of the People's Republic of Bangladesh guarantees freedom of press and the right of every citizen to freedom of speech and expression subject to certain exceptions. That such exceptions are namely (i) in the interests of the security of the State, (ii) friendly relations with foreign states, (iii) public order, decency or morality, or (iv) in relation to contempt of

court, (v) defamation or (vi) incitement to an offence. Apart from the above, investigative journalism is the necessary corollary of such freedom.

<u>In a democracy, there should be an efficient and fearless press to act as watchdog of democracy:</u>

Investigation by a journalist includes research, gathering information from different sources, observation and due diligence. In doing so, the journalists act as the fourth pillar of democracy and consequently, serve the nation. They are the part and parcel of a democratic process. In a modern world, right to information is being treated as one of the pre-conditions for expression of opinion. Journalists act as helping hands for ensuring rule of law and democracy which have been recognized as the basic structure of the Constitution. They work as watchdogs and in appropriate situation; they ventilate information not to undermine any person but to serve the cause of justice. In a democracy, there should be an efficient and fearless press to act as watchdog of democracy. Newspapers make people aware of every field of society. In the present age, corruption is present in all walks of life. Newspapers play an important role in highlighting the menace of corruption and thereby the people are made aware of the corrupt practices if any prevalent in various state-run departments, organisations, agencies and private organisations. (Para-38)

<u>The media and the journalists are constitutionally and legally authorised to publish news reports on corruption and corrupted practices:</u>

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. Under the aforesaid discussions, our considered view is that the media and the journalists are constitutionally and legally authorised to publish news reports on corruption and corrupted practices along with money laundering if any including other important news on the matters of public interest. (Para-38)

<u>Section 2(5) of the Public-interest Information Disclosure Act (Provide Protection), 2011:</u>

Section 2(5) of the Public-interest Information Disclosure Act (Provide Protection), 2011, provides that “whistleblower” means the person who discloses the public interest information to a competent authority, Section 4 of the aforesaid Act contemplates that any whistleblower can make public interest disclosure, if considered reasonable, to a competent authority and Section 5(1) of the aforesaid Act indicates that if any whistleblower discloses any authentic information under sub-section (1) of Section 4, his identity cannot be divulged without his consent.” (Para 40)

<u>Section 2(4) of the Public-interest Information Disclosure Act (Provide Protection), 2011:</u>

<u>Protection of publisher/news agency:</u>

A reference to Section 2(4) of the Public-interest Information Disclosure Act (Provide Protection), 2011 and Rules, 2017 provide for protection of publisher/news agency of information of public interest relating to a) irregular and unauthorized use of public money; b) mismanagement of public resources; c) misappropriation or misuse of public money or resources; d) abuse of power or maladministration; e) committing criminal

offense or illegal or prohibited acts; f) a conduct that is harmful or dangerous for public health, safety or to the environment; or; g) corruption. (Para 44)

Section 28B of the Anti-Corruption Commission Act, 2004:

Section 28B of the Anti-Corruption Commission Act, 2004 provides that no information given by any person about any offence under this Act and specified in its Schedule be admitted as an evidence in any civil or criminal court, or no witness shall be allowed or compelled to disclose name, address and identity of the informant, or cannot be allowed to present or disclose any information which discloses or may disclose the identity of the informant. Therefore, the required disclosure of the papers and documents by Respondent No. 02, at the prayer of ACC, may be violative of the above provision of the Anti-Corruption Commission Act, 2004 in view of the above statement of law and analogical reasoning as well. (Para 45)

So, under the above facts and circumstances and the propositions of law, we have no hesitation to hold the view that the laws have given protection to the journalists in not disclosing the source of information. (Para-48)

JUDGMENT

Md. Nazrul Islam Talukder, J:

1. On 08.03.2021, Mr. A.K.M. Amin Uddin, the learned Deputy Attorney-General appearing on behalf of the State, has drawn our attention to the news report under caption **"দুর্নীতি দমনে 'দুদক স্টাইল": ২০ কোটিতে প্রকৌশলী আশরাফুলের দায়মুক্তি!** published in the Daily Inqilab dated the 2nd March 2021 and taken us through the contents of the news report which reads as under:-

দুর্নীতি দমনে 'দুদক স্টাইল'

২০ কোটিতে প্রকৌশলী আশরাফুলের দায়মুক্তি!

সাঈদ আহমেদ

দুর্নীতির মাধ্যমে অবৈধ সম্পদ অর্জনের অভিযোগ থেকে অব্যাহতি দেয়া হচ্ছে 'হাউজিং অ্যান্ড বিল্ডিং রিসার্চ ইনস্টিটিউট'র মহাপরিচালক প্রকৌশলী আশরাফুল আলম এবং তার স্ত্রীকে। দুর্নীতি দমন কমিশনের (দুদক) পেছনে এ বাবদ তার খরচ হয়েছে ২০ কোটি টাকার বেশি।

গুঞ্জন উঠেছে, এ অর্থ সংস্থাটির অনুসন্ধান কর্মকর্তা, সংশ্লিষ্ট উপ-পরিচালক, পরিচালক, মহাপরিচালক থেকে শীর্ষ পর্যায় পর্যন্ত ভাগবাটোরা হয়েছে। দুর্নীতির দায় থেকে অব্যাহতি দিতে শুরু থেকে শেষ পর্যন্ত ঘাটে ঘাটে সক্রিয় ছিল একটি শক্তিশালী সিন্ডিকেট। এ কারণে আশরাফুল দম্পতির বিরুদ্ধে মামলা রুজুর সুপারিশ করেও সেটি প্রত্যাহার হয়ে যায়।

সুপারিশ করা হয় অভিযোগ থেকে অব্যাহতি দানের। অব্যাহতি দানের সুপারিশ সম্বলিত প্রতিবেদনটি কমিশনে জমা পড়ে গত ২৪ ফেব্রুয়ারি। প্যাকেজ ডিলের আওতায় বিদায়ী কমিশনকে দিয়েই অনুসন্ধানের সমাপ্তি ঘটাতে এখন তোরজোড় চলছে। সর্বশেষ তথ্য অনুযায়ী, গত রোববার একজন কমিশনার দায়মুক্তির ওই ফাইলে স্বাক্ষর করেছেন বলে জানা গেছে।

নির্ভরযোগ্য সূত্র জানায়, গণপূর্ত অধিদফতরের সাবেক প্রধান প্রকৌশলী আশরাফুল আলমের বিরুদ্ধে অবৈধ সম্পদের অনুসন্ধান শুরু হয় ২০১৯ সালে। তখন তিনি গণপূর্ত অধিদফতরের প্রধান প্রকৌশলী। এখন 'হাউজিং অ্যান্ড বিল্ডিং রিসার্চ ইনস্টিটিউট'র মহাপরিচালক। গণপূর্তে থাকাকালে তার বিরুদ্ধে অবৈধ সম্পদ অর্জনের অভিযোগ ওঠে।

অনুসন্ধানের (নথি নং- ০০.০১.০০০০.৫০১.০১.০৬১.১৯) দায়িত্ব দেয়া হয় দুদকের অনুঃতদন্ত-১ এর সহকারী পরিচালক মো. সাইদুজ্জামানকে। এই ডেস্কটির দায়িত্বে রয়েছেন- মহাপরিচালক সাঈদ মাহবুব।

অনুসন্ধান প্রক্রিয়ায় প্রকৌশলী মো. আশরাফুল আলম, তার স্ত্রী সাবিহা আলমের সম্পদ বিবরণী চাওয়া হয়। এ পরিপ্রেক্ষিতে তিনি সম্পদ বিবরণী দাখিল করেন। দাখিলকৃত সম্পদ বিবরণী যাচাই করেন সংশ্লিষ্ট অনুসন্ধান কর্মকর্তা। তাতে দেখা যায়, আশরাফুল আলমের আইএফআইসি ব্যাংকের লালমাটিয়া শাখায় (সঞ্চয়ী হিসেব নম্বর-১০২৫১৭৯১৫৫০৩১) জ্ঞাত আয়বহির্ভূত সম্পদ রয়েছে ৪ লাখ ৮৯ হাজার ৭১৫ টাকা। একই ব্যাংকের বনানী শাখার ৮ লাখ টাকার এমআইএস (নং-১০১৬১৯২) রয়েছে। এফডিআর (নং-০০০০১৫৯১৩৩২০০) রয়েছে ৮ লাখ টাকার। আইএফআইসি ব্যাংকের গুলশান শাখায় রয়েছে ১২ লাখ টাকার এমআইএস (নং-১০০২-১৭৯১৫৫-২৩৬)।

দাখিলকৃত সম্পদ বিবরণীতে আশরাফুল আলম ৪২ লাখ ৫৫ হাজার ৩১৩ টাকা ব্যাংকে রয়েছে বলে উল্লেখ করেন। বিবরণী যাচাইকালে ৪৭ লাখ ৩৫ হাজার ২৮ টাকার তথ্য বেরিয়ে আসে। এখানে তিনি ৪ লাখ ৭৯ হাজার ৭১৫.১২ টাকার তথ্য গোপন করেন। সম্পদ বিবরণীতে আশরাফ পৈত্রিক, ক্রয়কৃত এবং হেবা দলিলে প্রাপ্ত স্থাবর-অস্থাবর সম্পত্তি মিলিয়ে ৫৫ লাখ ৮ হাজার ৬৭২ টাকার সম্পত্তি রয়েছে- মর্মে উল্লেখ করেন। যাচাইয়ে বেরিয়ে আসে ৮১ লাখ ৮৯ হাজার ১০৭.৪৬ টাকার সম্পদ। ২৬ লাখ ৮০ হাজার ৪৩৫.১২ টাকার সম্পদের তথ্য গোপন করেন।

নিজের ৬টি আয়ের উৎস উল্লেখ করেন তিনি। এগুলো হচ্ছে- অতীত কৃষি আয় ১,৫০,০০০/-, বেতন-ভাতা প্রাপ্ত ৯৪,৩২,৫২০/-, পরামর্শ ফি বাবদ আয় ২,৩৫,০০০/-, পৈত্রিক সূত্রে প্রাপ্ত জমির মূল্য ১,০০০০০/-, উপহার হিসেবে প্রাপ্ত আসবাবপত্রের মূল্য ৮০,০০০/-, উপহার হিসেবে প্রাপ্ত স্বর্ণালঙ্কার মূল্য ২,৮৯.২০০/-। সব মিলিয়ে মূল্য দেখান ১ কোটি ৩ লাখ ৬৬ হাজার ৭২০ টাকা। কিন্তু যাচাইকালে ২৬ লাখ ৮৬ হাজার ৭২৩.৪৬ টাকার জ্ঞাত আয়ের উৎসবহির্ভূত সম্পদ বেরিয়ে আসে তার।

মালিকানাধীন স্থাবর সম্পত্তির মধ্যে বগুড়া সোনাতোলা উপজেলাধীন দিগদাইর মৌজায় ১২ শতক জমিতে (দলিল নম্বর : ৩১৪৭, তারিখ : ২৬/০৮/২০১৩) ১ লাখ ১৬ হাজার টাকা গোপন করেন। একই মৌজায় ৬ শতক জমিতে (দলিল নং ২০৬৫/ তারিখ : ২৬/০২/২০১৩) ৬৩ হাজার ২৬০ টাকা গোপন করেন। দিগদাইর মৌজায় আশরাফুল আলম এবং তার স্ত্রী সাহিবা আলমের যৌথ নামে কেনা ১৮৩ শতক জমির (দলিল নং-৩৫৩০, তারিখ : ২৫/০৮/২০১৪) মূল্যে ১৯ লাখ ৭৫ হাজার ১৮০ টাকা গোপন করেন।

একই এলাকায় ১১.৫০ শতক জমি ক্রয়ের মূল্য গোপন করতে তিনি 'হেবা দলিল'-এর আশ্রয় নেন। এই দলিলেও তিনি ২১৬ টাকা গোপন করেন। সোনাতোলা উপজেলার ফুলবাড়ি মৌজায় ০৪৫০ অযুতাংশ জমিক্রয়ে (দলিল নং-১৫৮২, তারিখ : ২৫/০১/২০০০) ৪৬ হাজার ৬৪ টাকার তথ্য গোপন করেন। আশরাফের সম্পদ বিবরণীতে দলিলে উল্লেখিত মূল্যের ভিত্তিতে ১২ লাখ ৫৩ হাজার ৩৫৯ টাকার সম্পত্তি মূল্য দেখান। যাচাইকালে বেরিয়ে আসে এ সম্পদের দলিল মূল্যই ২৪ লাখ ৫৪ হাজার ৭৯ টাকা। অর্থাৎ ২২ লাখ ৭২০ টাকা তিনি হিসাব বিবরণীতে গোপন করেন।

আশরাফুল আলমের স্ত্রী সাবিহা আলমের স্থাবর সম্পত্তি মধ্যে ঢাকার পশ্চিম ধানমন্ডি রোড-৮/এ, বাড়ি-৩২২, নং-১/সিতে রয়েছে- 'একান্ত ভবন' নামে ১৪২০ বর্গফুটের একটি ফ্ল্যাট। আয়ের উৎস দেখানো হয়েছে 'ব্যবসায়িক, টিউশনি, উপহার হিসেবে প্রাপ্ত অর্থ'। ২০০৩ সালের ২৩ অক্টোবর কেনা এই ফ্ল্যাটের দলিল মূল্য দেখানো হয়েছে মাত্র ২৬ লাখ ৫৮ হাজার টাকা। 'অতীত আয়, ব্যাংক সুদ এবং বাড়িভাড়া থেকে প্রাপ্ত অর্থ' দিয়ে এটি কেনা হয়েছে মর্মে উল্লেখ করা হয়

বিবরণীতে। কিন্তু দলিলে উল্লেখ রয়েছে ২৬ লাখ ৮৫ হাজার টাকা। এখানে কম দেখানো হয় ২৭ হাজার টাকা।

তবে ধানমন্ডির এই ফ্ল্যাটটির বর্তমান বাজার মূল্য প্রায় ৩ কোটি টাকা। ঢাকার গুলশান আবাসিক এলাকার রোড-৪৯, বাড়ি-২১ এ অবস্থিত ৫/এ নম্বর ফ্ল্যাটটির মালিকও সাবিহা আলম। সম্পদ বিবরণীতে এটি ক্রয়ের উৎস দেখানো হয়েছে, অতীত আয়, বাড়িভাড়া, ব্যবসায়িক আয়, টিউশনি এবং উপহার লব্ধ অর্থ। ২০১৪ সালের ২৩ এপ্রিল ফ্ল্যাটটি (দলিল নং-৩০৮২) কেনা হয়। ২ হাজার ৫০ বর্গফুট আয়তনের ফ্ল্যাটটির দলিল মূল্য দেখানো হয় মাত্র ৮৩ লাখ ২২ হাজার ৩২২ টাকা। যা অবিশ্বাস্য ধরনের কম। বগুড়া সোনাতলা উপজেলার শিহিপুর মৌজায় রয়েছে ৫ বিঘা জমি (খতিয়ান নং-৮০৮)।

রাজউকের উত্তরা প্রকল্পে রয়েছে আড়াই কাঠার প্লট (সেক্টর -১৬/সি, ব্লক-০২, প্লট নং-২০)। ২০১৪ সালের ৫ মার্চ কেনা এই প্লটটির (দলিল নং-২৫৬৮) দলিল মূল্য দেখানো হয়েছে ১১ লাখ ৩ হাজার ৩৫৯ টাকা। উৎস দেখানো হয়েছে উপহার থেকে প্রাপ্ত অর্থ। বগুড়া পৌরসভায় স্নিগ্ধা আবাসিক এলাকায় রয়েছে ৩ তলা ভবন (বাড়ি নং-১২৭/সি)। এটির জমির মূল্য দেখানো হয়েছে ৩৫ হাজার টাকা। ভবন নির্মাণ ব্যয় দেখা হয়েছে ১৮ লাখ টাকা। এক্ষেত্রে ১০ লাখ ৯ হাজার টাকা গোপন করা হয়েছে।

সাবিহা আলমের আয়ের উৎসবিহীন সম্পত্তির মধ্যে রয়েছে রাজধানীর ইস্টার্ণ হাউজিংয়ে আড়াই কাঠার প্লট (নং-এন-১০, রোড নং ৫/২) রয়েছে। ২০০৭ সালের ২৭ অক্টোবরে তিনি এটি কেনেন। মূল্য দেখান ৭ লাখ ৬৫ হাজার টাকা। দাখিলকৃত বিবরণীতে এটির তথ্যও সম্পূর্ণ গোপন করা হয়।

বগুড়া সোনাতোলা দিগদাইর মৌজায় ১৮৩ শতক (দলিল নং-৩৫৩০) জমি রয়েছে। এটি আশরাফুল আলম ও সাবিহা আলমের যৌথ নামে কেনা। এটির মূল্যে ১৯ লাখ ৮৫ হাজার ১৮ টাকা গোপন করা হয় । একই মৌজায় ২১ শতক জমির মালিক সাবিহা আলম। ২০১৪ সালের ২৮ এপ্রিল এটি কেনা (দলিল নং-১৭৩১) হয়। এখানে ২ লাখ ৩৬ হাজার ৪৫০ টাকা গোপন করা হয়েছে। একই মৌজায় ১১.৫ শতক জমির (দলিল নং-২১০৯) মূল্য ৫২ হাজার ৬২৩ টাকা গোপন করা হয়। এভাবে একই মৌজায় যথাক্রমে ১৬ শতক, ১১ শতক , ৪শতক জমিতে তিনি যথাক্রমে: ১ লাখ ২৬ হাজার, ১ লাখ ৫ হাজার ২০০ এবং ৭৭ হাজার ২৫৪ টাকা গোপন করেন। যাচাইকালে দেখা যায়, সাবিহা আলম স্থাবর সম্পত্তিতেই ৩৬ লাখ ৮ হাজার ৯২৮ টাকা গোপন করেন। এসব সম্পদ ক্রয়ে অর্থের উৎসও দেখাতে পারেননি তিনি। সাবিহার নিজ নামে ১ কোটি ৮২ লাখ ৯২ হাজার ৬০৯ টাকার স্থাবর সম্পদ কেনেন। এছাড়া তিনি ২০২০ সালের ২৫ ফেব্রুয়ারি পর্যন্ত ২ কোটি ১৩ লাখ ৬,৫১১ টাকার অস্থাবর সম্পদের ঘোষণা দেন। যাচাইয়ে দেখা যায়, তিনি স্থাবর-অস্থাবর মিলিয়ে ৩৬ লাখ ৮ হাজার ৯২৮ টাকার সম্পদ গোপন করেছেন।

সূত্রমতে, দুদকের সহকারী পরিচালক (অনু: ও তদন্ত-১) মো. সাইদুজ্জামান গত বছর ২৮ ডিসেম্বর আশরাফুল আলম ও সাবিহা আলমের বিরুদ্ধে মামলা রুজুর সুপারিশ করে কমিশনে প্রতিবেদন জমা দেন। প্রতিবেদনে বলা হয়, সাবিহা আলমের নিজের কোনো উপার্জন না থাকা সত্বেও স্বামী আশরাফুল আলমের অবৈধ উপায়ে অর্জিত অপরাধলব্ধ অর্থ দ্বারা নিজ নামে জ্ঞাত আয়বহির্ভূত ৩ কোটি ৫৩ লাখ ৮২ হাজার ৬৩৫ টাকা মূল্যের সম্পদ অর্জন করে দুর্নীতি দমন কমিন আইন-২০০৪ এর ২৭ (১) ধারা, মানিলন্ডারিং প্রতিরোধ আইন, ২০১২ এর ৪(২) এর ৪(২), (৩) এবং দন্ডবিধির ১০৯ ধারায় অপরাধ করেছেন। আশরাফুল আলমের বিরুদ্ধে ২৬ লাখ ৮৬ হাজার ৭২৩.৪৬ টাকার জ্ঞাত আয়বহির্ভূত সম্পদ অর্জনের অভিযোগে দুদক আইনের ২৬(২) ও ২৭ (১) ধারায় পৃথক মামলা রুজুর অনুমোদন চাওয়া হয় প্রতিবেদনে।

কিন্তু প্রতিবেদনটি জমা দেয়ার কিছু দিনের মধ্যেই রহস্যজনকভাবে প্রতিবেদনটি প্রত্যাহার করা হয়। সহকারী পরিচালক মো. সাইদুজ্জামান প্রত্যাহার করে নতুনভাবে প্রতিবেদন দাখিলের নির্দেশনা পান। নতুন এই ‘নির্দেশনা’ আসে কমিশনের শীর্ষ পর্যায় থেকে। অনুসন্ধান কর্মকর্তার ওপর ‘উপরের চাপ’ও আসতে থাকে। কমিশনে এই মর্মে গুঞ্জন ছড়িয়ে পড়ে যে, কথিত

'নির্দেশনা' এবং 'চাপ'টি আসে মূলত: মোটা অংকের অর্থের বিনিময়ে। আশরাফুল আলমের পক্ষে একটি শক্তিশালী সিন্ডিকেট কাজ করে। আশরাফুল আলম এবং তার স্ত্রীকে দুদকের 'দায়মুক্তি সনদ' পাইয়ে দিতে ঘাটে ঘাটে ঢালা হয় এই অর্থ। এই লেনদেন সম্পন্ন হয় দুদকের বাইরে। যদিও কোনো অনৈতিক লেনদেনেরই প্রমাণ থাকে না। কিন্তু মামলা থেকে অব্যাহতি পেতে ঘুষ দিয়েছেন- পুলিশের একজন সাবেক কর্মকর্তার এমন দাবির ভিত্তিতে সংস্থার একজন সিনিয়র পরিচালকের বিরুদ্ধে মামলা করেছে কমিশন। যদিও 'লেনদেনকৃত ঘুষ' এর অর্থ আলামত হিসেবে জব্দ করা হয়নি। আশরাফুল আলমও ২০ কোটি টাকার বিনিময়ে দুদকের দায়মুক্তি সনদ খরিদ করেছেন- মর্মে গুঞ্জন রয়েছে। এ লেনদেনের কোনো অডিও ক্লিপ নেই। কিন্তু ক্লু হিসেবে দুই ব্যক্তির মাঝে সম্পাদিত একটি 'অঙ্গীকারনামা'কে ভিত্তি ধরা যেতে পারে। এটি স্বাক্ষরিত হয় আশরাফুল আলমের শ্যালক সদরুল ইসলাম সায়মন এবং জনৈক 'রিন্টু আনোয়ার'র মধ্যে। এটি সম্পাদিত হয় ২০১৯ সালের ১০ নভেম্বর।

এতে বলা হয়, 'আমি মো. সদরুল ইসলাম সায়মন (জাতীয় পরিচয়পত্র নং; ১৯৮৩২৬৯২৫৩০০৭২৫২৩), মো. আশরাফুল আলম পিতা-মৃত কাশেম আলী আকন্দ, মাতা আমেনা খাতুন, জাতীয় পরিচয়পত্র নং (স্মার্ট কার্ড : ১৯২২৪৬৩৯২০) অতিরিক্ত প্রধান প্রকৌশলী, গণপূর্ত অধিদফতর (রংপুর জোন), গৃহায়ণ ও গণপূর্ত মন্ত্রণালয়, ফ্ল্যাট নং-৫/এ, বাড়ি নং-২১, রোড-৪৯, গুলশান-২, ঢাকা, এর প্রধান প্রকৌশলী হিসেবে পদোন্নতিতে সহযোগিতা করার জন্য জনাব রিন্টু আনোয়ার, ৩৪, বিজয়নগর, আমি মো. আশরাফুল আলমের সম্মতি, অনুরোধ এবং সিদ্ধান্ত অনুযায়ী রিন্টু আনোয়ারের অফিস ৩৪, বিজয়নগর, চতুর্থ তলার সভায় উপস্থিত হয়ে আমার নামীয় অ্যাকাউন্টের ২০ কোটি টাকার (বিশ) তারিখবিহীন একটি চেক অগ্রীম হিসেবে উক্ত অঙ্গীকারনামার সাথে নিম্নে স্বাক্ষরকারীগণের উপস্থিতিতে নিজ হাতে স্বাক্ষর করে প্রদান করিলাম। যাহার চেক নং-১০৩৮৯৬, রূপালী ব্যাংক লিমিটেড, লক্ষ্মীপুর শাখা, রাজশাহী।

উল্লেখ্য যে, প্রধান প্রকৌশলী হিসেবে মো. আশরাফুল আলমের পদোন্নতি চিঠি প্রাপ্তির ৭ কার্যদিবসের মধ্যে তারিখ দিয়ে জনাব রিন্টু আনোয়ার উক্ত চেক নগদায়ন করে নিতে পারিবেন এবং এখানে আরও উল্লেখ্য যে, আমার উক্ত চেক মো. আশরাফুল আলমের পদোন্নতির চিঠি প্রাপ্তির ৭ কার্যদিবসের মধ্যে যদি নগদায়ন না করে দেই, তবে জনাব রিন্টু আনোয়ার আমার প্রদেয় উক্ত চেকটি 'ডিজ অনার' করিয়ে আমার বিরুদ্ধে প্রয়োজনীয় আইনগত ব্যবস্থা গ্রহণ করতে পারবেন। আমি সজ্ঞানে সুস্থ মাথায় নিম্নলিখিত সাক্ষীগণের সামনে স্বাক্ষর প্রদান করলাম।'

'অঙ্গীকারনামা'য় স্বাক্ষরকারী সদরুল ইসলাম সায়মনের ঠিকানা 'বাড়ি-৮/৩, রোড-৪/এ, ৫ম তলা, ধানমন্ডি আবাসিক এলাকা, ঢাকা' উল্লেখ করা হয়। আশরাফুল আলমের ঠিকানা উল্লেখ করা হয়- রোড-৪৯, বাড়ি-২১, ফ্ল্যাট নম্বর ৫/এ। দুদকের অনুসন্ধান প্রতিবেদনের তথ্য অনুযায়ী, এই ফ্ল্যাটটির মালিক আশরাফুল আলমের স্ত্রী সাবিহা আলম।

সংশ্লিষ্ট সূত্রটি জানায়, কথিত এই অঙ্গীকারনামায় 'পদোন্নতি'র বাবদ লেনদেনের কথা উল্লেখ থাকলেও এটি সম্পাদিত হয়েছে দুদক থেকে দায়মুক্তির 'প্যাকেজ ডিলিং'কে আড়াল করার লক্ষ্যে পদোন্নতির বিষয়টি উল্লেখ করা হয়েছে। আশরাফুল আলমের শ্যালক সদরুল ইসলাম সায়মন। সায়মনের বন্ধু রিন্টু আনোয়ার। রিন্টু আনোয়ার নিজেকে লেখক, সাংবাদিক ও সংগঠক হিসেবে পরিচয় দেন। একসময় তিনি জাতীয় পার্টি করতেন। এ দল থেকে তিনি এমপি নির্বাচনও করেছেন।

আশরাফুল আলম দম্পতির সম্পদ অনুসন্ধান সম্পর্কে জানতে চাইলে দুদক মহাপরিচালক (বিশেষ অনু:-তদন্ত) সাঈদ মাহবুব ইনকিলাবকে বলেন, এটি এখনও অনুসন্ধানাধীন। ২০ কোটি টাকার 'প্যাকেজ ডিলের' আওতায় আশরাফুল আলম দম্পতিকে অব্যাহতি দেয়া হচ্ছে, দুদকের বেশ কয়েকজন কর্মকর্তা এ অর্থের ভাগ পেয়েছেন- এ প্রসঙ্গে তিনি বলেন, বিষয়টি আমার জানা নেই। এদিকে 'অঙ্গীকারনামা'য় উল্লেখিত সায়মনের মোবাইল নম্বরটি বন্ধ পাওয়া যায়। হাউজিং অ্যান্ড বিল্ডিং রিসার্চ ইনস্টিটিউটের মহাপরিচালক প্রকৌশলী আশরাফুল আলমের সঙ্গে এ বিষয়ে কথা বলতে একাধিকবার ফোন করা হয়। ক্ষুদে বার্তা পাঠানো হয়। এতে তিনি সাড়া দেননি।

2. It may be noted that in view of the above facts and circumstances, this court, by order No. 01 dated 08.03.2021, directed the Chairman, Anti-Corruption Commission to explain its position in this regard and to submit a report as to whether the allegation of discharge/release of Engineer Ashraful Alam, Director General of Housing and Research Institute and his wife from the inquiry proceeding in exchange of a huge amount of money, are true or not, before this court on or before 15.04.2021 by way of affidavit.

3. Further, at the prayer of ACC, the Respondent No.2, Mr. Syed Ahmed, the News Reporter of the Daily Inqilab was also directed to submit the papers and documents before this court by way of affidavit on or before 15.04.2021 on which he made the reporting on the discharge/release of Engineer Ashraful Alam, Director General of Housing and Research Institute and his wife from the inquiry proceeding in exchange of a huge amount of money in the news report published in the Daily Inqilab on 02.03.2021.

4. This court, by another order dated 14.02.2022, also directed the Anti-Corruption Commission to submit the inquiry report before this court on or before 27.02.2022 as per order No.01 dated 08.03.2021 of this court. Side by side, at the prayer of ACC, the Respondent No.02, the News Reporter of the Daily Inqilab was also directed to submit his sources of information before this court on or before 27.02.2022 as per order No.01 dated 08.03.2021 of this court.

5. On 02.02.2022, the Respondent No.3, Engineer Ashraful Alam, was added as Respondent No.3 to this Suo Muto Rule following an application for addition of party filed by him.

6. This court, by an order dated 13.04.2022, directed the Anti-Corruption Commission to transmit and produce the records of the inquiry proceeding in respect of Respondent No.03, Engineer Ashraful Alam and his wife before this court on or before 27.04.2022. Following the order of this court, the Respondent No.02, the News Reporter of the Daily Inqilab submitted affidavit-in-reply dated 10.02.2022 and also submitted supplementary-affidavit dated 12.04.2022 before this Court.

7. Mr. Md. Khurshid Alam Khan, the learned Senior Advocate appearing on behalf of the Anti-Corruption Commission, has filed affidavit-in-compliance dated 06.03.2022 before this court.

8. It may be noted that after holding inquiry into the allegations brought against the Respondent No.3 and his wife, the Inquiry Officer submitted inquiry report on 22.02.2021 recommending release of Respondent No.3 and his wife from the inquiry proceeding but after issuance of our order, the Anti-Corruption Commission formed a 3-member inquiry team on 15.02.2022 and started a fresh inquiry into the allegations brought against the Respondent No.03 and his wife.

9. At the very outset, Mr. Md. Khurshid Alam Khan, the learned Senior Advocate appearing on behalf of the Anti-Corruption Commission, submits that the Respondent No.02 by making publication of the news report in the newspaper has offended, defamed and tarnished the image of the Anti-Corruption Commission and also challenged the efficacy of the Anti-Corruption Commission which is no doubt a mala fide act to malign the Anti-Corruption Commission which is punishable and he may be punished in accordance of law.

10. He further submits that this sort of publication of news report made by the Respondent No.02 is not only yellow journalism but also a mafia journalism; publication of this sort of news report maligning the image of the Anti-Corruption Commission can't be spared at all; so, it should be brought under the strict supervision of this court and he should be punished in accordance with law.

11. From the news report, Mr. Khan reads out that **গুঞ্জন উঠেছে, এ অর্থ সংস্থাটির অনুসন্ধান কর্মকর্তা, সংশ্লিষ্ট উপ-পরিচালক, পরিচালক, মহাপরিচালক থেকে শীর্ষ পর্যায় পর্যন্ত ভাগবাটোরা হয়েছে। দুর্নীতির দায় থেকে অব্যাহতি দিতে শুরু থেকে শেষ পর্যন্ত ঘাটে ঘাটে সক্রিয় ছিল একটি শক্তিশালী সিন্ডিকেট। এ কারণে আশরাফুল দম্পতির বিরুদ্ধে মামলা রুজুর সুপারিশ করেও সেটি প্রত্যাহার হয়ে যায়।**

সুপারিশ করা হয় অভিযোগ থেকে অব্যাহতি দানের। অব্যাহতি দানের সুপারিশ সম্বলিত প্রতিবেদনটি কমিশনে জমা পড়ে গত ২৪ ফেব্রুয়ারি। প্যাকেজ ডিলের আওতায় বিদায়ী কমিশনকে দিয়েই অনুসন্ধানের সমাপ্তি ঘটাতে এখন তোরজোড় চলছে। সর্বশেষ তথ্য অনুযায়ী, গত রোববার একজন কমিশনার দায়মুক্তির ওই ফাইলে স্বাক্ষর করেছেন বলে জানা গেছে। and then submits that this sort of news report is totally false, fabricated, manufactured and has no basis at all; this kind of news report is imaginary and has been published with a view to scandalizing and undermining the Anti-Corruption Commission; so, this matter should not be taken lightly rather it should be taken and dealt with very strictly and that the reporter and the concerned newspaper may be punished with necessary punishments.

12. He lastly submits that if this sort of news report is allowed to publish in the newspaper, in that case, the tendency to publish this sort of news report in the newspaper will increase day by day with a view to defaming and undermining the sensitive institutions and organizations such as the Anti-Corruption Commission.

13. Mr. Khan, in support of his contentions, has referred to a decision taken in the case of Advocate Md. Riaz Uddin Khan vs. Mahmudur Rahman reported in 63DLR(AD)(2011)29 and taken us through paragraph Nos.68, 69, 80, 83 and 89 of the decision.

14. In paragraph No.68 of the above decision, it has been categorically observed that "Any expression of opinion would not be immune from liability for exceeding the limits under the law of contempt of court or the constitutional limitations either under the law of defamation or contempt of court or the other constitutional limitations under Article 39(2). If a citizen, therefore, in the garb of exercising right of free expression under Article 39(2)(a) and (b), tries to scandalise the court or undermines the dignity of the court or makes abusive words, then the court is under duty to exercise its jurisdiction under Article 108. No person has any right to flout the mandate of law or the authority of the court for alleged establishment of law under the cloak of freedom of thought and conscience or freedom of speech and expression or the freedom of the press guaranteed by Article 39. Such freedom is subject to reasonable restrictions imposed by the law."

15. In agreement with the submissions of the Anti-Corruption Commission, Mr. Md. Shahidul Islam Khan Liton, the learned Advocate appearing on behalf of the Respondent No. 03, submits that the news report in question published in the newspaper has affected the right, name and fame of the Respondent No. 03 and his wife since the matter is under inquiry and it has also influenced and affected the inquiry proceeding and for this reasons, this matter may

be disposed of with appropriate observation and direction so that the inquiry proceeding is not influenced in any way and in any manner.

16. He next submits that the news report itself is fake, fabricated and manufactured one and this sort of news report should not be published in the newspaper while an inquiry proceeding is going on against the Respondent No. 03 and his wife; so, the Respondent No. 02 should not have published this sort of news report in the newspaper and that being the reason, this matter may be disposed of with appropriate direction so that the inquiry proceeding is concluded following the appropriate provisions of laws and rules.

17. He lastly submits that the news report has certainly tarnished the image of the Respondent No.03 along with his wife and the Anti-Corruption Commission as well and on this landscape, this matter may be disposed of with necessary observation and direction.

18. On the other hand, Mr. Mohammad Shishir Manir, the learned Advocate appearing on behalf of the Respondent No.02, categorically submits that the Respondent No.02 being a senior journalist having 30 years of experience has produced so many news reports basing on which the authority concerned has come to know about the situation happening around; he was the President of Law Reporters Forum and he is a member of National Press Club, Dhaka Reporters Unity (DRU) and Reporters against Corruption (RAC); he worked with mainstream national daily newspapers like the Daily Jugantor, the Daily Orthonite Pratidin and the Daily Bangladesher Khobor; he worked as a television anchor of different talk-shows; he is a rhymer and has published 3 (three) rhyme books; he published many sensational and investigative news reports; he has been covering news reports of the Anti-Corruption Commission, Judiciary, Law Ministry and Law Commission. During his 20 years of working in court beats, he covered many sensational cases including Bangabandhu murder case; he has a remarkable track record of serving this nation and he produced this report with the intention to safeguard potential corruption; in fact, he is professionally duty bound to bring to the notice of the authority any irregularities/corruption happened or likely to happen in the society; he performed his professional commitment with sincerity and integrity and he should be praised for that; because of his report, the Anti-Corruption Commission formed a 3-member inquiry committee in order to conduct further inquiry into the offences alleged to have been committed by the added Respondent No.3 and his wife; the Anti-Corruption Commission should praise him rather than blaming him; for his investigative journalism, this Hon'ble Court issued order on 08.03.2021 and on 15.02.2022, the Respondent No. 01 passed an order to conduct further inquiry into the self-same matter forming 3-member inquiry team, which indicates that the Respondent No.01 accepted his investigative report; now, it is surprising why Respondent No.01 is repeatedly pressing to ensure punishment of the Respondent No.02; in one hand, Respondent No.01 accepted the news report for conducting further inquiry into the matter and in another hand, the Respondent No.1 is pressing for appropriate punishment; it is a classic dichotomy.

19. He next submits that the purpose of Anti-Corruption Commission is to prevent corruption and other corrupt practices in the country and for conducting inquiry and investigation of corruption and other specific offences and for the matters incidental thereto; the Respondent No.02, in fact, provided clue for conducting inquiry into the offences alleged to have been committed by the added Respondent No.3 and his wife; hence, the purpose of the Anti-Corruption Commission and the Respondent No.2 is on the same page; they are concomitant side of the same coin; they can work hand to hand; there is no earthly reason that the Respondent No.01 will blame the experienced journalist who can provide

reliable and trustworthy information; the Respondent No.1 should come up with praise worthy words for Respondent No.2; perhaps that situation would best serve this nation against corruption drive.

20. He then submits that the source of information is a property of a journalist; he deals with information and maintains sources carefully and reasonably; information is the only raw material based on which a journalist provides assistance to the process of rule of law and democracy; therefore, across the globe, the urgency of maintaining secrecy of the source of information is recognized; nowhere of the world, the journalists can be forced to disclose the source of information.

21. He candidly submits that in our jurisdiction, the Press Council Act, 1974 (Act No.XXV of 1974) has specially provided protection to the journalists. Section 13 (2) of the said Act specially provides as under:

> "Nothing in sub-section (1) shall be deemed to compel any newspaper, news agency, editor or journalists to disclose the source of any news or information published by that newspaper or received or reported by that news agency, editor or journalist."

22. He additionally submits that since the law of the land has provided mandate to protect the source of information, so long this provision exits, there is no way to force them to disclose the source of information wherefrom journalists received appropriate information.

23. He vigorously submits that on 22.06.2011, our Parliament enacted another legislation titled 'the Public-Interest Information Disclosure Act (Provide Protection), 2011 (Act No.07 of 2011) which has encouraged the whistleblowers to ventilate information against corruption. Section 5 of the said Act, has specifically provided protection and inspiration to the persons who would blow the whistle against potential corruption.

24. He strongly submits that upon a cursory view of the Act, it is crystal clear that the law requires to reward/encourage those who as insiders would take initiative to share information around him for the purpose of disclosing corruption scam and irregularities.

25. He strenuously submits that in the case of **Manohar Lal Sharma vs. Union of India and Others,** reported in AIR 2021 SC 5396 (widely known as Pegasus Case), the Supreme Court of India felt necessity to protect the source of information of journalists. The relevant portion of said Judgment as laid down in paragraph No.40 is quoted below:

> "An important and necessary corollary of such a right is to ensure the protection of sources of information. Protection of journalistic sources is one of the basic conditions for the freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest."

26. He earnestly submits that admittedly, democracy is one of the basic structures of our Constitution; freedom of press is considered as the fourth pillar of democracy; investigative journalism is the integral part of freedom of press guaranteed under Article 39 of the Constitution; we all should work together to uphold the freedom of press, failing which the spirit of democracy will be at stake; Article 39 of the Constitution has guaranteed the freedom of thought and conscience; more specifically, Article 39(2)(b) has clearly mentioned the term 'freedom of the press'; investigative journalism is the necessary corollary of such freedom.

27. He frankly submits that the Respondent No. 02 works as watchdog and in appropriate situation, they ventilate information not to undermine any person but to serve the cause of justice.

28. He with reference to Section 12 of The Press Council Act, 1974, submits that if the news report published by the Respondent No.2 offends, defames and tarnishes the image of the Anti-Corruption Commission and the Respondent No. 3, they may file a complaint before the Press Council and if the Press Council has reason to believe that a newspaper or news agency has offended against the standard of journalistic ethics or public taste or that an editor or a working journalist has committed any professional misconduct or a breach of the code of journalistic ethics, the Council may, after giving the newspaper or news agency, the editor or journalist concerned an opportunity of being heard, hold an inquiry in such manner as may be provided by regulations made under this Act, and if it is satisfied that it is necessary so to do, it may, for reasons to be recorded in writing, warn, admonish or censure the newspaper, the news agency, the editor or the journalist, as the case may be.

29. Summing up all the submissions, Mr. Mohammad Shishir Manir, the learned Advocate appearing on behalf of the Respondent No. 02, lastly submits that for the publication of the news report in the newspaper, he should not be blamed rather he should be appraised for his works because he is working to unearth the hidden corruptions which are available in the society; so, under the circumstances, the Respondent No. 02 should be free and absolved of the alleged charge and/or allegation that he committed wrong and tarnished the image of the Anti-Corruption Commission by making publication of news report in the newspaper.

30. Mr. A.K.M Amin Uddin, the learned Deputy Attorney-General appearing for the respondents, with reference to sections 12 and 13 of the Press Council Act, 1974, submits that if the Respondent No.2, by publishing the news report, offends the Respondent Nos.1 and 3, there is a provision of filing complaint before the Press Council and necessary action may be taken against him by the Press Council itself and as such, this matter may be disposed of in accordance with law giving necessary observation and direction.

31. He lastly submits that since the inquiry is going on against the Respondent No. 03 and his wife, so, this matter may be disposed of in accordance with law with a direction upon the Respondent No.1 to conclude the inquiry as early as possible.

32. We have gone through the news report published in the newspaper and the contents thereof. We have also considered all the facts and circumstances of the case and the submissions advanced by the learned Advocates and the learned Deputy Attorney-General for the respective parties.

33. On going through the materials on records, it is evident that following allegations of acquisition of properties by the Respondent No.3 and his wife, which are claimed to be disproportionate to their known sources of income, on 08.01.2020, the Anti-Corruption Commission issued notices upon them for submitting wealth-statement before the Anti-Corruption Commission. Pursuant to the notices, the Respondent No. 3 and his wife submitted wealth-statement before the Anti-Corruption Commission. On 11.03.2020, the Anti-Corruption Commission appointed an inquiry officer to assess/enquire into the statements of wealth submitted by the Respondent No. 3 and his wife. Having completed the inquiry, an inquiry report was thereupon submitted on 22.02.2021 before the Anti-Corruption

Commission holding the view that the Respondent No.3 and his wife acquired both movable and immovable properties by their valid sources of income recommending that no prima-facie evidence was found against the allegations brought against the Respondent No.3 and his wife.

34. Against this backdrop, on 02.03.2021, the Respondent No.02 published a report in the Daily Inqilab stating, inter-alia, that an inquiry against the Respondent No. 3, Engineer Ashraful Alam and his wife has been terminated by obtaining a huge amount of money by the officers of the Anti-Corruption Commission.

35. On 08.03.2021, Mr. A.K.M Amin Uddin, the learned Deputy Attorney-General brought this matter to the notice of this court. Then, this court, by order No. 01 dated 08.03.2021, issued an order directing the Chairman of the Anti-Corruption Commission to explain its position in this regard and to submit a report as to whether or not the allegations published in the newspaper are true and side by side the Respondent No.02, Mr. Syed Ahmed, the News Reporter of the Daily Inqilab was also directed to submit the papers and documents if any before this court, at the prayer of ACC, on which he made the reporting of corruption and releasing the Respondent No.3 and his wife from the inquiry proceeding.

36. Following the above order and the subsequent orders, Mr. Mohammad Shishir Manir, the learned Advocate appearing on behalf of the Respondent No. 02 has submitted affidavit-in-reply and supplementary affidavit before this court and Mr. Md. Khurshid Alam Khan, the learned Senior Advocate appearing on behalf of the Anti-Corruption Commission has also submitted affidavit-in-compliance before this court.

37. As per submissions of the learned Advocate for the Anti-Corruption Commission, the Respondent No.2 by publishing the news report in the Daily Inqilab has offended, defamed and tarnished the image of the Anti-Corruption Commission and also challenged the efficacy of the Anti-Corruption Commission which is no doubt a mala fide act to malign the Anti-Corruption Commission which is punishable and he may be punished in accordance of law. On the flip side, the arguments of the learned Advocate for the Respondent No. 2 are that the Respondent No. 2 being duty bound professionally and legally published the news report in the newspaper with regard to the irregularities and corruption with a view to bringing this matter to the notice of the authorities and the public as a whole and that for this reason, the Respondent No. 2 should be appreciated rather than being blamed. In the context of submissions and counter-submissions, now we want to discuss about the scopes and privileges of the newspapers/media and journalists in publishing news report in the newspaper as underlined in the Constitution and other laws.

38. It is worthwhile to mention that Article 39 of the Constitution has guaranteed freedom of thought and conscience. More specifically, Article 39 (2)(b) has clearly mentioned about the term of ‘freedom of the press’. Furthermore, Article 39 of the People’s Republic of Bangladesh guarantees freedom of press and the right of every citizen to freedom of speech and expression subject to certain exceptions. That such exceptions are namely (i) in the interests of the security of the State, (ii) friendly relations with foreign states, (iii) public order, decency or morality, or (iv) in relation to contempt of court, (v) defamation or (vi) incitement to an offence. Apart from the above, investigative journalism is the necessary corollary of such freedom. Investigation by a journalist includes research, gathering information from different sources, observation and due diligence. In doing so, the journalists act as the fourth pillar of democracy and consequently, serve the nation. They are the part and

parcel of a democratic process. In a modern world, right to information is being treated as one of the pre-conditions for expression of opinion. Journalists act as helping hands for ensuring rule of law and democracy which have been recognized as the basic structure of the Constitution. They work as watchdogs and in appropriate situation; they ventilate information not to undermine any person but to serve the cause of justice. In a democracy, there should be an efficient and fearless press to act as watchdog of democracy. Newspapers make people aware of every field of society. In the present age, corruption is present in all walks of life. Newspapers play an important role in highlighting the menace of corruption and thereby the people are made aware of the corrupt practices if any prevalent in various state-run departments, organisations, agencies and private organisations. But of course, yellow Journalism is always disapproved, discarded and not appreciated at all. newspaper should concentrate on giving only the true picture of the society. Corruption is now a universal phenomenon. It is as old as our human society. The corrupt people are eating out the possibility and dream of the Nation dreamt by the father of the Nation Bangabandhu Sheikh Mujibur Rahman and the people of this country. The poorer and marginalised section of the people suffers the most for corruption. United Nations Convention against corruption was adopted in 2003 with a view to preventing, investigating and prosecuting the corrupt people engaged in corruption. United Nations Convention against corruption has highlighted the preventive measures, criminalization and law enforcement measures, international cooperation and asset recovery. An entire chapter of the Convention is dedicated to prevention, with measures directed at both the public and private sectors. The Convention requires countries to establish criminal and other offences to cover a wide range acts of corruption, if these are not already crimes under domestic law. Countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders. A highlight of the Convention is the inclusion of a specific chapter on asset recovery, aimed at returning assets to their rightful owners, including countries from which they had been taken illicitly. To us, the corrupt people are responsible to breed, create and sustain an atmosphere of corruption with impunity. Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. Under the aforesaid discussions, our considered view is that the media and the journalists are constitutionally and legally authorised to publish news reports on corruption and corrupted practices along with money laundering if any including other important news on the matters of public interest.

39. In view of the submissions of the parties as noted above, now we want to discuss about the laws and legal decisions which have given protection to the journalists in not disclosing the source of information.

40. Section 2(5) of the Public-interest Information Disclosure Act (Provide Protection), 2011, provides that "whistleblower" means the person who discloses the public interest information to a competent authority, Section 4 of the aforesaid Act contemplates that any whistleblower can make public interest disclosure, if considered reasonable, to a competent authority and Section 5(1) of the aforesaid Act indicates that if any whistleblower discloses any authentic information under sub-section (1) of Section 4, his identity cannot be divulged without his consent."

41. It may be noted that in the case of **Manohar Lal Sharma vs. Union of India and Others,** reported in AIR 2021 SC 5396 (widely known as Pegasus Case), the Supreme Court of India felt necessity to protect the source of information of journalists. The relevant portion of said Judgment as laid down in paragraph No.40 is quoted below:

> "An important and necessary corollary of such a right is to ensure the protection of sources of information. Protection of journalistic sources is one of the basic conditions for the freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on the matters of public interest."

42. According to Section 20(2) of the Press Council Act, 1974, no suit or other legal proceeding shall lie against any newspaper in respect of the publication of any matter therein under the authority of the Council. As per submissions of Mr. Mohammad Shishir Manir, the Respondent No. 02 being a "working journalist" for the Daily Inqilab may be afforded the protection of the provisions of the Press Council Act, 1974 and be dispensed with the submission of the papers and documents as required by this court.

43. The Rule 10 of the জনস্বার্থ সংশ্লিষ্ট তথ্য প্রকাশ (সুরক্ষা প্রদান) বিধিমালা, ২০১৭ provides that secrecy shall have to be maintained while using any published public interest information so that the identity of the informant or information source is not disclosed. Therefore, the required disclosure of the papers and documents by Respondent No. 02, may be violative of the Rule 10 of the জনস্বার্থ সংশ্লিষ্ট তথ্য প্রকাশ (সুরক্ষা প্রদান) বিধিমালা, ২০১৭।

44. A reference to Section 2(4) of the Public-interest Information Disclosure Act (Provide Protection), 2011 and Rules, 2017 provide for protection of publisher/news agency of information of public interest relating to a) irregular and unauthorized use of public money; b) mismanagement of public resources; c) misappropriation or misuse of public money or resources; d) abuse of power or maladministration; e) committing criminal offense or illegal or prohibited acts; f) a conduct that is harmful or dangerous for public health, safety or to the environment; or; g) corruption. Since there are efficacious mechanism for the protection of journalistic information sources used for publication of public interest information, the required disclosure of the papers and documents by Respondents No.02 may be violative of the provisions of the Public-interest Information Disclosure Act (Provide Protection), 2011 and Rules, 2017.

45. Section 28B of the Anti-Corruption Commission Act, 2004 provides that no information given by any person about any offence under this Act and specified in its Schedule be admitted as an evidence in any civil or criminal court, or no witness shall be allowed or compelled to disclose name, address and identity of the informant, or cannot be allowed to present or disclose any information which discloses or may disclose the identity of the informant. Therefore, the required disclosure of the papers and documents by Respondent No. 02, at the prayer of ACC, may be violative of the above provision of the Anti-Corruption

Commission Act, 2004 in view of the above statement of law and analogical reasoning as well.

46. As per submission of the learned Advocate for the Respondent No.02, the Supreme Court is oath bound to protect the constitution and laws of the country including the fundamental rights enshrined in our Constitution and is guardian to protect the freedom of press. In this regard, this Court may direct the relevant authorities to eliminate the corruption from the country upholding the freedom of press and protecting the source of information of the journalists.

47. It may be noted that the lack of protection to the whistleblower is one of the contributors to corruption. In this regard, our High Court Division in the case of Iqbal Hassan Mahmood alias and Iqbal Hassan Mahmood Tuku vs. Government of Bangladesh and others, reported in 60 DLR (HC) (2008)88, observed in paragraph No.183 as follows:

> "In order to succeed in the campaign against corruption, we must first find out the factors contributing to corruption or failing in the prevention of corruption. In various international researches, conditions found favourable to corruption are lacking control over accountability of the government, over-size of the government and/or excessive presence of the governance in the life of the citizens, absence of access to the information of the decision making process at the high level of the government, absence of democracy or dysfunctional democracy, lacking civil society and non-governmental organizations which could monitor the government, weak rule of law, weak legal profession, weak judicial independence and lacking protection of the whistle blowers, etc are found to be the main contributors to corruption."

48. So, under the above facts and circumstances and the propositions of law, we have no hesitation to hold the view that the laws have given protection to the journalists in not disclosing the source of information.

49. Now we want to make discussion in respect of punishment of the journalist for the publication of the news report since the same, as per submission of Mr. Khan, has offended, defamed and scandalised the Anti-Corruption Commission.

50. As per Mr. Khan, the news report published by the Respondent No.2 is totally false, fabricated and manufactured one and has no basis at all and this sort of news is imaginary and has published with a view to scandalising and undermining the Anti-Corruption Commission and as such, this matter should not be taken lightly rather it should be taken and dealt with very strictly and that the reporter and the concerned newspaper may be punished with necessary punishments.

51. In order to address this issue, we want to refer to Section 12 of the Press Council Act, 1974, which runs as under:

Section 12(1) of the aforesaid Act contemplates that where, on receipt of a complaint made to it or otherwise, the Council has reason to believe that a newspaper or news agency has offended against the standard of journalistic ethics or public taste or that an editor or a working journalist has committed any professional misconduct or a breach of the code of journalistic ethics, the Council may, after giving the newspaper or news agency, the editor or journalist concerned an opportunity of being heard, hold an inquiry in such manner as may be provided by regulations made under this Act, and if it is satisfied that it is necessary so to do, it may, for reasons to be recorded in writing, warn, admonish or censure the newspaper, the news agency, the editor or the journalist, as the case may be.

Section 12(2) of the aforesaid Act provides that if the Council is of opinion that it is necessary or expedient in the public interest so to do, it may require any newspaper to publish therein, in such manner as the Council thinks fit, any report relating to any inquiry under this section against a newspaper or news agency, an editor or a journalist working therein, including the name of such newspaper, news agency, editor or journalist.

Section 12(4) of the aforesaid Act indicates that the decision of the Council under sub-Section (1) or Sub-Section (2), as the case may be, shall be final and shall not be questioned in any court of law.

Section: 13(1) of the aforesaid Act suggests that for the purpose of performing its functions or holding any inquiry under this Act, the Council shall have the same powers throughout Bangladesh as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908 (V of 1908), in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of persons and examining them on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavit;
(d) requisitioning any public record or copies thereof from any court or office;
(e) issuing commissions for the examination of witnesses or documents;
(f) any other matter which may be prescribed.

Section 13(2) of the aforesaid Act speaks out that nothing in sub-section (1) shall be deemed to compel any newspaper, news agency, editor or journalist to disclose the source of any news or information published by that newspaper or received or reported by that news agency, editor or journalist.

52. Apart from the above, as per submission of Mr. Khan, the reporter may be punished since the matter is an offence. It may be noted that this matter is not a contempt proceeding. The court simply issued an order directing the Anti-Corruption Commission to explain as to whether or not the reporting on corruption and irregularities that has been made by the reporter, the Respondent No.02 is correct/true.

53. It is also evident from the record that immediately after passing the order by this court, the Anti-Corruption Commission has taken the initiative to start a fresh inquiry into the matter which was terminated earlier releasing the Respondent No.3 and his wife from the

previous inquiry proceeding. Since it is not a contempt matter, so the question of imposing punishment on the reporter does not come within the ambit of contempt of this court.

54. It stems out from the record that the previous inquiry proceeding was not conducted following the provisions of the Anti-Corruption Commission Manual, 2018.

55. It is pertinent to note that the Constitution has not given any impunity to any person except immune from arrest and prosecution in respect of any criminal offence. There is neither any constitutional nor any statutory or legal bar to conducting an inquiry by the Anti-Corruption Commission in respect of allegation of commission of offence mentioned in the schedule of the Anti-Corruption Commission Act, 2004.

56. Moreover, Section 17(c) of the Anti-Corruption Commission Act, 2004 empowers the Anti-Corruption Commission to start inquiry with regard to any type of corruption.

57. Considering the facts and circumstances of the case, the submissions advanced by the learned Advocates and the learned Deputy Attorney-General for respective parties and the legal propositions of law cited and discussed above, the matter at hand may is disposed of in the following manner:-

(1) Since an inquiry proceeding against the Respondent No.03 and his wife has already been started, that will continue in accordance with law subject to the condition that the officers who conducted the inquiry earlier will not be allowed to remain in the fresh inquiry;

(2) The Anti-Corruption Commission shall conclude the inquiry proceeding initiated against the Respondent No.3 and his wife within 6 (six) months from the date of receipt of this judgment and order following the provisions of the Anti-Corruption Commission Act, 2004, the Anti-Corruption Commission Rules, 2007 and the Anti-Corruption Commission Manual, 2018.

4) If the Respondent Nos.01 and 03 are offended, maligned and undermined by the news report of the news reporter of the Daily Inqilab and the newspaper, they being aggrieved by the same may lodge a complaint before the Press Council for appropriate remedies whatsoever.

58. **With the aforesaid observation and direction, this matter is disposed of.**

59. The Anti-Corruption Commission is directed to proceed with the fresh inquiry proceeding in accordance with law and submit affidavit of compliance before this Court with the outcomes of the inquiry through the Registrar of the Supreme Court of Bangladesh, High Court Division.

60. Communicate the judgment and order to the Chairman, Anti-Corruption Commission and other respondents at once.

17 SCOB [2023] HCD 57

HIGH COURT DIVISION

(দেওয়ানী রিভিশন অধিক্ষেত্র)
সিভিল রিভিশন নং ১২৮৯/ ২০২১

বিগ বস কর্পোরেশন লিমিটেড

.... প্রতিপক্ষ--দরখাস্তকারী

-বনাম-

আর্মি ওয়েলফেয়ার ট্রাস্ট (এডব্লিউটি)

......আবেদনকারী-প্রতিবাদী

এ্যাডভোকেট ইমতিয়াজ মইনুল ইসলাম

.... প্রতিপক্ষ-দরখাস্তকারীপক্ষে

অনুপস্থিত

...... আবেদনকারী-প্রতিবাদী পক্ষে

শুনানীর তারিখঃ ১৫.০৬.২০২২, ১৯.০৬.২০২২, ২৭.০৬.২০২২, ২৫.০৭.২০২২ এবং রায় প্রদানের তারিখঃ ০৮.০৮.২০২২।

উপস্থিতঃ
বিচারপতি জনাব মোঃ আশরাফুল কামাল

Editors' Note:

এই মোকদ্দমায় প্রতিবাদীপক্ষ ১৮৮ দিন বিলম্ব মওকুফের প্রার্থণাসহ জেলা জজ আদালতে সালিশ আইনের ৪২ ধারা অনুসারে সালিশী রোয়েদাদ বাতিলের আবেদন করেন। আদালত তামাদি মওকুফ করে শুনানির জন্য দিন ধার্য করে। আদালতের আদেশে সংক্ষুব্ধ হয়ে দরখাস্তকারীপক্ষ হাইকোর্ট বিভাগে অত্র সিভিল রিভিশন মোকদ্দমাটি দায়ের করলে আদালতের সামনে প্রশ্ন উত্থাপিত হয় যে, সালিস আইন ২০০১ এর ৪২ ধারায় উল্লিখিত ৬০ (ষাট) দিন সময়সীমা অতিক্রান্ত হওয়ার পর কোন পক্ষ বিলম্ব মওকুফের আবেদনসহ সালিশী রোয়েদাদ বাতিলের আবেদন করলে আদালত কর্তৃক তা মঞ্জুরের আইনগত কোনো সুযোগ রয়েছে কি না? হাইকোর্ট বিভাগ সালিস আইনের ৪২ ধারা এবং তামাদি আইনের ৫ ও ২৯ ধারা বিশ্লেষণ করে এই সিদ্ধান্তে উপনীত হয় যে, বিশেষ আইনে ভিন্নতর তামাদির মেয়াদের বিধান সুনির্দিষ্ট থাকলে তামাদি আইনের ২৯(২) ধারা মোতাবেক তামাদি আইনের ৫ ধারা সেক্ষেত্রে প্রযোজ্য হবে না। পরিণামে হাইকোর্ট বিভাগ রুলটি চূড়ান্ত করে জেলা জজ আদালতের আদেশ বাতিল করে।

Key Words:

সালিশ আইন, ২০০১ এর ৪২ ধারা; তামাদি আইন ১৯০৮ এর ৫ ও ২৯ ধারা;

তামাদি আইনের ৫ ধারাঃ

ধারা ৫ সহজ সরল পাঠে এটি কাঁচের মত স্পষ্ট যে, কোন আপীল বা রায় পুনর্বিচার বা পুনরীক্ষণের দরখাস্ত বা আপীল করার অনুমতি প্রার্থনার দরখাস্ত বা অন্য কোন দরখাস্ত, যার উপর এই ধারা বর্তমানে কার্যকর অন্য কোন আইনের দ্বারা বা অধীনে প্রযোজ্য করা হয়, তার নির্দিষ্ট তামাদির মেয়াদ উত্তীর্ণ হওয়ার পর গৃহীত হতে পারে, যদি আপীলকারী বা দরখাস্তকারী এই মর্মে আদালতকে সন্তুষ্ট করতে পারে যে, নির্ধারিত মেয়াদের মধ্যে আপীল দায়ের বা দরখাস্তটি দাখিল না করার যথেষ্ট কারণ ছিল।
অর্থাৎ কোন আপীল দায়েরে, রায় পুনর্বিচার দায়েরে, পুননিরিক্ষনের দরখাস্ত দায়েরে আপীল করার অনুমতি প্রার্থনায় এবং অন্য কোন দরখাস্ত দায়েরে বর্তমানে কার্যকর কোন আইন দ্বারা বা কোন আইনের অধীন তামাদি আইনের ৫ ধারার বিধান প্রযোজ্য করা হলে তামাদির নির্দিষ্ট মেয়াদ উত্তীর্ণ হওয়ার পরও আদালতের সন্তুষ্টি সাপেক্ষে আপীল দায়ের বা দরখাস্ত গৃহীত হতে পারে।
(প্যারা ১৬, ১৭)

তামাদি আইন, ১৯০৮ এর ২৯ ধারাঃ

বিশেষ আইনে ভিন্নতর তামাদির মেয়াদের বিধান সুনির্দিষ্ট থাকলে তামাদি আইনের ধারা ২৯(২) মোতাবেক তামাদি আইনের ধারা ৫ প্রযোজ্য হবে নাঃ

কোন বিশেষ আইনে কোন মামলা, আপীল বা দরখাস্ত দাখিলের জন্য তামাদি আইন, ১৯০৮ এর প্রথম তফসিলে বর্ণিত নির্ধারিত মেয়াদ অপেক্ষা ভিন্নতর তামাদির মেয়াদের বিধান থাকলে, অর্থাৎ তামাদি আইনের প্রথম তফসিলে মামলা, আপীল বা দরখাস্ত দাখিলে যে মেয়াদ বা সময় দেওয়া সে মেয়াদ ও সময়ের পরিবর্তে ভিন্নতর তামাদির মেয়াদ বা সময় দেওয়া থাকলে তামাদি আইনের ২৯(২)(ক) মোতাবেক বিশেষ আইনের যে পরিমান সরাসরি বহির্ভূত না হবে সে পরিমান তামাদি আইনের ৪ ধারা,

তামাদি আইনের ৯ থেকে ১৮ ধারা এবং ২২ ধারার বিধান সমূহ প্রযোজ্য হবে এবং ২৯(২)(খ) মোতাবেক তামাদি আইনের ২৯(২)(ক) ধারার বিধান ব্যতীত তামাদি আইনের অবশিষ্ট বিধান সমূহ প্রযোজ্য হবে না। অর্থাৎ বিশেষ আইনে ভিন্নতর তামাদির মেয়াদের বিধান সুনির্দিষ্ট থাকলে তামাদি আইনের ধারা ২৯(২) মোতাবেক তামাদি আইনের ধারা ৫ প্রযোজ্য হবে না।

(প্যারা ২০, ২১)

সালিশ আইন, ২০০১ এর ধারা ৪২ ও তামাদী আইনের ৫, ২৯(২) ধারাঃ

ধারা ৪২ সহজ সরল পাঠে এটি কাঁচের মত স্পষ্ট যে, সালিশী রোয়েদাদ প্রাপ্তির ৬০ (ষাট) দিনের মধ্যে সংক্ষুব্ধ পক্ষকে বাংলাদেশে অনুষ্ঠিত আন্তর্জাতিক বাণিজ্যিক সালিশী রোয়েদাদ বাতিলের ক্ষেত্রে হাইকোর্ট বিভাগে এবং আন্তর্জাতিক বাণিজ্যিক সালিশে প্রদত্ত রোয়েদাদ ব্যতীত সালিশী আইন, ২০০১ এর অধীন প্রদত্ত সালিশী রোয়েদাদ বাতিলের ক্ষেত্রে জেলা জজ আদালতে আবেদন দাখিল করতে হবে। যেহেতু সালিশী আইন, ২০০১ এর ৪২ ধারার দরখাস্ত দায়েরে ৬০ (ষাট) দিন সময় প্রদত্ত হয়েছে সেহেতু তামাদী আইনের ২৯(২) ধারার বিধান মোতাবেক তামাদি আইনের ৫ ধারা প্রযোজ্য নয়। ফলে সালিশী আইন, ২০০১ এর ৪২ ধারায় বর্ণিত ৬০ (ষাট) দিন অতিবাহিত হওয়ার পর রোয়েদাদ বাতিলের দরখাস্ত আইন দ্বারা বারিত।

(প্যারা ২৩, ২৪)

রায়

বিচারপতি জনাব মোঃ আশরাফুল কামালঃ

১. প্রতিপক্ষ-দরখাস্তকারী কর্তৃক দেওয়ানী কার্যবিধির ১১৫(১) এর বিধান মোতাবেক দরখাস্ত দাখিলের প্রেক্ষিতে বিগত ইংরেজী ১৯.০৭.২০২১ তারিখে নিম্নবর্ণিতভাবে রুলটি ইস্যু করা হয়েছিলঃ

"এটি ১৯০৮ সালের দেওয়ানী কার্যবিধি ধারা ১৫১(১) মোতাবেক দায়েরকৃত একটি সিভিল রিভিশন দরখাস্ত। বিবাদী-দরখাস্তকারী পক্ষে বিজ্ঞ এ্যাডভোকেট ইমতিয়াজ মইনুল ইসলাম যুক্তিতর্ক উপস্থাপন পূর্বক প্রথমেই নিবেদন করেন যে, তর্কিত সালিশী রোয়েদাদ সংখ্যাগরিষ্ট সালিশকারী (৩ জন সালিশকারীর মধ্যে ২ জন) কর্তৃক স্বাক্ষরিত এবং ১ জন সালিশকারী স্বাক্ষর না করার কারণও রোয়েদাদে উল্লেখ করা হয়েছে বিধায় আলোচ্য সালিশী রোয়েদাদ সালিশ আইন, ২০০১ এর ৩৮(২) ধারা অনুযায়ী সম্পূর্ণ বৈধ একটি সালিশী রোয়েদাদ।

অপরদিকে, তামাদি আইন, ১৯০৮ এর ৫ ধারা মোতাবেক আপিল, রিভিউ, রিভিশন ইত্যাদির ক্ষেত্রে স্বয়ংক্রিয়ভাবে কার্যকর হলেও যেকোন বিশেষ আইনের অধীন আপীল রিভিশন বা রিভিউর ক্ষেত্রে উক্ত আইন দ্বারা সুনির্দিষ্টভাবে বলা না থাকলে তামাদি আইন উক্ত বিশেষ আইনের ক্ষেত্রে প্রযোজ্য হয় না।

বিজ্ঞ এ্যাডভোকেট ইমতিয়াজ মইনুল ইসলাম আরও নিবেদন করেন যে, সালিশ আইন, ২০০১ এর ৪২ ধারা মোতাবেক ৬০ (ষাট) দিনের মধ্যে সালিশ রোয়েদাদ চ্যালেঞ্জ করার সুযোগ প্রদান করা হয়েছে। কিন্তু উক্ত সালিশী আইন, ২০০১ এর ৪২ ধারা মোতাবেক ৬০ (ষাট) দিন অতিবাহিত হওয়ার পর তামাদি আইন ১৯০৮ এর ধারা ৫ মোতাবেক বিলম্ব মার্জনার সুযোগ প্রদান করা হয় নাই। কিন্তু বিজ্ঞ জেলা জজ, ঢাকা আইন ঘটিত ভুলের কারণে আরবিটিশন বিবিধ আবেদনটি দাখিলে তামাদি সময় মওকুফ করে আইনগত ভুল করেছেন।

উপরিল্লিখিত যুক্তিতর্কের সমর্থনে বিজ্ঞ এ্যাডভোকেট ৫২ ডি,এল,আর (এডি) ১৭৮; সিভিল আপিল নং-১/১৯৮৪ এর রায়, ৬৪ ডি,এল,আর (২০১২) ২৪৫ সিদ্ধান্ত সমূহ উপস্থাপন করেন।

অত্র সিভিল রিভিশন দরখাস্ত এবং এর সাথে সংযুক্ত সকল সংযুক্তি বিস্তারিতভাবে পর্যালোচনা করা হলো। বিজ্ঞ এ্যাডভোকেট ইমতিয়াজ মইনুল ইসলাম এর যুক্তিতর্ক শ্রবণ করা হলো।

নথি তলব করা হোক।

জেলা জজ, ঢাকা কর্তৃক আরবিট্রেশন বিবিধ আবেদন নং ১৬৬/২০২১-এ প্রদত্ত বিগত ইংরেজী ১৩.০৬.২০২১ তারিখের আদেশ কেন রদ ও রহিত করা হবে না এবং অত্র আদালত কর্তৃক সঠিক এবং যথাযথ মনে করলে আরও অন্যান্য বা অতিরিক্ত আদেশ বা আদেশসমূহ কেন প্রদান করা হবে না মর্মে প্রতিপক্ষের প্রতি কারণ দর্শানোপূর্বক রুল নিশি জারী করা হল।

অত্র রুলটি নিষ্পত্তি না হওয়া পর্যন্ত জেলা জজ, ঢাকা আদালতে বিচারাধীন আরবিট্রেশন বিবিধ আবেদন নং ১৬৬/২০২১ এর সকল কার্যক্রম আগামী ০৬ (ছয়) মাসের জন্য স্থগিত করা হল।

অদ্যকার তারিখ হতে ০৪ (চার) সপ্তাহের মধ্যে রুলটি জারী হয়ে ফেরতযোগ্য।

তলবানা ০২ (দুই) ফর্দ ০৩ (তিন) কর্ম দিবসের মধ্যে যার ০১ (এক) ফর্দ রেজিষ্ট্রি ডাকযোগে এবং অন্য ফর্দ স্বাভাবিক নিয়মে দাখিল করার জন্য দরখাস্তকারীকে নির্দেশ প্রদান করা হলো।"

২. অত্র রুলটি নিস্পত্তির লক্ষ্যে ঘটনার সংক্ষিপ্ত বিবরণ এই যেঃ-

আর্মি ওয়েলফেয়ার ট্রাষ্ট এর সাথে দরখাস্তকারী বিগ বস কর্পোরেশন লিমিটেডের বিগত ইংরেজী ২৭.১১.২০১৮ তারিখে সম্পাদিত চুক্তির শর্ত অনুযায়ী ***"বিগ বস কর্পোরেশন লিমিটেড"*** সালিশী মোকদ্দমা নং- ০১/২০১৯ দায়ের করলে বিগত ইংরেজী ১৫.০৬.২০১৯ তারিখে উভয় পক্ষের সালিশকারীগণ (আরবিট্রেটরস) সালিশী ট্রাইব্যুনালের চেয়ারম্যানের সম্মুখে উপস্থিত থাকলে সালিশের কার্যক্রম উক্ত তারিখ থেকে শুরু হয়। অতঃপর **"আর্মি ওয়েলফেয়ার ট্রাস্ট"** তথা সালিশী মোকদ্দমার ১ম পক্ষ সময়ের দরখাস্ত করলে সালিশী ট্রাইব্যুনাল তা মঞ্জুর করে এবং বিগত ইংরেজী ১৩.০৭.২০১৯ তারিখে শুনানীর পরবর্তী তারিখ নির্ধারণ

করেন। কিন্তু বিগত ইংরেজী ১৩.০৭.২০১৯ তারিখে আর্মি ওয়েলফেয়ার ট্রাস্ট এর পক্ষে কেউ উপস্থিত না থাকায় ন্যায় বিচারের স্বার্থে সালিশী ট্রাইব্যুনাল সালিশী কার্যক্রম স্থগিত করে বিগত ইংরেজী ২৭.০৭.২০১৯ তারিখে নতুন শুনানীর তারিখ নির্ধারন করেন। অতঃপর বিগত ইংরেজী ২৭.০৭.২০১৯ তারিখে আর্মি ওয়েলফেয়ার ট্রাস্ট এর পক্ষে কেউ উপস্থিত না থাকায় পরবর্তী তারিখ বিগত ইংরেজী ০৯.০৮.২০১৯ নির্ধারন করা হয়। অতঃপর আর্মি ওয়েলফেয়ার ট্রাস্ট পক্ষের নিযুক্তিয় সালিশকারক বিগত ইংরেজী ২৯.০৭.২০১৯ তারিখে পত্রের মাধ্যমে সালিশী ট্রাইব্যুনালকে অবহিত করেন যে, তিনি ব্যক্তিগত কারণে সালিশকারক থেকে নিজের নাম প্রত্যাহার করে নিবেন। অতঃপর বিগত ইংরেজী ০৯.০৮.২০১৯ তারিখ আর্মি ওয়েলফেয়ার ট্রাষ্ট্র উপস্থিত না থাকায় পরবর্তী শুনানীর তারিখ বিগত ইংরেজী ১৩.০৮.২০১৯ তারিখ নির্ধারন করে ব্যর্থতায় একতরফা শুনানী হবে মর্মে আদেশ প্রদান করেন। অতঃপর বিগত ইংরেজী ১৩.৮.২০১৯ তারিখে আর্মি ওয়েলফেয়ার ট্রাষ্ট তথা প্রথম পক্ষ উপস্থিত না থাকায় সালিশী ট্রাইব্যুনাল মোকদ্দমাটি একতরফা শুনানী শেষ করেন এবং বিগত ইংরেজী ১৪.০৯.২০১৯ তারিখে সালিশী রোয়েদাদ প্রদানের জন্য দিন নির্ধারন করেন এবং উক্ত দিন রোয়েদাদ প্রদান করেন। অতঃপর বিগত ইংরেজী ১৪.০৯.২০১৯ তারিখের রোয়েদাদ বাতিলের নিমিত্তে আর্মি ওয়েলফেয়ার ট্রাষ্ট তথা সালিশী মোকদ্দমা নং- ০১/২০১৯ এর প্রথম পক্ষ সালিশী আইন, ২০০১ এর ৪২ ও ৪৩ ধারার বিধান মতে দরখাস্ত দাখিল করলে দরখাস্তটি আরবিট্রেশন মিস কেইস নং- ১৬৬/২০২১ নাম্বারে নিবন্ধিত হয়। দরখাস্তটি দায়েরে ১১৮ দিন বিলম্ব হওয়ায় বিলম্ব মওকুফের নিমিত্তে তামাদি আইনেও অপর একটি দরখাস্ত দাখিল করা হয়। বিজ্ঞ জেলা জজ, ঢাকা ১৮৮ দিন তামাদি মঞ্জুর করতঃ সালিশী আইন, ২০০১ এর ৪২ ও ৪৩ ধারার দরখাস্তটি শুনানীর জন্য গ্রহণ করেন এবং বিগত ইংরেজী ১৪.০৯.২০১৯ তারিখের রোয়েদাদ এর সকল কার্যক্রম পরবর্তী নির্দেশ না দেওয়া পর্যন্ত স্থগিত করেন। বিজ্ঞ জেলা জজ, ঢাকা কর্তৃক আরবিট্রেশন বিবিধ মোকদ্দমা নং- ১৬৬/২০২১-এ প্রদত্ত বিগত ইংরেজী ১৩.০৬.২০২১ তারিখের আদেশে সংক্ষুব্ধ হয়ে প্রতিপক্ষ অত্র সিভিল রিভিশন মোকদ্দমাটি দাখিল করে রুলটি প্রাপ্ত হন।

৩. **প্রতিপক্ষ-দরখাস্তকারী পক্ষের বিজ্ঞ এ্যাডভোকেট ইমতিয়াজ মইনুল ইসলাম** অত্র সিভিল রিভিশন দরখাস্তের ০৬ থেকে ১০ নং প্যারা উপস্থাপন পূর্বক বিস্তারিতভাবে যুক্তিতর্ক প্রদান করেন। গুরুত্বপূর্ণ বিধায় অত্র সিভিল রিভিশন দরখাস্তের ০৬ থেকে ১০ নং প্যারা নিম্নে অবিকল অনুলিখন হলোঃ

> *"06. That, admittedly there has been a delay of 188 days in filling the setting aside application under section 42 of the 2001 Act on 25.05.2021. Counting from the date of filling, admittedly, the respondent came to know about the award on 17.11.2020. The respondent sought condonation of 188 days and the Learned District Judge, Dhaka on 13.06.2021, vide his Order No. 2, condoned the said delay by applying section 5 of the 1908 Act. This Order is hereby impugned;*
>
> *07. That is is stated that an application under section 42 of the 2001 Act is the only application that can be preferred to set aside an arbitration award and the time to prefer such application is fixed to be 60 days from the date of knowledge/ receiving of the award. The respondent admitted this time limit by filing the application for condonation of delay and the only issue remaining to adjudicate is whether by applying section 5 of the 1908 Act, the learned Court can condone the said delay in filling an application under section 42 of the 2001 Act;*
>
> *08. That, it is most humbly submitted that sectin 5 of the 1908 reads as:*
>
> *"5. Any appeal or application for a revision or a review of judgment or for leave to appeal or* ***any other application to which this section may be made application by or under any enactment for the time being in force*** *may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfied the Court that he had sufficient cause for not preferring the appeal or making the application within such period.*
>
> *Explanation- the fact that the appellant or applicant was misled by any order, practice or judgment of the High Court Division in*

ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section."

For plain reading of section 5 of the 1908 Act, it is conspicuously evident that in case of ***applicatins other than*** *revision application, review application or civil petition for leave to appel, section 5 of the 1908 has to be specifically made applicable by or under any enactment; otherwise section 5 of the 1908 Act shall not be applicable to that application;*

09. That, it is most humbly submitted that an example of the specific application of section 5 of the 1908 Act in cases of "other applications" can be witnessed from Order 9 Rule 9 of the Code of Civil Procedure, 1908 (CPC);

10. That, it is most humbly submitted that section 42 of the 2001 Act did not specifically made section 5 of the 1908 Act applicable to condone delay in filling a setting aside application hence the Learned District Judge, Dhaka committed an error of law resulting in an error in Order No. 2 dated 13.06.2021 passed in Arbitration Miscellaneous Case No. 166 of 2021 occasioning failure of justice."

৪. অপরদিকে আবেদনকারী-প্রতিবাদী পক্ষ অনুপস্থিত।

৫. অত্র সিভিল রিভিশন দরখাস্ত এবং নথী পর্যালোচনা করলাম। প্রতিপক্ষ-দরখাস্তকারী পক্ষের বিজ্ঞ এ্যাডভোকেট এর যুক্তিতর্ক শ্রবণ করলাম।

৬. গুরুত্বপূর্ণ বিধায় আর্মি ওয়েলফেয়ার ট্রাষ্ট এবং বিগবস কর্পোরেশন লিমিটেড এর মধ্যে সম্পাদিত চুক্তিপত্রটি (Annexure-A) নিম্নে অবিকল অনুলিখন হলোঃ

আরবিট্রেশন চুক্তিপত্র

অত্র চুক্তিপত্র অদ্য ২৭ নভেম্বর, ২০১৮ ইং তারিখে নিম্ন লিখিত পক্ষগণের মধ্যে সম্পাদিত হইল।

আর্মি ওয়েলফেয়ার ট্রাষ্ট (এডব্লিউটি), পক্ষে সচিব কর্ণেল মোহাম্মদ ইকবাল হোসেন, প্রযত্নে- আর্মি ওয়েলফেয়ার ট্রাষ্ট, সেনাবাহিনী সদর দপ্তর, এ্যাডজুডেন্ট জেনারেল শাখা, কল্যাণ ও পুনর্বাসন পরিদপ্তর, ঢাকা সেনানীবাস, ঢাকা (পরবর্তীতে ইহার উত্তরাধিকারী স্থলবর্তী ওয়ারিশ এবং আইনানুগ প্রতিনিধিগণ অত্র চুক্তিপত্রের আবশ্যকীয় পক্ষ হিসাবে গণ্য হইবে)।

-------প্রথম **পক্ষ**।

এবং

বিগবস কর্পোরেশন লিমিটেড ও শানিলা ফ্যাশন লিমিটেড, **পক্ষে** ইহার ব্যবস্থাপক পরিচালক- সৈয়দ রেজাউল হোসেন কাজী, পিতা- সৈয়দ আবুল হোসেন কাজী, স্থায়ী ঠিকানাঃ গ্রাম ও ডাকঘর- চৌদ্দ-বুড়িয়া, থানা- নলছিটি, জেলা- ঝালকাঠি, বর্তমানে- কৃষ্ণচুড়া এ্যাপার্টমেন্ট নং- ১/ডি, ফ্ল্যাট নং- ৪০, রোড নং- ২১, ব্লক-বি, বনানী, ঢাকা-১২১৩, পেশা- ব্যবসা, ধর্ম- ইসলাম, জাতীয়তা- বাংলাদেশী। তদপক্ষে- ক্ষমতা প্রাপ্ত প্রতিনিধি- ইহার জেনারেল ম্যানেজার জনাব কাজী ফারুকুজ্জামান পিতা- কাজী আব্দুল হাকিম, সাং- ই-১৩, মধ্য বাড্ডা, লেভেল-১১, গুলশান, ঢাকা- ১২১২। (পরবর্তীতে তাহাদের উত্তরাধিকারী, স্থলবর্তী ওয়ারিশ এবং আইনানুগ প্রতিনিধিগণ অত্র চুক্তিপত্রের আবশ্যকীয় পক্ষ হিসাবে গন্য হইবে)।

---------দ্বিতীয় পক্ষ

এবং

পরম করুনাময় ও অসীম, দয়ালু আল্লাহ তায়ালার নাম স্মরণ করিয়া অত্র আরবিট্রেশন চুক্তিপত্রের বয়ান আরম্ভ করিতেছি। যেহেতু অত্র আরবিট্রেশন চুক্তিপত্রের পক্ষদ্বয় গাজীপুর জেলার জয়দেবপুর থানাধীন "সারাবো" মৌজার সম্পত্তি যাহার যাহার প্রতিষ্ঠানের নামে ক্রয় করিয়াছে।

যেহেতু গাজীপুর জেলার জয়দেবপুর থানার "সারাবো" মৌজার সম্পত্তি প্রথম পক্ষ ও দ্বিতীয় পক্ষ যাহার যাহার খরিদা দলিল মূলে মালিকানা দাবী করিতেছে এবং যেহেতু বর্ণিত মৌজার সম্পত্তির কতক দাগের সম্পত্তির স্বত্ত্ব সম্পর্কে পক্ষদ্বয়ের মধ্যে বিরোধ দেখা দেওয়ায় পক্ষদ্বয়ের হিতৈষী ও শুভাকাঙ্খীদের পরামর্শে এবং নিজেরা আলাপ-আলোচনা করিয়া আরবিট্রেশন এর মাধ্যমে তাহাদের বিরোধীয় বিষয়টি নিষ্পত্তি করিতে আগ্রহ প্রকাশ করায় এবং উভয় পক্ষের মধ্যে বিরোধ নিষ্পত্তির জন্য আরবিট্রেশন ট্রাইবুন্যাল গঠনের লক্ষ্যে একটি আরবিট্রেশন চুক্তি সম্পাদনের আবশ্যকীয়তা দেখা দেওয়ায় পক্ষদ্বয় অত্র চুক্তিপত্রে আবদ্ধ হইলেন ।

এবং

যেহেতু প্রথম ও দ্বিতীয় পক্ষের আলোচনার ভিত্তিতে বর্ণিত "সারাবো" মৌজার সম্পত্তির স্বত্ব সংক্রান্ত বিরোধ সহ তদ সংক্রান্ত যাবতীয় বিষয়াদি নিষ্পত্তি করার জন্য এক্ষণে প্রথম ও দ্বিতীয় পক্ষদ্বয় পারস্পরিক আলাপ আলোচনার ভিত্তিতে একমত হইয়া নিম্ন বর্ণিত শর্তাবলীর আলোকে অত্র আরবিট্রেশন চুক্তিপত্র সম্পাদন করিলেন।

-ঃ শর্তসমূহ ঃ-

১. উভয় পক্ষের মধ্যকার বিরোধ নিষ্পত্তির জন্য আরবিট্রেশনের কার্য্যক্রম পরিচালনার জন্য প্রথম পক্ষের অফিস যথা ঢাকাস্থ মিরপুর ১৭ ইসিবি সম্মেলন কক্ষে আরবিট্রেশন এর কার্যাক্রম পরিচালিত হইবে ।

২. আরবিট্রেশন ট্রাইবুন্যাল এর নিকট দাখিলকৃত সম্পত্তি সংক্রান্ত বিরোধ এর আইনানুগ, ন্যায় সংগত এবং পক্ষপাতহীন ভাবে আরবিট্রেশন এ্যাক্ট এর বিধান অনুসরণপূর্বক আরবিট্রেশন কার্য্যক্রম শুরু হওয়ার দিন হইতে ৯০ (নব্বই) কার্য্য দিবসের মধ্যে আরবিট্রেশন কার্যক্রম সমাপ্ত করা হইবে । যদি নির্ধারিত তারিখের মধ্যে আরবিট্রেশন কার্য্যক্রম সমাপ্ত করা সম্ভব না হয় তবে উভয় পক্ষের সম্মতিতে আরবিট্রেশনের সময় বৃদ্ধি করা যাইবে ।

৩. আরবিট্রেশন কার্য্যক্রম শুরু হওয়ার প্রাক্কালে উভয় পক্ষ তাহাদের দাবীকৃত সম্পত্তি সম্পর্কে লিখিত বক্তব্য আরবিট্রেশন ট্রাইবুন্যালের নিকট উপস্থাপন করিবেন এবং দাবীর স্বপক্ষে দলিলাত ও কাগজপত্রের ফটোকপি লিখিত বক্তব্যের সহিত দাখিল করিবেন এবং এক পক্ষের লিখিত বক্তব্যে ও উহার সঙ্গীয় দলিলাত ও কাগজপত্রের ফটোকপি অপর পক্ষকে আরবিট্রেশন ট্রাইবুন্যালের মাধ্যমে প্রদান করিতে হইবে এবং একপক্ষ অপর পক্ষের লিখিত বক্তব্য ও দাখিলী কাগজপত্র ও দলিলাত পরীক্ষা করিয়া ট্রাইবুন্যালে শুনানীর সময়ে শুনানীতে অংশ গ্রহণ করিবেন।

৪. বর্ণিত "সারাবো" মৌজার স্থানীয় ভূমির মালিকগণ পক্ষদ্বয়ের আরবিট্রেশনকৃত খতিয়ান ও দাগের সম্পত্তিতে কোন প্রকার দাবী দাওয়া উত্থাপন করিলে ও বিরোধ সৃষ্টি হইলে তাহারা আরবিট্রেশন ট্রাইবুন্যালে উপস্থিত হইয়া তাহাদের সম্পত্তি সংক্রান্ত বক্তব্য, বিবরণ ও দাবী দাওয়া আরবিট্রেশন ট্রাইবুন্যালের নিকট লিখিতভাবে পেশ করিয়া তৃতীয় পক্ষ হিসাবে আরবিট্রেশন ট্রাইবুন্যালে অংশ গ্রহণ করিতে পারিবেন এবং বিজ্ঞ আরবিট্রেটরগণ প্রথম পক্ষ ও দ্বিতীয় পক্ষের মত একই সাথে বর্ণিত তৃতীয় পক্ষের বক্তব্য শ্রবন করিয়া ও কাগজপত্র পরীক্ষা করিয়া তাহাদের বিষয়ে একই সাথে রায় প্রদান করিবেন। তবে সেক্ষেত্রে বর্ণিত স্থানীয় ব্যক্তিগণ যাহারা তৃতীয় পক্ষ হিসাবে অংশ গ্রহণ করিবেন তাহারা আরবিট্রেশন-ট্রাইবুন্যালের রায় মানিয়া নেওয়ার জন্য আরবিট্রেশন ট্রাইবুন্যাল বরাবরে অঙ্গীকারনামা প্রদান করিতে হইবে। অন্যথায় তাহারা আরবিট্রেশন ট্রাইবুন্যালে অংশ গ্রহণ করিতে পারিবেন না।

৫. আরবিট্রেশন ট্রাইবুন্যাল এর কার্য্যক্রম আরবিট্রেশন এ্যাক্ট- ২০০১ এর বিধান মোতাবেক পরিচালিত হইবে এবং সকল পক্ষ ট্রাইবুন্যাল এর কার্যক্রম সঠিক ভাবে পরিচালনার জন্য আরবিট্রেশন ট্রাইবুন্যালকে সর্বাত্মক ভাবে সহযোগীতা করিবেন ।

৬. আরবিট্রেশন ট্রাইবুন্যাল গঠনের জন্য উভয় পক্ষ ০১ (এক) জন করিয়া আরবিট্রেটর (Arbitrator) মনোনয়ন প্রদান করিবেন এবং পক্ষদ্বয়ের মধ্যে মনোনীত আরবিট্রেটরগন একমত হইয়া তৃতীয় ০১ (এক) জনকে আরবিট্রেশন টাইবুন্যালের চেয়ারম্যান হিসাবে মনোনয়ন প্রদান করিবেন। বর্ণিত ০৩ (তিন) জনের সমন্বয়ে আরবিট্রেশন ট্রাইবুন্যাল গঠিত হইয়া আরবিট্রেশন ট্রাইবুন্যালের কার্য্যক্রম পরিচালিত হইবে।

৭. প্রথম পক্ষ তাহাদের পক্ষে অবসরপ্রাপ্ত জেলা জজ জনার আনিসুজ্জামানকে আরবিট্রেটর হিসাবে মনোনয়ন করিয়াছেন।

৮. দ্বিতীয় পক্ষ তাহাদের পক্ষে অবসরপ্রাপ্ত জেলা জজ জনাব মোঃ একরামুল হক চৌধুরীকে আরবিট্রেটর হিসাবে মনোনয়ন করিয়াছেন।

৯. পক্ষগণের মনোনীত আরবিট্রেটরগণের মাধ্যমে আরবিট্রেশন বোর্ড উভয় পক্ষের লিখিত বক্তব্য শ্রবন ও কাগজপত্র পর্যযালোচনা করিয়া বিরোধীয় বিষয়টি নিস্পত্তি করিবেন। আরবিট্রেশন ট্রাইবুন্যাল যে রায়/রোয়েদাদ (Award) প্রদান করবেন, বর্ণিত রায়/রোয়েদাদ (Award) চুড়ান্ত বলিয়া গণ্য হইবে এবং সকল প্রক্ষের উপর উত্তরায়/রোয়েদাদ (Award) বাধ্যকর হইবে এবং সকল পক্ষ তাহা মান্য করিতে বাধ্য থাকিবেন ।

১০. পক্ষদ্বয়ের মধ্যে বিরোধীয় বিষয়টি আরবিট্রেশন ট্রাইবুন্যাল এর মাধ্যমে নিস্পত্তি অন্তে রায়/রোয়েদাদ (Award) প্রদান সম্ভব না হইলে অত্র আরবিট্রেশন অকার্যকর বলিয়া গণ্য হইবে এবং সেক্ষেত্রে পক্ষগণ তাহাদের বিরোধ ও দাবী দাওয়া সম্পর্কে দেওয়ানী আদালতের স্মরণাপন্ন হইতে পারিবেন। ইহাতে কোন পক্ষের কোন ওজর আপত্তি থাকিবে না ও কোন প্রকার আইনের প্রতিবন্ধকতা থাকিবে না।

১১. আরেবিট্রেশন ট্রাইবুন্যালের রায়/রোয়েদাদ (Award) মানিয়া লইতে সম্মত আছেন মর্মে পক্ষগণ আলাদা একটি অঙ্গীকারনামায় যৌথ স্বাক্ষর প্রদান করিবেন, যাহাতে আর্মি ওয়েলফেয়ার ট্রাষ্ট (এডব্লিউটি) এবং বিগবস কর্পোরেশন লিমিটেড ও শানিলা ফ্যাশন লিমিটেড, (এ্যাপটেক গ্রুপ) এর পক্ষে ক্ষমতা প্রাপ্ত বৈধ প্রতিনিধি স্বাক্ষর করিবেন। কোন তৃতীয় পক্ষ পরবর্তীতে অত্র আরিবিট্রেশনে অংশ গ্রহণ করিতে চাহিলে তাহারা প্রথম পক্ষ ও দ্বিতীয় পক্ষের সহিত আলাপ-আলোচনা করিয়া যৌথ ভাবে অঙ্গীকার নামায় স্বাক্ষর করিবেন।

১২. আরবিট্রেশন ট্রাইবুন্যালে উত্থাপিত বিরোধ শুনানী অন্তে প্রদত্ত রায়/রোয়েদাদ (Award). কম্পিউটারে কম্পোজকৃত হইবে এবং উহাতে ট্রাইবুন্যালের চেয়ারম্যান ও সদস্যগণের স্বাক্ষরযুক্ত হইতে হইবে।

১৩. কোন পক্ষের মৃত্যুতে অত্র আরবিট্রেশন চুক্তিপত্র বাতিল হইবে না বরং মৃত পক্ষের আইনানুগ ওয়ারিশগণের উপর তাহা বাধ্যকর থাকিবে এবং এই চুক্তিপত্রের যাবতীয় শর্তাবলী ভবিষ্যতেও ওয়ারিশগণের উপর সমভাবে বর্তাইবে।

১৪. কোন পক্ষ অত্র আরবিট্রেশন চুক্তিপত্র বাতিল করিতে চাহিলে চুক্তিপত্র বাতিল প্রার্থনাকারী পক্ষ কর্তৃক আরবিট্রেশন ট্রাইবুন্যালের নিকট সেই মর্মে যথাযথ কারণ উল্লেখ পূর্বক লিখিত ভাবে তাহা দাখিল করিবেন এবং সেই বিষয়ে আরবিট্রেশন ট্রাইবুন্যাল প্রয়োজনীয় পদক্ষেপ গ্রহণ করিবেন।

১৫. অত্র আরবিট্রেশন চুক্তিপত্র অনুযায়ী ট্রাইবুন্যাল এর কার্য্যক্রম নিস্পত্তি না হওয়া পর্যন্ত পক্ষগণের যাহার যাহার দাবীকৃত সম্পত্তির দখল পূর্বের ন্যায় থাকিবে এবং একপক্ষ অন্যপক্ষকে কোন প্রকার বাধা বিঘ্নের সৃষ্টি করিতে পারিবেন না। আরবিট্রেশন ট্রাইবুন্যালের রায়/রোয়েদাদ (Award) হওয়ার পর রায় অনুসারে যাহার যাহার প্রাপ্ত সম্পত্তিতে ভোগ দখল করিবেন ।

১৬. অত্র আরবিট্রেশন ট্রাইবুন্যাল এর মাননীয় চেয়ারম্যান মহোদয়ের সম্মানী উভয় পক্ষের নিয়োজিত বিজ্ঞ আরবিট্রেটরগণ মাননীয় চেয়ারম্যান এর সহিত আলাপ-আলোচনা করিয়া অত্র পক্ষগণের সহিত পরামর্শ ক্রমে নির্ধারন করিবেন এবং মাননীয় চেয়ারম্যান মহোদয়ের জন্য নির্ধারিত সম্মানী বাবদ দেয় টাকা প্রথম ও দ্বিতীয় পক্ষ ৫০% হারে পরিশোধ করিবেন এবং পক্ষদ্বয়ের নিযুক্তীয় আরবিট্রেটরগণের সম্মানী পক্ষগণ নিজ নিজ তহবিল হইতে বহন করিবেন।

এতদ্বার্থে স্বেচ্ছায়, স্বজ্ঞানে এবং অন্যের বিনা প্ররোচনায় পক্ষগণ অত্র চুক্তিপত্রের শর্ত সমুহ পাঠ করিয়া ও উহার মর্ম ও ফলাফল সম্পর্কে সম্পূর্ণ অবগত হইয়া অত্র আরবিট্রেশন চুক্তিপত্র সম্পাদন করিলেন।

অত্র চুক্তিপত্র মোট ০৬ (ছয়) পাতায় কম্পিউটারে কম্পোজকৃত এবং স্বাক্ষী ০৩ (তিন) জন বটে।

(আর্মি ওয়েলফেয়ার ট্রাষ্ট (এডব্লিউটি), প্রতিনিধিত্বে- ইহার সচিব কর্ণেল মোহাম্মদ ইকবাল হোসেন, প্রযত্নে- আর্মি ওয়েলফেয়ার ট্রাষ্ট, সেনাবাহিনী সদর দপ্তর, এ্যাডজুডেন্ট জেনারেল শাখা, কল্যাণ ও পুনর্বাসন পরিদপ্তর, ঢাকা সেনানীবাস, ঢাকা)।

(বিগবস কর্পোরেশন লিমিটেড ও শানিলা ফ্যাশন লিমিটেড, পক্ষে ইহার ব্যবস্থাপনা পরিচালক- সৈয়দ রেজাউল হোসেন কাজী, পিতা- সৈয়দ আবুল হোসেন কাজী, তদ্‌পক্ষে ক্ষমতা প্রাপ্ত প্রতিনিধি- ইহার জেনারেল ম্যানেজার জনাব কাজী ফারুকুজ্জামান, পিতা- কাজী আব্দুল হাকিম, সাং- ই-১৩, মধ্য বাড্ডা, লেভেল-১১, গুলশান, ঢাকা- ১২১২।

সাক্ষীগণের নাম ও ঠিকানাঃ

১। মোঃ সাইফুল ইসলাম, পিতা- মৃত হাজী আব্দুর রহমান, গ্রাম- মাইঝাইল, থানা- আশুলিয়া, উপজেলা- সাভার, জেলা- ঢাকা।

২। মোঃ আয়েশ উদ্দিন, পিতা- মৃত ফালু মিয়া, গ্রাম- লতিফপুর, পোঃ সারদাগঞ্জ, থানা- জয়দেবপুর, জেলা- গাজীপুর।

৩। মোঃ ইমরান হোসেন, পিতা- কাওছার আলী, আর্মি ওয়েলফেয়ার ট্রাষ্ট কল্যান ও পূনর্বাসন পরিদপ্তর, ঢাকা সেনানিবাস, ঢাকা।

৪। মোঃ বাবুল হোসেন, পিতাঃ আহাম্মদ আলী, ঠিকানাঃ বাসা নং- ০৯, রোড নং- ১৬, মেরুল বাড্ডা, ঢাকা।

৭. গুরুত্বপূর্ণ বিধায় সালিশী মোকদ্দমা নং- ০১/২০১৯-এ প্রদত্ত বিগত ইংরেজী ১৪.০৯.২০১৯ তারিখের সালিশী রোয়েদাদ (Annexure-B) নিম্নে অবিকল অনুলিখন হলোঃ

Annexure-B

(Certified Copy of Award
Office of the Arbitrator
10/1, Shegunbagicha, Dhaka-1000
AWARD OF ARBITRATION
IN THE ARBITRATION CASE NO. 01/2019
Between
Army Welfare Trust---------------- First Party
and
Big Boss Corporation Ltd and another ---- Second Parties

PANEL OF ARBITRATORS:

1. *Justice Md. Shamsul Huda (Former Judge Appellate Division) Supreme Court of Bangladesh, Chairman.*
2. *Mr. Md. Anisuzzaman (Rtd. District Judge) Arbitrator (Appointed by the First Party)*
3. *Mr. Md. Ekramul Hoque Chowdhury (Rtd. District Judge) Arbitrator (Appointed by the Second Party)*

DATE NOTIFICATION OF AWARD: 14.09.2019.

BACKGROUND OF FACTS:

1. *Both the First Party Army Welfare Trust and the Second Party Big Boss Corporation Ltd and Shalina Fashion Ltd claim the ownership and possession of some land properties in the Sarabo Mouza under Joydevpur P.S. of District Gazipur. They claim the properties from the same plots of the same khatians of the disputed area. Both the parties admit the purchase and possession of the properties by the other but only for a small portion of land dispute arose between the parties and both the parties tried amicably to settle the issues and reached at settlement in almost all the matters but failing to resolve the issue of possession and matter of exchange regarding a small portion of land for which both the parties agreed to refer the matter to settle through arbitration by a panel of arbitrators and for that end in view they entered into an agreement of arbitration on 27 November 2018 and in the said agreement of arbitration it is stated that Mr. Md. Anisuzzaman (Rtd. District Judge) will act as an Arbitrator having been appointed by the First Party and Mr. Md. Ekramul Hoque Chowdhury (Rtd.*

District Judge) will be acting as an Arbitrator being appointed by the Second Party.

2. *Subsequently these two arbitrators jointly proposed Justice Md. Shamsul Huda (Retd. Justice Appellate Division) to act as the Chairman of the Panel of Arbitration vide letter dated 20.12.2018 and the proposal has been formally accepted by him.*

3. *Thereafter, the Chairman of the Panel to started the arbitration proceeding, issued notices of arbitration to the Arbitrators mentioning the date as 16.01.2019 and also time and venue of arbitration. On the fixed date the 1st Party prayed for time through an official letter but Arbitrator ob their side did not appear and hence the time was allowed and the next date was fixed as 15.06.2019. On 15.06.2019 the Arbitrators of both the sides were present before the Chairman and as such the proceeding of arbitration started on that day. But the first party again prayed for time to adjourn the proceeding and the prayer was allowed and 13.07.2019 was fixed for next date of hearing. On 13.07.2019 arbitrators of the both the parties were present but no representative of the First Party was found present and for ends of justice the hearing was again adjourned fixing next date as 27.07.2019. On 27.07.2019 again arbitrators of the both the parties were present; but no interested person of the First Party was found present and again the date of hearing was adjourned to 09.08.2019. On 09.08.2019 the second party was found present but the first party remained absent and it was found that the arbitrator appointed by the first party has informed vide letter dated 29.07.2019 to withdraw himself from the proceeding for his personal cause and for that reason the hearing was again postponed and 13.08.2019 and fixed for submission of written statements by the first party, failing which ex-parte hearing.*

4. *On 13.08.2019 the First Party again remained absent and the second party was present through their representative and as the first party failed to submit the written statements and also failed to present in the hearing. As process of arbitration in the present case is a joint process and both the parties conjointly started the arbitration proceeding by appointing their respective arbitrators here in the eye of law both the parties can be treated as the applicant and none of the parties can be treated as the respondents. Here as the second party is found all along present in all the dates of hearing fixed for arbitration proceeding and this first party can also be treated as the applicant or petitioner in the same proceeding and as such they are entitled to have the result of arbitration ex-parte and the absence of the first party cannot render the process to be worth of abandonment merely on the technical ground of their intentional absence. Therefore the Chairman of the Arbitration proceeding has decided to proceed ex-parte and recorded the deposition of the representative of the second party and marked the documents as exhibits accordingly.*

5. *In these facts in view the Chairman of the present Arbitration Proceeding considers that justice will be met if award is given on the basis of the deposition of the witnesses and on the basis of the papers and documents submitted before the Panel of Arbitrators.*

DISCUSSION & DECISION:

The case, in brief, of the second party Big Boss Corporation Ltd and Shanila Fashion Ltd, as transpires from their written statements is as follows;

That the suit land is situated at Mouza Saraba under Gazipur Sadar Thana of District Gazipur, formerly Keranigonj Thana of District Dhaka. That the suit C.S. Khatian No.63 is comprising of C.S. Plot No.453 entirely containing 7.09 acres of land, Plot No. 459 containing in all .27 acres of land, Plot No. 543 containing in all 1.10 acres of land and Plot No. 457 containing totally .76 acres of land and thereby in four plots totally having 09.22 acres of land. That another suit C.S. Khatian No. 64 of the same locality comprising C.S. Plot No. 3 containing totally 0.3400 acres of land, Plot No.452 containing 5.6900 acres of land, Plot No. 454 containing 3.3800 acres of land and Plot No. 484 containing 1.1400 acres of land and thereby in four plots totally 10.5500 acres of land. Thus these two suit C.S. Khatians totally contains 19.7700 acres of land and this property was owned and possessed by Jurai Bepari, Fazar Munshi @ Fazar Bepari and Sumu Bepari @ Shom Bepari, equally each having 5 anas 6 gonda 2 kora and 2 kranti shares and C.S. Khatian No.63 and 64 were prepared and published accordingly. That Jurai Bepari became the owner and possessor of .6600 acres of land in C.S. Plot No.455 of C.S. Khatian No. 66 of the same locality by way of purchase and note of that purchase is found in the remarks column of the concerned Khatian.

That Jurai Bepari while in the title and possession transferred 1.78 acres of land from C.S. Plot No. 453, 457, 459 and 543 of C. S. Khatian No. 63 and .55 acres of land out of 0.66 acres of land from C.S. Plot No. 455 of C.S. Khatian No. 66 in favor of his two grandsons namely Ratan Bepari and Tota Bepari @ Habibur Rahman vide Heba Bil Ewaj deed no. 252 dated 25.01.1950 and thereafter Jurai Bepari died leaving behind two sons Nabi Hossain Bepari and Pochu Bepari and one daughter Ayman Nesa as his heirs in his rest of the property in C.S. Khatian No. 63 and 64.

That Nabi Hossain Bepari being owner as his father's heir and Ratan Bepari and Tota Bepari @ Habibur Rahman being owner by way of hiba deed transferred .7250 acres of land out of the property in C.S. Plot Nos. 453, 457, 459, 543 of C.s. Khatian No. 63 .1100 acres of land out of .66 acres of land from C.S. Plot No. 455 of C.S. Khatian No. 66 in favor of Pochu Bepari vide registered sale deed no. 3137 dated 09.09.1950.

That thereafter Nabi Hossain died leaving behind his for sons namely, Ratan Bepari, Tota Bepari @ Habibur Rahman, Montaj Bepari and Intaj Bepari and six daughters namely, Jiron Nesa, Roshida Begum, Shamsunnahar, Rekha Begum, Nilufa Yasmin and Setara Begum as his heirs in his property.

That Rashida Begum being owner by way of inheritance from her father transferred .1300 acres of land from C.S. Plot Nos. 453, 459, 543, 457 of C.S. Khatian No. 63 and also from C.S. Plot Nos. 452, 454, 484 of C.S. Khatian No. 64 and also from C.S. Plot No. 455 of C.S. Khatian No. 66 in favor of her brother Ratan Bepari and Tota Mia @ Habibur Rahman vide deed of heba bil ewaj dated 16.11.1991.

That thereafter Tota Mia @ Habibur Rahman mutated his name in the concerned Khatian and paid the rents accordingly and then transferred to

Rahat Reality Ltd .8500 acres of land from C.S. Plot Nos. 453 and 543 out of the C.S. Plot Nos. 453, 557, 543, 452, 459, 454, 484 vide registered deed no. 2867 dated 07.03.2012, plus 0.2675 acres of land from C.S. and S.A. Plot No. 455 corresponding to R.S. Plot No. 760 of C.S. Khatian No.66 corresponding to S.A. Khatian No.119 corresponding to R.S. Khatian No. 238 vide registered sale deed no. 6233 dated 14.05.2011, plus .8500 acres of land from C.S. and S.A Plot No. 53 and 543 out of C.S. and S.A. Plot No. 453, 557, 543, 452, 459, 454, 484 of C.S. Khatian No. 63 and 64 corresponding to S.A. Khatian No.116 corresponding to R.s. Khatian No. 128 vide registered sale deed no. 2867 dated 01.03.2012 and after purchase of this property Rahat Reality Ltd mutated their names in the concerned khatian and paid rents accordingly.

That Ratan Bepari died leaving behind his wife Sufia Begum, three sons namely, Masud Rana, Ismail Hossain and Faruk Hossain and two daughters namely, Renu Akter Baby and Selina Akter as his heirs in his property. That Ismail Hossain, son of Ratan Bepari, appointed his brother Rana as his Power of Attorney holder in his .4660 acres of land in C.S. Plot Nos. 453, 454, 452, 543, 459, 547, 484 vide registered deed of power of attorney no. 11804 dated 22.09.2011. This appointed power of attorney holder himself and on behalf of Isamil Hossain, along With Sufia Khatun, Renu Akter Baby and Selina Akter transferred 1.6000 acres of land from C.S and S.A Plot Nos. 454, 453, 543, 452 out of C.S. and S.A. Plot Nos. 453, 457, 543, 452, 459, 454, 484 of C.S. Khatian No. 63 and 64 corresponding to S.A. Khatian No. 116 corresponding to R.S. Khatian No. 128 in favor of Rahat Reality Ltd vide registered sale deed no. 2868 dated 01.03.2012.

That Pochu Bepari being owner by way of inheritance from his father transferred .1800 acres of land from C.S. Plot No.453, 457, 459, 543 of C.S. Khatian No. 63 and .0300 acres of land out of .6600 acres of land from C.S. Plot No.455 of C.S. Khatian No.66 in favor of his adopted son Abdur Rashid Mia vide registered deed of heba no.6342 dated 26.09.1967. That this Abdur Rashid Mia thereafter mutated his name in the Khatian and paid rents accordingly and thereafter transferred 0.2600 acres of land from C.S. Plot Nos. 453, 457, 543, 452, 459, 454, 484, 453, 457, 543 to Rahat Reality Ltd. vide registered sale deed no.13452 dated 20.10.2011. Thereafter Pochu Bepari died leaving behind his wife Amatan Nesa, son Noor Mohammad and two daughters Fatema and Panwara Begum and dead daughter's daughter Laki Begum and son Sabdar Ali to inherit his rest of the property.

That Noor Mohammad and Fatema Begum jointly appointed K.M. Shahed Kamal as their Power of Attorney holder vide registered Deed of Power of Attorney no.19919 dated 23.09.2004 and this appointed attorney transferred his property infavor of Mahbub Kazi and Harun ar Rashid vide registered deed no.12688 dated 10.05.2009 and these purchasers mutated their names in the concerned khatian and thereafter transferred .4450 acres of land from C.S. Khatian No.453 in favor of Rahat Reality Ltd vide registered deed no. 5842 dated 05.05.2011. That on that same date K.M.Shahed Kamal transferred 0.4340 acres of land from C.S. Khatian No. 453 and 454 out of C.S. Plot Nos. 452, 453, 459, 457, 454, 443, 484 vide registered sale deed no. 12689 in favor of Mahbubul Alam who mutated his name in the concerned khatian and transferred 3.1220 acres of land from C.S. and S.A. Plot Nos. 453 and 454 corresponding to R.S. Plot Nos. 757, 759 and 762 of C.S. Khatian No.

116 corresponding to R.S. Khatian No. 128 vide registered sale deed no. 8076 dated 13.10.2010 in favor of Rahat Reality Ltd.

Thus Rahat Reality Ltd after being the owner and possessor of the property by way of purchase through several sale deeds transferred 8.9295 acres of land out of their property in C.S. Plot Nos. 452, 484, 459, 453, 543, 454, 455 and 457 vide registered sale deed no. 226 dated 11.01.2014 in favor of Big Boss Corporation Ltd.

That Abul Hossain, Shiuli Akter and Shamsuddin's daughter Samsad Parveen jointly appointed Syed Rejaul Hossain Kazi as their attorney by the registered Power of Attorney Deed No. 3253 dated 21.04.2016 and this Attorney transferred .4350 acres of land from C.S and S.A. Plot Nos. 453, 547, 543, 459, 454, 484, 452 of C.S. Khatian No. 63 and 65 corresponding to S.A. Khatian No. 117 corresponding to R.S. Khatian No. 48 in favor of Big Boss Ltd vide registered sale deed no. 8040 dated 20.10.2016.

That Abdul Jabbar being the owner by way of inheritance from his father transferred .3300 acres of land from S.A. Plot No. 453 of S.A. Khatian No. 116 in favor of his four sons Fasiuddin, Showkat Hossain, Emarat Hossain and Ashrafuddin vide registered hiba deed no. 2165 dated 27.01.2004. This Abdul Jabbar also transferred .7500 acres of land from C.S. Plot No. 452, 484, 459, 453, 543, 454, 547 in favor of Fasiuddin, Showkat Hossain, and Ashraf Ali vide registered deed no. 4396 dated 13.07.2010 and transferred .1300 acres of land from C.S. Plot No. 452, 484, 459, 453, 543, 454, 547 in favor of his sons Fasiruddin, Showkat Hossain, and Ashraf Ali and six daughters Bilkis, Rehana, Misron, Mohela, Nasima, Sanowara vide registered hiba deed no. 4399 dated 13.07.2010 and died leaving behind five sons Fasiruddin, Showkat Hossain, Emarat Hossain and Ashraf Ali, Chan Mia and six daughters Bilkis, Rehana, Misron, Mohela, Nasima, Sanowara as heirs in his rest of the property.

That this Showkat Hossain thereafter mutated his name in the Khatian and paid rents accordingly and thereafter transferred 0.2425 acres of land from C.S. Plot Nos. 453, 457, 543, 452, 459, 454, 584, to Rahat Reality Ltd. vide registered sale deed no. 5263 dated 11.05.2013.

That thereafter Abdur Rahman and Abdul Hakim's son Abdus Salam jointly transferred 0.1200 acres of land from C.S and S.A. Plot No. 454 corresponding to R.S. Plot No. 128 out of C.S. and S.A. Plot No. 454, 452, 453 corresponding to R.S. Plot No. 759, 661, 757 of C.S. Khatian No. 63 corresponding to S.A. Khatian No.116 corresponding to R.S. Khatian No. 128 Sadekur Rahman vide registered sale deed no.10082 dated 01.08.2011 and this Sadekur Rahman thereafter mutated his name in the Khatian and paid rents accordingly and thereafter transferred 0.1200 acres of land from C.S. Plot Nos. 454 out of C.S. Plot No. 452, 453 and 454 of C.S. Khatian No. 63 corresponding to S.A. Khatian No.116 corresponding to R.S. Khatian No. 128 to Shanila Fashion Ltd. vide registered sale deed no.7916 dated 29.06.2014. The same Abdur Rahman transferred .0600 acres of land in favor of his son Saiful Islam from his property situated in C.S Plot Nos. 454 and 452 of C.S. Khatian No. 63 corresponding to S.A. Khatian No.116 corresponding to R.S. Khatian No. 128 vide deed of hiba no. 2361 dated 26.05.2010 and this son Saiful Islam transferred 0.0500 acres of land from C.S. and S.A. Plot Nos. 454 corresponding to R.S. Plot No. 759 of C.S. Khatian No. 63, 64 corresponding to S.A. Khatian No.116 corresponding to R.S. Khatian No. 128 vide registered

sale deed no. 5243 dated 16.05.2014 in favor of Shanila Fashion Ltd. The same Abdur Rahman again transferred .4550 acres of land from the land situated in C.S. Plot Nos. 453 and 454 vide registered sale deed no.5244 dated 16.05.2014 in favor of Shanila Fashion Ltd. The same Abdur Rahman again transferred vide registered hiba deed no. 4093 dated 14.05.2015 1.1000 acres of land from the property in the C.S. Plot Nos. 453, 547, 543, 452, 459, 454, 484 in favor Saiful Islam, Abdul Karim, Shariful Islam, Sohel Rana, Rahim and Sohag Hossain and thereafter these six persons conjointly transferred 0.2500 acres of land from the property lying in C.S. Plot Nos. 453, 547, 459, 454, 484 of C.S. Khatian No. 63, 64 corresponding to S.A. Khatian No.116, 117 orresponding to R.S. Khatian No. 48 vide registered sale deed no. 7627 dated 06.10.2016 in favor of Big Boss Corporation Ltd.

That Somu Bepari @ Somo Bepari died leaving behind two sons Kafiluddin and Hafijuddin and two daughters Peton Nesa and Amaton Nesa as his heirs in his property.

That Kofiluddin being owner by way of inheritance transferred 2.0950 acres of land from C.S. Plot Nos. 454, 459, 553, 484, 142, 193, 438, 442 vide registered hiba deed no. 4609 dated 07.09.1981 in favor of his son Ibrahim Khalil who mutated his name in the concerned khatian and paid rents accordingly and thereafter transferred 0.9200 acres of and from C.S. Plot Nos. 484, 459, 453, 543, 454, 457 vide registered sale deed no. 5112 dated 20.01.2011 in favor of Rahat Reality Ltd.

That Ibrahim Khalilullah transferred 0.1000 acres of land from C.S. Plot No. 454 out of the property in C.S. Plot Nos. 453 and 454 vide registered sale deed no. 3638 dated 24.06.2010 in favor of Masud Hossain and Sharimin Akter and these two purchasers again transferred that same property in favor of Shanila Fashion Ltd. vide registered sale deed no. 3908 dated 13.04.2014.

That Kofiluddin being owner by way of inheritance transferred 2.0950 acres of land from C.S. Plot Nos. 454, 459, 553, 557, 484, 142, 193, 438, 442 vide registered hiba deed no. 4610 dated 07.09.1981 in favor of his son Nasirullah who mutated his name in the concerned khatian and paid rents accordingly and thereafter transferred 0.9075 acres of land and from C.S. Plot Nos. 452, 453, 543, 454 vide registered sale deed no. 3109 dated 10.03.2011 in favor of Rahat Reality Ltd.

That during S.A. operation one Subani Mondol got her name recorded in S.A. Plot No. 465 of S.A. Khatian No. 36 appertaining to Mouza Saraba under District Dhaka formerly Gazipur and sold out the same and transferred possession to Md. Kafiluddin who had his name recorded in the R.S. Plot No. 662 of R.S. Khatian No. 150 and died leaving behind his wife Mosammat Joynab Bibi, two sons Md. Nasirullah and Ibrahim Khalilullah and three daughters Mosammat Fatema Begum, Mosammat Ayesha Begum and Mosammat Rokeya Begum as his heirs in that property. That the heirs Joynab Bibi, Fatema Begum and Ayesha Begum appointed Md. Nasirullah as their attorney for management of 0.2064 acres of land out of their share vide registered deed of Power of Attorney No. 6946 dated 27.05.2011 and this Nasirullah on his own behalf and as the attorney of Joynab Bibi, Fatema Begum and Ayesha Begum transferred .4425 acres of land from C.S. and S.A. Plot No. 465 corresponding to R.S. Plot No. 662 in favor of Mrs. Khadiza Islam vide registered sale deed no. 1320 dated 31.01.2012 and this purchaser mutated her name in the concerned khatian and paid rents accordingly and

thereafter transferred 0.4425 acres of and vide registered sale deed no. 227 dated 12.01.2014 in favor of Big Boss Corporation Ltd.

That after death of Kafiluddin his two sons Nasir Ullah and Ibrahim Khalil Ullah and three daughters Fatema Begum, Ayesha Begum and Rokeya Sultana became the owner in his rest of the property as his heirs who transferred 1.2025 acres of land in favor of Big Boss Corporation Ltd vide registered sale deed no. 225 dated 12.01.2014.

That thereafter Hafij Uddin died leaving behind his three sons Shamsuddin, Shafiuddin, and Abdus Salam and two daughters Monwara Begum and Hasina Akter as his heirs in his property and subsequently Shamsuddin died leaving behind wife Momtaj Begum, son Selim Al Din, daughter Parvin Akter @ Shamsad Parvin as his heirs. These Momtaj Begum, Selim Al Din, Parvin Akter @ Shamsad Parvin conjointly transferred .2400 acres of land from C.S. Plot No. 452 vide registered sale deed no. 4838 dated 07.03.2005 in favor of Sheikh Sarah Samamah Islam who mutated her name in the concerned khatian and paid rents accordingly and thereafter transferred .1200 acres of land from C.S. Plot No. 452 vide registered kabala no. 2095 dated 23.05.2010 in favor of Bayezid Ali and Jahangir Alam and these purchasers also mutated their names in the concerned khatian and paid rents accordingly and thereafter appointed Morzina Akter as their attorney vide deed of power of attorney no. 7055 dated 09.09.2015 and this attorney transferred .1200 acres of land of her own and that of her principal vide registered sale deed no. 6846 dated 01.09.2016 in favor of Big Boss Corporation Ltd.

That thereafter Sheikh Samama Islam transferred .1200 acres of land vide registered kabala no. 2096 dated 23.05.2010 in favor of Shahjahan Shajau and vide registered sale deed no. 2097 in favor of Najir Ahmmed and these purchasers also mutated their names in the concerned khatian and paid rents accordingly and thereafter transferred .1200 acres of land from C.S. Plot No. 452 vide registered sale deed no. 6847 dated 01.09.2016 in favor of Big Boss Corporation Ltd. That Monwara Begum transferred .2500 acres of land from C.S. Plot Nos. 454, 453, 484, 452 vide registered sale deed no. 5418 dated 19.05.2014 in favor of Abdul Karim, Saiful Islam, Shoriful Islam and Sohel Rana and they mutated their names in the concerned khatian and paid rents accordingly. Thereafter Hasina Akter died leaving behind two daughters Sumayia Akter, Sultana Yasmin one minor son Rezwanul Kabir and these heirs transferred .2500 acres of land from C.S. Plot Nos. 454, 453 and 584 vide registered sale deed no. 7626 dated 06.10.2016 in favor of Big Boss Corporation Ltd. Thereafter Samsad Parvin, Shiuli Akter and Abul Hossain appointed Syed Rezaul Hossain Kazi as their attorney vide registered deed of power of attorney no. 3253 dated 21.04.2013 in respect of .4350 acres of land and this attorney transferred the same .4350 acres of land from C.S. Plot Nos. 453, 547, 543, 459, 454, 484, 452 vide registered sale deed no.8040 dated 20.01.2016 in favor of Big Boss Corporation Ltd.

Thus Big Boss Corporation Ltd. has become the owner and possessor of 1.2025 acres of land vide sale deed no. 225 dated 11.01.2014 and 8.9295 acres of land vide sale deed no. 226 dated 11.01.2014 and .4425 acres of land vide sale deed no. 227 dated 11.01.2014 and .1200 acres of land vide sale deed no. 6846 dated 01.09.2016 and 1200 acres of land vide sale deed no. 6847 dated 01.09.2016 and 2500 acres of land vide sale deed no. 7626 dated

06.10.2016 and .2500 acres of land vide sale deed no. 7627 dated 06.10.2016 and .5480 acres of land vide sale deed no. 8039 dated 20.10.2016 and .4350 acres of land vide sale deed no. 8040 dated 20.10.2016. On the other hand Shanila Fashion Ltd has become the owner and possessor of 1000 acres of land vide sale deed no. 3908 dated 13.04.2014 and .0500 acres of land vide sale deed no. 5243 dated 16.05.2014 and .4550 acres of land vide sale deed no. 5244 dated 16.05.2014 and .1200 acres of land vide sale deed no. 7169 dated 29.06.2014.

That thus Big Boss Corporation Ltd and Shanila Fashion Ltd have become the owner and possessor in 13.0225 acres of land in total.

That the Army Welfare Trust has also become the owner and common possessor of some property in the disputed area and to remove the difficulties in the possession of the respective parties both have tried to settle the issues amicably and reached at the decision to enjoy the northern side of the disputed area by Army Welfare Trust and the southern side by the Big Boss Corporation Ltd. and Shanila Fashion Ltd. to effect the amicable partition and therefore the second party got possession in 11.38674 acres of land on the southern side of the disputed area and the first party got possession in 1.63576 acres of land. Out of this share of the 1st party the second party handed over their purchased portion in the C.S./S.A. Plot No. 484 corresponding to R.S. Plot No. 723 and also their share in purchased property in the C.S/S.A. Plot No. 459 corresponding to R.S. Plot No. 757 and in the C.S/S.A. Plot No. 457 corresponding to R.S. Khatian No. 762 to ensure the amicable partition are in the disputed land.

That thereafter after discussion with the 1st party and to their knowledge and consent the second party has erected 15 feet height boundary wall around their saham of property and also constructed three factory buildings to run 100% export oriented garments industry. In those factories near about 10000 persons both of national and foreign are working and the second party are earning huge amount of foreign currencies.

That the second party has purchased .4100 acres of land from C.S/S.A Plot No.452 corresponding to R.S. Plot No. 661 and C.S/S.A Plot No.453 corresponding to R.S. Plot No. 757 and C.S/S.A Plot No.557 corresponding to R.S. Plot No. 762 and S/S.A Plot No.543 corresponding to R.S. Plot No. 758 and C.S/S.A Plot No.459 corresponding to R.S. Plot No. 754 and C.S/S.A Plot No.454 corresponding to R.S. Plot No. 759 and C.S/S.A Plot No.484 corresponding to R.S. Plot No.723 vide registered deed no. 636 dated 18.01.2018 from Chan Mia and .2400 acres of land from C.S/S.A. Plot No. 452 corresponding to R.S. Plot No. 661 and C.S/S.A Plot No.453 corresponding to R.S. Plot No. 757 and C.S/S.A Plot No.557 corresponding to R.S. Plot No. 762 and C.S/S.A Plot No.543 corresponding to R.S. Plot No. 758 and C.S/S.A Plot No.459 corresponding to R.S. Plot No. 754 and C.S/S.A Plot No.454 corresponding to R.S. Plot No. 759 and C.S/S.A Plot No.484 corresponding to R.S. Plot No.723 vide registered deed no. 1289 dated 19.02.2018 from Md. Emarat Hossain and as such totally 0.6500 acres of land vide two kabalas to construct dormitory building for the garment factory labors and the construction work has been started accordingly.

That in fact there exists no sort of dispute in the lands owned and possessed by both the parties. Even though there exists no actual point of dispute relating to the ownership and possession of their respective lands the

first party is trying to raise some unfounded claim and as such to remove the possibility of any unfounded claim this arbitration proceeding has been initiated by both the parties.

In support of the above contention of the Second Party their authorised representative Mr. Kazi Farukuzzaman, the General Manager of Big Boss Corporation Ltd and Shanila Fashion Ltd deposed before the Panel of Arbitrators and submitted all the required documents namely copies of all the registered sale deeds establishing the chain of title of this second party in the disputed khatians and plots, the copies of the C.S., S.A. and R.S. porchas, all the mutation porchas, rent receipts and other related documents in support of the ownership and possession of their claimed properties. On perusal of these submitted documents and on perusal of the deposition as recorded it has been found that the second party namely Big Boss Corporation has successfully proved their title and possession in 12.9475 acres of land and the Shanila Fashion Ltd has successfully proved their title and possession in .7250 acres of land in the disputed Sarabo mouza.

Hence it is considered

1. *That the Second Party is well in title and possession in entirely 13.6725 acres of land in the disputed Sarabo mouza under Joydevpur P.S. of District Gazipur.*
2. *That the parties to this arbitration proceeding shall take necessary measures to show mutual respect to each other regarding their respective title and possession in the disputed mouza.*
3. *That both the parties shall carry their respective cost of arbitration as per provision of law and the agreement of arbitration.*

This Award of Arbitration has been signed by me on this 14th day of the month of September, 2019.

(Md. Shamsul Huda)
Chairman
Office of the Arbitrator
and
Former Justice Bangladesh Supreme Court
(Appellate Division)
Dhaka

৮. গুরুত্বপূর্ণ বিধায় জেলা ও দায়রা জজ বরাবর আর্মি ওয়েলফেয়ার ট্রাস্ট কর্তৃক দাখিলকৃত দরখাস্তটি (Annexure-C) নিম্নে অবিকল অনুলিখন হলোঃ

জেলা ও দায়রা জজ আদালত
দাখিলঃ
25 May 2021

আর্মি ওয়েলফেয়ার ট্রাস্ট (এডব্লিউটি) পক্ষে সচিব
প্রযত্নে- এ্যাডজুটেন্ট জেনারেল শাখা
কল্যাণ ও পুর্ণবাসন পরিদপ্তর
সেনাবাহিনী সদর দপ্তর, ঢাকা সেনা নিবাস
থানা- ঢাকা ক্যান্টনমেন্ট, ঢাকা।

-------দরখাস্তকারী

= বনাম =

বিগবস কর্পোরেশন লিমিটেড ও শাণিলা ফ্যাশন
লিমিটেড পক্ষে ব্যবস্থাপনা পরিচালক

সাং-কৃষ্ণচূড়া এ্যাপার্টমেন্ট নং-১/ডি, ফ্লাট নং-৪০, রোড নং-২১, ব্লক-বি, বনানী, ঢাকা-১২১৩।

-------প্রতিপক্ষ

আরবিট্রেশন এ্যাক্ট ২০০১ এর ৪২ ও ৪৩ ধারার বিধান মতে আরবিট্রেশন কেস ১/২০১৯ নম্বর মোকদ্দমায় আরবিট্রেশন এ্যাক্টের পরিপন্থিতে অত্র দরখাস্তকারীর অজ্ঞাতে বেআইনী ও অবৈধভাবে এক তরফাভাবে বিগত ১৪/০৯/২০১৯ ইং তারিখে প্রচারিত বেআইনী ও অবৈধ এওয়ার্ড রদ, রহিত ও বাতিলের আবেদন ।

তায়দাদ-১,০০,০০,০০০/- টাকা ।

দরখাস্তকারী পক্ষে সবিনয় নিবেদন এই যে,

১। *দরখাস্তকারী পক্ষ ও প্রতিপক্ষের মধ্যে গাজীপুর জেলার জয়দেবপুর থানাধীন সারাবো মৌজার সম্পত্তি সম্পর্কে মালিকানার বিষয়ে বিরোধ সৃষ্টি হইলে উভয়পক্ষের হিতৈষী ও শুভাকাঙ্খিদের পরামর্শে উভয়পক্ষ আলাপ-আলোচনা করিয়া বর্ণিত সম্পত্তি সংক্রান্ত বিরোধ আরবিট্রেশনের মাধ্যমে নিষ্পত্তির সিদ্ধান্ত লইয়া আরবিট্রেশনের কার্যপদ্ধতি সম্পর্কে উভয়পক্ষ বিগত ২৭/১১/২০১৮ ইং তারিখে এক আরবিট্রেশন চুক্তি সম্পাদন করেন।*

২। *বর্ণিত চুক্তিপত্রের ১নং শর্তে উল্লেখ থাকে যে, উভয়পক্ষের মাধ্যমে বিরোধ নিষ্পত্তির বিষয়ে আরবিট্রেশনের কার্যক্রম পরিচালনার জন্য দরখাস্তকারী পক্ষের অফিস যথা ঢাকাস্থ মিরপুর ১৭ ইসিবি সম্মেলন কক্ষে আরবিট্রেশনের কার্যক্রম পরিচালিত হইবে। বর্ণিত চুক্তিপত্রের ৫নং দফায় শর্ত থাকে যে,*

আরবিট্রেশন ট্রাইব্যুনালের কার্যক্রম আরবিট্রেশন এ্যাক্ট ২০০১ এর বিধান মোতাবেক পরিচালিত হইবে এবং বর্ণিত চুক্তিপত্রের ৬নং দফায় শর্ত থাকে যে, আরবিট্রেশন ট্রাইব্যুনাল গঠনের জন্য উভয়পক্ষ একজন করিয়া আরবিট্রেটর (Arbitratior) মনোনয়ন প্রদান করিবেন এবং উভয়পক্ষের মনোনীত আরবিট্রেটরগণ একমত হইয়া তৃতীয় একজনকে আরবিট্রেশন ট্রাইব্যুনালের চেয়ারম্যান হিসাবে মনোনয়ন প্রদান করিবেন এবং বর্ণিত তিনজনের সমন্বয়ে আরবিট্রেশন ট্রাইব্যুনাল গঠিত হইয়া আরবিট্রেশন ট্রাইব্যুনালের কার্যক্রম পরিচালিত হইবে। বর্ণিত চুক্তিপত্রের ৭নং ৭নং দফায় উল্লেখ থাকে যে, দরখাস্তকারী প্রথমপক্ষের পক্ষে অবসরপ্রাপ্ত জেলা জজ জনাব আনিসুজ্জামান সাহেবকে আরবিট্রেটর হিসাবে মনোনয়ন প্রদান করা হয় এবং ৮নং দফায় উল্লেখ থাকে যে, প্রতিপক্ষ ২য় পক্ষের পক্ষে আরবিট্রেটর হিসাবে অবসর প্রাপ্ত জেলা জজ জনাব মোঃ একরামুল হক চৌধুরী সাহেবকে মনোনয়ন প্রদান করেন । বর্ণিত চুক্তিপত্রের ৯নং দফায় আরো শর্ত থাকে যে, উভয়পক্ষের মনোনীত আরবিট্রেটরের মাধ্যমে গঠিত আরবিট্রেশন বোর্ড উভয়পক্ষের লিখিত বক্তব্য ও কাগজপত্র পর্যালোচনা করিয়া বিরোধীয় বিষয়টি নিষ্পত্তি করিবেন এবং আরবিট্রেশন ট্রাইব্যুনাল যে রোয়েদাদ প্রদান করিবেন উভয়পক্ষ তাহা মান্য করিতে বাধ্য থাকিবেন। উক্ত চুক্তিপত্রের ১২নং দফায় আরো শর্ত থাকে যে, আরবিট্রেশন ট্রাইব্যুনালে উত্থাপিত বিরোধ শুনানী অন্তে প্রদত্ত রোয়েদাদ (Award) কম্পিউটার কম্পোজকৃত হইবে এবং উহাতে আরবিট্রেশনের চেয়ারম্যান ও সদস্যগণের অর্থাৎ আরবিট্রেটরগণের স্বাক্ষরযুক্ত হইতে হইবে ।

৩। *বর্ণিত চুক্তিপত্র সম্পাদনের পর উভয়পক্ষে নিযুক্তীয় বিজ্ঞ আরবিট্রেটরগণ আরবিট্রেশন ট্রাইব্যুনালের চেয়ারম্যান হিসাবে অবসরপ্রাপ্ত বিচারপতি জনাব আজিজুল হক সাহেবকে মনোনীত করিয়াছেন মর্মে জানান হয়। কিন্তু পরবর্তীতে অত্র দরখাস্ত কারীর অজ্ঞাতে আরবিট্রেশন ট্রাইব্যুনালের চেয়ারম্যান হিসাবে অবসরপ্রাপ্ত। বিচারপতি জনাব এম.ডি শামসুল হুদাকে মনোনীত করা হইলে অত্র দরখাস্তকারী বিষয়টি জ্ঞাত হইয়া উক্ত আরবিট্রেশন ট্রাইব্যুনালের বিজ্ঞ চেয়ারম্যান মহোদয়ের মনোনয়নের বিষয়ে অসম্মতি জ্ঞাপন করিয়া তাহা দরখাস্তকারী পক্ষের বিজ্ঞ আরবিট্রেটর জনাব আনিসুজ্জামানকে জ্ঞাত করা হয়।*

৪। *বর্ণিত প্রকারে আরবিট্রেশন ট্রাইব্যুনালের বিজ্ঞ চেয়ারম্যান বিচারপতি জনাব এম.ডি. শামসুল হুদা সাহেবের মনোনয়ের বিষয়ে অসম্মতির বিষয় বিবেচনাধীন থাকা অবস্থায়*

আরবিট্রেশনের বিজ্ঞ চেয়ারম্যান বিচারপতি জনাব এম.ডি. শামসুল হুদা সাহেব কর্তৃক বিগত ০৮/০১/২০১৯ ইং তারিখে নোটিশ মারফত চুক্তিপত্রে উল্লেখিত আরবিট্রেশনের কার্যক্রম পরিচালিত হইবার স্থান ঢাকার মিরপুরস্থিত ১৭ ইসিসি সম্মেলন কক্ষের পরিবর্তে ঢাকার ১০/১, সেগুন বাগিচা গ্লোব নিবাসে আরবিট্রেশনের কার্যক্রম শুরু হইবে মর্মে দরখাস্তকারী পক্ষকে নোটিশের মাধ্যমে অনুযায়ী জানানো হইলে দরখাস্তকারী পক্ষ উক্ত নোটিশ প্রাপ্ত হইয়া বিগত ১৫/০১/২০১৯ ইং তারিখের একপত্র দ্বারা বিজ্ঞ চেয়ারম্যান মহোদয়কে জানানো হয় যে, ইতিপূর্বে বর্ণিত প্রকারে বিজ্ঞ চেয়ারম্যান মনোনয়ের বিষয়ে দরখাস্তকারী পক্ষের আরবিট্রেটর জনাব আনিসুজ্জামান সাহেব দরখাস্তকারী পক্ষকে কোন কিছু জ্ঞাত না করার বিষয়ে উল্লেখ করিয়া আরবিট্রেশনের কার্যক্রম স্থগিত করিবার আবেদন জানানো হয়। পরবর্তীতে বিজ্ঞ চেয়ারম্যান মহোদয় পুনরায় ১৮/০৪/২০১৯ ইং তারিখে এক নোটিশ দ্বারা ১৫/০৬/২০১৯ ইং তারিখে আরবিট্রেশন ট্রাইব্যুনালের দপ্তরে হাজির হওয়ার জন্য অনুরোধ জানান হইলে দরখাস্তকারী পক্ষ উক্ত নোটিশ প্রাপ্ত হইয়া বিগত ১১/০৬/২০১৯ ইং তারিখের এক পত্র দ্বারা বিজ্ঞ চেয়ারম্যান মহোদয়কে জানানো হয় যে, দরখাস্তকারী ও প্রতিপক্ষের মধ্যে জমি সংক্রান্ত বিরোধ আরবিট্রেশনের মাধ্যমে নিষ্পত্তির জন্য চুক্তি করা সত্ত্বেও প্রতিপক্ষ বাদী স্বরূপে দরখাস্তকারী পক্ষকে বিবাদী স্বরূপে পক্ষভূক্ত করিয়া গাজীপুর ১ম যুগ্ম জেলা জজ আদালতে দেওয়ানী ৭০/২০১৮, ৭২/২০১৮ ও ৮৪/২০১৮ নং মোকদ্দমা সমূহ দায়ের করিয়াছে যাহার প্রেক্ষিতে এবং ইতিপূর্বে বর্ণিত চেয়ারম্যান মনোনয়নের বিষয়ে অসম্মতি থাকায় আরবিট্রেশনের কার্যক্রম স্থগিত রাখিবার জন্য আবেদন করা হয় এবং সেই প্রেক্ষিতে বিজ্ঞ চেয়ারম্যান মহোদয় বিগত ১৫/০৬/২০১৯ ইং তারিখের আদেশ দ্বারা আরবিট্রেশনের কার্যক্রম স্থগিত করেন। দরখাস্তকারী পক্ষ ট্রাইব্যুনালে হাজির না হইয়া পত্রের মাধ্যমে যোগাযোগের কারনে দরখাস্তকারী পক্ষ আরবিট্রেশনের কার্যক্রম সম্পর্কে কোন কিছু জ্ঞাত ছিলেন না ।

৫। *পরবর্তীতে দরখাস্তকারী পক্ষ তাহাদের নিযুক্তীয় বিজ্ঞ আরবিট্রেটর জনাব আনিসুজ্জামান সাহেবকে ইতিপূর্বের বর্ণিত ঘটনা সম্পর্কে জ্ঞাত করাইলে তিনি দরখাস্তকারী পক্ষকে জানান যে, বিজ্ঞ আরবিট্রেটর জনাব আনিসুজ্জামান সাহেব বিগত ২৯/০৭/২০১৯ ইং তারিখের পত্র দ্বারা আরবিট্রেশন ট্রাইব্যুনালের বিজ্ঞ চেয়ারম্যান বিচারপতি এম.ডি শামসুল হুদা সাহেব বরাবরে এক পত্র প্রদানে তিনি ব্যক্তিগত অসুবিধার কারনে আরবিট্রেশন ট্রাইব্যুনালে আর্মি ওয়েলফেয়ার ট্রাস্টের পক্ষে আরবিট্রেটর হিসাবে দায়িত্ব পরিচালনা করিতে পারিবেন না মর্মে জ্ঞাত করাইয়া দিয়াছেন এবং সেই প্রেক্ষিতে আরবিট্রেশনের কার্যক্রম স্থগিত হইয়া গিয়াছে। দরখাস্তকারী পক্ষ তাহাদের মনোনীত বিজ্ঞ আরবিট্রেটর জনাব আনিসুজ্জামান সাহেবের নিকট হইতে আরবিট্রেশন ট্রাইব্যুনালের কার্যক্রম স্থগিত হওয়ার বিষয়ে জ্ঞাত হইয়া পরবর্তীতে আর কোন পদক্ষেপ গ্রহন করেন নাই ।*

৬। *বর্ণিতরূপে অবস্থা থাকাবস্থায় এবং দেশে মহামারী করোনার কারনে লক ডাউন থাকায় অফিস আদালতের কার্যক্রম সীমিত আকারে চালু হইলে দরখাস্তকারী ও প্রতিপক্ষের মধ্যকার সারাবো মৌজার জমি সংক্রান্ত বিরোধ আরবিট্রেশনের মাধ্যমে নিষ্পত্তির জন্য প্রতিপক্ষ কর্তৃক বাদী স্বরূপে গাজীপুর ১ম যুগ্ম জেলা জজ আদালতের ইতিপূর্বে বর্ণিত প্রকারে দাখিলী দেওয়ানী ৭০/২০১৮, ৭২/২০১৮ ও ৮৪/২০১৮ নং মোকদ্দমা সমূহ প্রতিপক্ষ কর্তৃক উত্তোলন করিয়া আরবিট্রেশনের কার্যক্রম পরিচালনার জন্য দরখাস্তকারী পক্ষ কর্তৃক প্রতিপক্ষ বরাবরে বিগত ২২/০৩/২০২১ ইং তারিখে এক পত্র প্রদান করিলে প্রতিপক্ষ উক্তপত্র প্রাপ্ত হইয়া প্রতিপক্ষের নিযুক্তীয় বিজ্ঞ কৌসুলী জনাব মোহাম্মদ ওমর ফারুক পারভেজ মাধ্যমে বিগত ২৯/০৩/২০২১ ইং তারিখের এক লিগ্যাল নোটিশ প্রেরণ করিয়া উহাতে উল্লেখ করে যে, উভয়পক্ষের মধ্যকার বিরোধ নিষ্পত্তির জন্য গঠিত আরবিট্রেশন ট্রাইব্যুনালের আরবিট্রেশন ১/২০১৯ নং মোকদ্দমায় বিগত ১৪/০৯/২০১৯ ইং তারিখে একতরফাভাবে এওয়ার্ড ঘোষণা করা হইয়াছে বিধায় উভয়পক্ষের মধ্যকার বিরোধ পুনরায় আরবিট্রেশনের মাধ্যমে নিষ্পত্তি হওয়ার আইনগত কোন সুযোগ নাই। প্রতিপক্ষের নিযুক্তীয় বিজ্ঞ কৌসুলীর প্রেরিত লিগ্যাল নোটিশ প্রাপ্ত হইয়া দরখাস্তকারী পক্ষ হতবাক হইয়া যান। কারণ দরখাস্তকারী পক্ষ বর্ণিত*

আরবিট্রেশন মোকদ্দমার শুনানীতে অংশ গ্রহণ করেন নাই এবং চূড়ান্ত শুনানী সম্পর্কে কোন কিছু জ্ঞাত ছিলেন না এবং দরখাস্তকারী পক্ষের বিজ্ঞ আরবিট্রেটর জনাব আনিসুজ্জামান চূড়ান্ত শুনানী আরম্ভ হইবার পূর্বেই ও ১৪/০৯/২০১৯ ইং তারিখে এওয়ার্ড প্রচারের বহু পূর্বে অর্থাৎ বিগত ২৯/০৭/২০১৯ ইং তারিখের পত্রের মাধ্যমে আরবিট্রেশন ট্রাইব্যুনালের কার্যক্রম হইতে অব্যাহতি গ্রহণ করিয়াছেন ।

৭। *বর্ণিত বিষয়ে জ্ঞাত হইয়া দরখাস্তকারী পক্ষের দপ্তর হইতে আরবিট্রেশন কেস-১/২০১৯ মোকদ্দমার তর্কিত এওয়ার্ডের সহি মোহরী নকল সংগ্রহ করিবার জন্য সংশ্লিষ্ট কর্মকর্তাকে বিগত ০৪/০৪/২০২১ ইং তারিখে দায়িত্ব দেওয়া হইলে মহামারী করোনার কারনে সরকার কর্তৃক ০৫/০৪/২০২১ ইং তারিখ হইতে দেশে লক ডাউন করা হইলে দরখাস্তকারী পক্ষের অফিস সহ সরকারী বেসরকারী বিভিন্ন দপ্তরের কার্যক্রম বন্ধ হইয়া যায় এবং পরবর্তীতে স্বল্প পরিসরে সরকারী অফিস আদালতের কার্যক্রম শুরু হইলে দরখাস্তকারী পক্ষের সংশ্লিষ্ট কর্মকর্তা আরবিট্রেশন ট্রাইব্যুনালের চেয়ারম্যান বিচারপতি জনাব এম.ডি শামসুল হুদা এর কার্যালয়ে যাইয়া জানিতে পারেন যে, তিনি অসুস্থ হইয়া হাসপাতালে আছেন । পরবর্তীতে মাননীয় চেয়ারম্যান মহোদয় সুষ্ঠ হইয়া বাসায় আসার বিষয়ে জ্ঞাত হইয়া দরখাস্তকারী পক্ষ তর্কিত আরবিট্রেশন কেস ১/২০১৯ এর এওয়ার্ডের সহি মোহরী নকলের জন্য বিগত ২০/০৫/২০২১ ইং তারিখে আবেদন করিয়া গত ২৩/০৫/২০২১ ইং তারিখে তর্কিত এওয়ার্ড সহ বর্ণিত মোকদ্দমার অর্ডারসীটের সহি মোহরী নকল প্রাপ্ত হইয়া দেখিতে পান যে, আরবিট্রেশন ট্রাইব্যুনালের বিজ্ঞ চেয়ারম্যান মহোদয় আরবিট্রেশন এ্যাক্ট ২০০১ এর আইনের পরিপন্থিতে আরবিট্রেশন ট্রাইব্যুনালের কার্যক্রম করিয়া সম্পূর্ণ বে-আইনী ও অবৈধভাবে তর্কিত আরবিট্রেশন ১/২০১৯ নং মোকদ্দমা দরখাস্তকারীর অজ্ঞাতে একতরফা ভাবে শুনানী করিয়া বেআইনী ও অবৈধভাবে দরখাস্তকারীর বিরুদ্ধে অবাস্তব বেআইনী ও ন্যায়-নীতির পরিপন্থিতে এওয়ার্ড প্রদান করিয়াছেন "যাহার প্রেক্ষিতে অত্র দরখাস্তকারী পক্ষের ক্ষতির কারণ ঘটিয়াছে। সেকারনে অত্র দরখাস্তকারী পক্ষ' বিজ্ঞ চেয়ারম্যান কর্তৃক তর্কিত আরবিট্রেশন কেস ১/২০১৯ নং মোকদ্দমায় বিগত ১৪/০৯/২০১৯ তারিখে প্রদত্ত বেআইনী ও অবৈধ এওয়ার্ড বাতিলের জন্য আরবিট্রেশন এ্যাক্ট ২০০১ এর ৪২ ও ৪৩ ধারার বিধান মতে অত্র আরবিট্রেশন মোকদ্দমা দায়ের করিলেন।*

৮ । *তর্কিত আরবিট্রেশন ১/২০১৯ নং মোকদ্দমায় আরবিট্রেশন ট্রাইব্যুনালের চেয়ারম্যান বিচারপতি জনাব মোঃ শামসুল হুদা (এম.ডি শামসুল হুদা) কর্তৃক স্বাক্ষরিত বিগত ১৪/০৯/২০১৯ ইং তারিখে প্রদত্ত এওয়ার্ড রদ, রহিত ও বাতিলের প্রার্থনায় নিম্নলিখিত কারণ ও যুক্তিসমূহের (Grounds) ভিত্তিতে অত্র আরবিট্রেশন মিস মোকদ্দমা দায়ের করা হইল ।*

<u>কারণ ও যুক্তি সমূহ (Grounds) :</u>

(১) *যেহেতু আরবিট্রেশন ট্রাইব্যুনালের বিজ্ঞ চেয়ারম্যান অত্র মোকদ্দমার প্রতিপক্ষ যথা আরবিট্রেশনের ২য়পক্ষের দাবীর স্বপক্ষে দাখিলী লিখিত বক্তব্য ও প্রতিপক্ষের দাখিলী কাগজপত্র এবং প্রতিপক্ষের স্বাক্ষ্য প্রমাণ পর্যালোচনা ও বিবেচনা না করিয়া প্রকৃত অবস্থার পরিপন্থিতে প্রতিপক্ষ যথা দ্বিতীয়পক্ষের প্রতি পক্ষপাতমূলক ভাবে বেআইনী, তঞ্চকতা ও দুর্নীতির আশ্রয়ে অবৈধভাবে আরবিট্রেশন ১/২০১৯ নং মোকদ্দমায় এওয়ার্ড প্রদান করিয়াছে সেহেতু প্রচারিত এওয়ার্ড আইন সঙ্গত হয় নহে এবং উহা রদ, রহিত ও বাতিলযোগ্য বটে ।*

(২) *যেহেতু দরখাস্তকারী পক্ষ ও প্রতিপক্ষের মধ্যে সৃষ্ট জমি সংক্রান্ত বিরোধ আরবিট্রেশনের মাধ্যমে আরবিট্রেশন ট্রাইব্যুনাল গঠন করতঃ উহার মাধ্যমে নিস্পত্তির জন্য উভয়পক্ষের মধ্যে বিগত ২৭/১১/২০১৮ ইং তারিখে সম্পাদিত চুক্তিপত্রের ১, ৫, ৯ ও ১২ নং দফার শর্তের পরিপন্থিতে আরবিট্রেশন কার্যক্রম পরিচালিত হইয়া আরবিট্রেশনের বিজ্ঞ চেয়ারম্যান প্রতিপক্ষের দ্বারা প্রভাবিত্ হইয়া দূর্নীতির আশ্রয়ে তঞ্চকতা ও পক্ষপাতমূলকভাবে আরবিট্রেশন এ্যাক্ট ২০০১ এর বিধানের পরিপন্থিতে প্রতিপক্ষের নির্দেশিত মতে অন্যায়, বেআইনী ও প্রকৃত অবস্থার এওয়ার্ড প্রদান করিয়াছেন যেহেতু প্রচারিত এওয়ার্ড আইন সঙ্গত হয় নাই এবং উহা রদ, রহিত ও বাতিলযোগ্য বটে ।*

(৩) *যেহেতু উভয়পক্ষের মধ্যে সম্পাদিত ২৭/১১/২০১৮ তারিখের চুক্তিপত্রের ১নং দফায় বর্ণিত প্রকারে উভয়পক্ষের স্বীকৃত স্থানে আরবিট্রেশনের কার্যক্রম পরিচালিত না হইয়া দরখাস্তকারী পক্ষের ইচ্ছার বিরুদ্ধে চুক্তিপত্রের শর্তের বহির্ভূতভাবে অপর একটি স্থানে প্রতিপক্ষের ইচ্ছা অনুসারে বেআইনী ও অবৈধভাবে আরবিট্রেশনের কার্যক্রম পরিচালিত হইয়াছে যাহা চুক্তির শর্তের বহির্ভূত ও আইন সঙ্গত নহে সেহেতু প্রচারিত এওয়ার্ড রদ, রহিত ও বাতিলযোগ্য বটে ।*

(৪) *যেহেতু উভয়পক্ষের মধ্যকার বিরোধ নিষ্পত্তির জন্য গঠিত আরবিট্রেশন ট্রাইব্যুনালের চেয়ারম্যান নিয়োগের বিষয়ে দরখাস্তকারী পক্ষের মতামত ও ইচ্ছা প্রতিফলিত হয় নাই এবং বিজ্ঞ চেয়ারম্যানের প্রতি দরখাস্তকারী গণের কোন আস্থা ছিল না এবং যেহেতু বিষয়টি বিজ্ঞ ট্রাইব্যুনালের নিকট উত্থাপিত হওয়া সত্ত্বেও আরবিট্রেশন ট্রাইব্যুনালের বিজ্ঞ চেয়ারম্যান বিষয়টি উপেক্ষা করিয়া সে বিষয়ে কোন সিদ্ধান্ত গ্রহণ না করিয়া অতি দ্রুততার সাথে পতিপক্ষের ইচ্ছা ও পরামর্শ অনুসারে অবাস্তব ও ভিত্তিহীন ধারনার বশবর্তী হইয়া একতরফা ভাবে আরবিট্রেশন মোকদ্দমা নিষ্পত্তি করিয়া একতরফা ভাবে বেআইনী, অবৈধ ও পক্ষপাতমূলক এওয়ার্ড প্রদান করিয়াছেন সেহেতু প্রচারিত এওয়ার্ড আইন সঙ্গত হয় নাই এবং সেকারনে উহা রদ, রহিত ও বাতিলযোগ্য বটে ।*

(৫) *যেহেতু আরবিট্রেশন ট্রাইব্যুনাল মোকদ্দমা চূড়ান্ত শুনানী আরম্ভ হওয়ার পূর্বেই তিনজন আরবিট্রেটরের মধ্যে একজন আরবিট্রেটর অবসরপ্রাপ্ত জেলা জজ জনাব আনিসুজ্জামান বিগত ২৯/০৭/২০১৯ ইং তারিখে আরবিট্রেশন ট্রাইব্যুনালের চেয়ারম্যান বরাবরে একপত্রের মাধ্যমে আরবিট্রেশনের কার্যক্রম পরিচালনা করিতে পারিবেন না মর্মে অব্যাহতি গ্রহণ করিয়াছেন এবং বিষয়টি বিজ্ঞ চেয়ারম্যান মহোদয় আরবিট্রেশন ১/২০১৯ নং মোকদ্দমার ০৯/০৮/২০১৯ ইং তারিখের আদেশ পত্রে বর্ণিত বিষয় উল্লেখ করতঃ আরবিট্রেশনের কার্যক্রম স্থগিত করিয়া ও আরবিট্রেশন এ্যাক্ট ২০০১ এর ১৫ ও ১৬ ধারার পরিপন্থিতে বিগত ২৩/০৮/২০১৯ ইং তারিখে তর্কিত আরবিট্রেশন মোকদ্দমায় বেআইনীভাবে অত্র দরখাস্তকারী পক্ষের অজ্ঞাতে একতরফা শুনানী করিয়া পরবর্তীতে আইন ও ন্যায়নীতি পরিপন্থিতে বিগত ১৪/০৯/২০১৯ ইং তারিখে একতরফা সূত্রে বেআইনী ও অবৈধ এওয়ার্ড প্রদান করিয়াছেন সেহেতু প্রচারিত এওয়ার্ড আইন সঙ্গত হয় নাই এবং উহা রদ, রহিত ও বাতিলযোগ্য বটে।*

(৬) *যেহেতু আরবিট্রেশন এ্যাক্ট, ২০০১ এর ৩৮ ধারার বিধানের পরিপন্থিতে তর্কিত আরবিট্রেশন ট্রাইব্যুনালের বিজ্ঞ চেয়ারম্যান কর্তৃক একক স্বাক্ষরে অর্থাৎ অপর আরবিট্রেটরগণের পরামর্শ ছাড়া ও তাহাদের স্বাক্ষর গ্রহণ ব্যতিত এওয়ার্ড প্রদান করিয়াছেন যাহা আরবিট্রেশন আইনের পরিপন্থি সেহেতু প্রচারিত এওয়ার্ড আইন সংগত হয় নাই এবং তাহা রদ, রহিত ও বাতিলযোগ্য বটে ।*

(৭) *যেহেতু প্রতিপক্ষ যথা আরবিট্রেশনের দ্বিতীয়পক্ষ আরবিট্রেশন চুক্তিপত্রের শর্ত সমূহ অগ্রাহ্য করিয়া বিরোধীয় বিষয় সম্পর্কে গাজীপুর ১ম যুগ্ম জেলা জজ আদালতে ৭০/২০১৮, ৭২/২০১৮ ও ৮৪/২০১৮ নম্বর তিনটি মোকদ্দমা দরখাস্তকারীর বিরুদ্ধে দায়ের করায় আরবিট্রেশন চুক্তির বরখেলাপের কারনে আরবিট্রেশন ট্রাইব্যুনালের কার্যক্রম আইন সঙ্গত ছিল না এবং যেহেতু দরখাস্তকারী পক্ষ কর্তৃক আরবিট্রেশন ট্রাইব্যুনালের বিজ্ঞ চেয়ারম্যানের নিকট লিখিত ভাবে বিষয়টি উপস্থাপন করা সত্বেও বিজ্ঞ চেয়ারম্যান মহোদয় তাহা উপেক্ষা করিয়া প্রতিপক্ষ যথা-দ্বিতীয়পক্ষের ইচ্ছা ও নির্দেশিত মতে পক্ষপাত মূলক, তঞ্চকতার ও দূর্নীতির আশ্রয়ে প্রতিপক্ষের ভিত্তিহীন দাবীকে সমর্থন করিয়অ সম্পূর্ণ অন্যায় ও বেআইনীভাবে, প্রতিপক্ষের পক্ষে এওয়ার্ড প্রদান করিয়া বিচার বিভ্রাট ঘটাইয়াছেন যাহা ন্যায় ও নিরপেক্ষ হয় নাই সেহেতু প্রচারিত এওয়ার্ড রদ, রহিত ও বাতিলযোগ্য বটে ।*

(৮) *যেহেতু তর্কিত আরবিট্রেশন ট্রাইব্যুনালের বিজ্ঞ চেয়ারম্যান প্রতিপক্ষ যথা দ্বিতীয়পক্ষের দাখিলী লিখিত বক্তব্য ও উহার সমর্থনে দাখিলী দলিলাত কাগজপত্র ন্যায়-নীতির আলোকে নিরপেক্ষভাবে পরীক্ষা ও বিবেচনা না করিয়া সম্পূর্ণ অবাবস্তব ভাবে প্রকৃত অবস্থার পরিপন্থিতে প্রতিপক্ষ যথা দ্বিতীয়পক্ষের নির্দেশিত মতে প্রতিপক্ষের পক্ষে এওয়ার্ড প্রদান করিয়া বিচার বিভ্রাট ঘটাইয়াছেন সেহেতু প্রচারিত এওয়ার্ড আইন সঙ্গত হয় নাই এবং উহা রদ, রহিত ও বাতিলযোগ্য বটে।*

(৯) যেহেতু তর্কিত আরবিট্রেশন মোকদ্দমায় আরবিট্রেশন ট্রাইব্যুনালে বিজ্ঞ চেয়ারম্যান আরবিট্রেশন এ্যাক্টের ও উভয়পক্ষের চুক্তির পরিপন্থিতে এককভাবে সিদ্ধান্ত লইয়া বেআইনী ও অবৈধভাবে এওয়ার্ড প্রদান করিয়াছেন সেহেতু প্রচারিত এওয়ার্ড আইনত; তিষ্টনীয় নহে এবং সেহেতু প্রচারিত এওয়ার্ড রদ, রহিত ও বাতিলযোগ্য বটে।

(১০) অত্র মিস মোকদ্দমার শুনানীকালে অপরাপর কারণ ও যুক্তিসমূহ উপস্থাপন করা হইবে।

উপরোক্ত কারণ ও অবস্থাধীনে দরখাস্তকারী যথা আরবিট্রেশনের ১ম পক্ষের সবিনয় প্রার্থনা এই যে, হুজুর আদালত অনুগ্রহপূর্বক অত্র আরবিট্রেশন মিস মোকদ্দমাটি শুনানীর জন্য গ্রহণ করতঃ প্রতিপক্ষ যথা আরবিট্রেশনের দ্বিতীয়পক্ষ বরাবরে নোটিশ প্রদানে উভয়পক্ষে শুনানী অন্তে আরবিট্রেশন ১/২০১৯ নং মোকদ্দমায় তিনজন আরবিট্রেটরের মধ্যে একজন আরবিট্রেটর যথা বিজ্ঞ চেয়ারম্যান জনাব মোঃ শামসুল হুদা (এম.ডি শামসুল হুদা) কর্তৃক যথা এককভাবে ও এক তরফা সূত্রে প্রদত্ত বিগত ১৪/০৯/২০১৯ ইং তারিখের বেআইনী, অবৈধ, পক্ষপাতমূলক, দুর্নীতি ও তঞ্চকতা মূলক এওয়ার্ড রদ, রহিত ও বাতিলের আদেশ দানে সুবিচার করিতে মর্জি হয়।

এবং

ইত্যবসরে অত্র আরবিট্রেশন মিস মোকদ্দমা নিস্পত্তি না হওয়া পর্যন্ত তর্কিত আরবিট্রেশন ১/২০১৯নং মোকদ্দমায় বিগত ১৪/৯/২০১৯ ইং তারিখে আরবিট্রেশন ট্রাইব্যুনালের চেয়ারম্যান কর্তৃক স্বাক্ষরিত বেআইনী ও অবৈধ এওয়ার্ডের কার্যকারিতা স্থগিত (stay) রাখিবার যথাবিহীত আদেশ দানে সুবিচার করিতে মর্জি হয়।

হলফনামা

আমি, ইমরান হোসেন, পিতা-মোঃ কাওসার আলী, সাং-আর্মি ওয়েলফেয়ার ট্রাস্ট, কল্যাণ ও পুনর্বাসন পরিদপ্তর, অ্যাডজুটেন্ট জেনারেল শাখা, সেনা সদর, ঢাকা সেনানিবাস, থানা-ঢাকা ক্যান্টনমেন্ট, জেলা-ঢাকা, জাতি-মুসলমান, ধর্ম-ইসলাম জাতীয়তা- বাংলাদেশী, বয়স-৩৫ বৎসর, পেশা-চাকুরী, প্রতিজ্ঞা পূর্বক ঘোষণা করিতেছি যে,

১। আমি অত্র মোকদ্দমার দরখাস্তকারী প্রতিষ্ঠানের আইন কর্মকর্তা এবং অত্র মোকদ্দমার দরখাস্তকারী পক্ষে তদ্বিরকারক এবং মোকদ্দমার যাবতীয় বিষয় সম্পর্কে সম্যক অবগত আছি।

২। অত্র হলফনামার ১নং দফায় এবং সঙ্গীয় অত্র আরবিট্রেশন মিস মোকদ্দমার দরখাস্তে বর্ণিত বিবরণ আমার জ্ঞান মতে সত্য।

অদ্য ২৫/০৫/২০২১ ইং তারিখে বেলা ১১.০৫ ঘটিকার সময় অত্রাদালতের হলফনামা কমিশনারের সম্মুখে উপস্থিত হইয়া অত্র হলফনামার মর্ম ও ফলাফল সম্যক অবগত হইয়া অত্র হলফনামা সম্পাদন করিলাম।

স্বা/- মোঃ ইমরান হোসেন
হলফকারী

অদ্য ২৫.০৫.২০২১ ইং মোতাবেক --- বাং তারিখ বেলা ১১ঃ০৫ ঘটিকায় ঢাকার জেলা জজ আদালতে আমার সম্মুখে উপস্থিত হইয়া সত্যপাঠ পূর্বক উপরোক্ত ঘোষণা করিলেন। ঘোষণাকারী এ্যাডভোকেট জনাব সুশান্ত কুমার বসু কর্তৃক সনাক্তকৃত।

স্বাঃ/অস্পষ্ট
কমিশনার
২৫.০৫.২০২১

হলফকারী আমার পরিচিত এবং অদ্য ২৫/০৫/২০২১ ইং তারিখে অত্রাদালতের হলফনামা কমিশনারের সম্মুখে তাহাকে সনাক্ত করিলাম।

স্বা/-অস্পষ্ট
এ্যাডভোকেট
২৫.০৫.২০২১
(Susanta Kumar Basu)
Advocate
Bangladesh Supreme Court
49, Jhonson Road (5th Floor)
Sutrapur, Dhaka-1100.
Mob. 01715-052125

৯. গুরুত্বপূর্ণ বিধায় তামাদি আইনের ৫ ধারার বিধানমতে দাখিলকৃত দরখাস্তটি (Annexure-D) নিম্নে অবিকল অনুলিখন হলোঃ

সীল
জেলা ও দায়রা জজ আদালত
দাখিলঃ
25 MAY 2021
ঢাকা।

জিলা ঢাকার ডিস্ট্রিক্ট জজ আদালত ও আরবিট্রেশন ট্রাইব্যুনাল, ঢাকা।
আরবিট্রেশন মিস কেস নং- ১৬৬/২০২১
আর্মি ওয়েলফেয়ার ট্রাস্ট

------- দরখাস্তকারী

= বনাম =

বিগবস কর্পোরেশন লিমিটেড ও শাণিলা ফ্যাশন লিমিটেড

-------প্রতিপক্ষ

তামাদি আইনের ৫ ধারার বিধান মতে দরখাস্ত।

দরখাস্তকারী পক্ষে সবিনয় নিবেদন এই যে,

১। *দরখাস্তকারী আরবিট্রেশন ১/২০১৯ নং মোকদ্দমায় বিজ্ঞ চেয়ারম্যান কর্তৃক একক স্বাক্ষরে একতরফাভাবে আরবিট্রেশন এ্যাক্ট ২০০১ এর পরিপন্থিতে বিগত ১৪/০৯/২০১৯ ইং তারিখে প্রদত্ত বেআইনী ও অবৈধ এওয়ার্ড রদ, রহিত ও বাতিলের জন্য অত্র মোকদ্দমা দায়ের করেন।*

২। *দরখাস্তকারী পক্ষ মূলক আরবিট্রেশন মোকদ্দমায় অংশ গ্রহণ করেন নাই এবং মূল আরবিট্রেশন মোকদ্দমায় দরখাস্তকারী পক্ষের মনোনীত আরবিট্রেটর আরবিট্রেশন মোকদ্দমার কার্যক্রম অংশ গ্রহণ করিবেন না মর্মে নিজেকে প্রত্যাহার করার প্রেক্ষিতে মূল আরবিট্রেশন মোকদ্দমা স্থগিত করা হয় এবং তিনজন আরবিট্রেটরের মধ্যে শুধুমাত্র চেয়ারম্যান এককভাবে আরবিট্রেশন মোকদ্দমা শুনানী করিয়া আরবিট্রেশন এ্যাক্টের পরিপন্থিতে বেআইনীভাবে ১৪/০৯/২০১৯ ইং তারিখে দরখাস্তকারীর অজ্ঞাতে একতরফা ভাবে এওয়ার্ড প্রদান করেন। যাহা দরখাস্তকারী পক্ষ জ্ঞাত ছিলেন না।*

৩। *দরখাস্তকারী পক্ষ ও প্রতিপক্ষের মধ্যে সম্পাদিত আরবিট্রেশন চুক্তির প্রেক্ষিতে প্রতিপক্ষ কর্তৃক বিরোধীয় সম্পত্তি সম্পর্কে প্রতিপক্ষ কর্তৃক দরখাস্তকারী পক্ষের বিরুদ্ধে দাখিলী দেওয়ানী মোকদ্দমা উত্তোলন পূর্বক আরবিট্রেশন চুক্তির অনুসারে বিরোধ নিষ্পত্তির জন্য দরখাস্তকারী পক্ষ কর্তৃক বিগত ২২/০৩/২০২১ ইং তারিখে প্রতিপক্ষ বরাবরে একপত্র প্রদান করিলে প্রতিপক্ষ উক্ত পত্র প্রাপ্ত হইয়া তাহাদের নিযুক্তীয় বিজ্ঞ কৌসুলীর মাধ্যমে বিগত ২৯/০৩/২০২১ ইং তারিখের লিগ্যাল নোটিশ মাধ্যমে দরখাস্তকারী পক্ষকে জ্ঞাত করায় যে বিরোধীয় সম্পত্তি সম্পর্কে আরবিট্রেশন ১/২০১৯ নং মোকদ্দমায় বিগত ১৪/০৯/২০১৯ ইং তারিখে এওয়ার্ড প্রদত্ত হইয়াছে এবং তাহাদের করণীয় কিছুই নাই। প্রতিপক্ষের প্রেরিত বিগত ২৯/০৩/২০২১ ইং তারিখের বর্ণিত লিগ্যাল নোটিশ দরখাস্তকারী পক্ষ বিগত ০৪/০৪/২০২১ ইং তারিখে প্রাপ্ত হন এবং পরবর্তীতে ০৫/০৫/২০২১ ইং তারিখ হইতে মহামারী করোনার কারনে লকডাউন ঘোষিত হইলে দেশের সরকারী ও বেসরকারী সকল অফিসের কার্যক্রম বন্ধ হইয়া যায় এবং পরবর্তীতে স্বল্প পরিসরে সরকারী ও বেসরকারী প্রতিষ্ঠানের কার্যক্রম শুরু হইলে দরখাস্তকারী পক্ষ তর্কিত আরবিট্রেশনের চেয়ারম্যান সাহেবের অফিসে যাইয়া জানিতে পারেন যে, তিনি অসুস্থ হইয়া হাসপাতালে আছেন এবং বিজ্ঞ চেয়ারম্যান হাসপাতাল হইতে ১৮/০৫/২০২০ ইং তারিখে বাসায় আসিলে দরখাস্তকারী পক্ষ বিষয়টি জ্ঞাত হইয়া বিগত ২৫/০৫/২০২১ ইং তারিখে আরবিট্রেশনের বিজ্ঞ চেয়ারম্যান সাহেবের অফিসে যাইয়া তর্কিত আরবিট্রেশন ১/২০১৯ নং মোকদ্দমার সহি মোহরী নকলের দরখাস্ত দিয়া ২৩/০৫/২০২১ ইং তারিখে বর্ণিত এওয়ার্ডের সহি মোহরী নকল প্রাপ্ত হইয়া অত্র মোকদ্দমা দায়ের করিতে ১৮৮ দিন বিলম্ব হইয়াছে। দরখাস্তকারীপক্ষ মূল আরবিট্রেশন মোকদ্দমায় একতরফা শুনানী ও রায় প্রচারের বিষয়ে প্রতিপক্ষের প্রদত্ত লিগ্যাল নোটিশ-০৪/০৪/২০২১ ইং তারিখে প্রাপ্ত হওয়ার পূর্বে জ্ঞাত ছিলেন না এবং সর্ব প্রথম*

প্রতিপক্ষের লিগ্যাল নোটিশের মাধ্যমে ০৪/০৪/২০২১ ইং তারিখের তর্কিত এওয়ার্ড বিষয়ে জানিতে পারেন। বর্ণিত বিলম্বের বিষয়ে দরখাস্তকারীর কোন এচটি নাই বিধায় বর্ণিত ১৮৮ দিন বিলম্ব মওকুফ করতঃ অত্র মোকদ্দমাটি শুনানীর জন্য গ্রহণের আদেশ হওয়া গত আবশ্যক । অন্যথায় দরখাস্তকারী পক্ষের অপূরণীয় ক্ষতির কারণ ঘটিবে।

উপরোক্ত কারণ ও অবস্থাধীনে দরখাস্তকারী পক্ষে সবিনয় প্রার্থনা এই যে, হুজুর আদালত অনুগ্রহ পূর্বক ন্যায় বিচারের স্বার্থে অত্র মোকদ্দমা দায়েরে ১৮৮ দিন বিলম্ব মওকুফ করতঃ অত্র মোকদ্দমাটি শুনানীর জন্য গ্রহণ করিবার আদেশ দানে সুবিচার করিতে মর্জি হয়।

হলফনামা

আমি, ইমরান হোসেন, পিতা-মোঃ কাওসার আলী, সাং-আর্মি ওয়েলফেয়ার ট্রাস্ট, কল্যাণ ও পুনর্বাসন পরিদপ্তর, অ্যাডজুটেন্ট জেনারেল শাখা, সেনা সদর, ঢাকা সেনানিবাস, থানা-ঢাকা ক্যান্টনমেন্ট, জেলা-ঢাকা, জাতি-মুসলমান, ধর্ম-ইসলাম জাতীয়তা- বাংলাদেশী, বয়স-৩৫ বৎসর, পেশা-চাকুরী, প্রতিজ্ঞা পূর্বক ঘোষণা করিতেছি যে,

১। আমি অত্র মোকদ্দমার দরখাস্তকারী প্রতিষ্ঠানের আইন কর্মকর্তা এবং অত্র মোকদ্দমার দরখাস্তকারী পক্ষে তদ্বিরকারক এবং মোকদ্দমার যাবতীয় বিষয় সম্পর্কে সম্যক অবগত আছি।

২। অত্র হলফনামার ১নং দফায় এবং সঙ্গীয় অত্র আরবিট্রেশন মিস মোকদ্দমার দরখাস্তে বর্ণিত বিবরণ আমার জ্ঞান মতে সত্য ।

অদ্য ২৫/০৫/২০২১ ইং তারিখে বেলা ১১.০৫ ঘটিকার সময় অত্রাদালতের হলফনামা কমিশনারের সম্মুখে উপস্থিত হইয়া অত্র হলফনামার মর্ম ও ফলাফল সম্যক অবগত হইয়া অত্র হলফনামা সম্পাদন করিলাম ।

স্বা/- মোঃ ইমরান হোসেন
হলফকারী

অদ্য ২৫.০৫.২০২১ ইং মোতাবেক --- বাং তারিখ বেলা ১১ঃ০৫ ঘটিকায় ঢাকার জেলা জজ আদালতে আমার সম্মুখে উপস্থিত হইয়া সত্যপাঠ পূর্বক উপরোক্ত ঘোষণা করিলেন। ঘোষণাকারী এ্যাডভোকেট জনাব সুশান্ত কুমার বসু কর্তৃক সনাক্তকৃত।	*হলফকারী আমার পরিচিত এবং অদ্য ২৫/০৫/২০২১ ইং তারিখে অত্রাদালতের হলফনামা কমিশনারের সম্মুখে তাহাকে সনাক্ত করিলাম।*
স্বাঃ/অস্পষ্ট কমিশনার ২৫.০৫.২০২১	*স্বা/-অস্পষ্ট এ্যাডভোকেট ২৫.০৫.২০২১ (Susanta Kumar Basu) Advocate Bangladesh Supreme Court 49, Jhonson Road (5th Floor) Sutrapur, Dhaka-1100. Mob. 01715-052125*

১০. গুরুত্বপূর্ণ বিধায় বিজ্ঞ জেলা জজ, ঢাকা কর্তৃক আরবিট্রেশন মিস কেস নং- ১৬৬/২০২১-এ প্রদত্ত বিগত ইংরেজী ১৩.০৬.২০২১ তারিখের রায় ও আদেশ নিম্নে অবিকল অনুলিখন হলোঃ-

*"**২-----১৩.০৬.২০২১***

আবেদনের প্রেক্ষিতে নথি উপস্থাপন করা হলো। অদ্য গ্রহণযোগ্যতা শুনানীর জন্য দিন ধার্য্য আছে। দরখাস্তকারী পক্ষ হাজিরা দাখিল করিয়াছে। গ্রহণযোগ্যতা শুনানীর জন্য নথি পেশ করা হলো।

Heard the learned lawyer for the petition, perused the stay petition & petition under Section 5 of the Limitation Act for

condonation of delay of 188 days in preferring the case which has been satisfactorily explained by the petitioner.

Considering the grounds narrated in the petition of condonation of delay, I do condone delay in filing of the case & accordingly the case is admitted for hearing.

Issue notice upon the O.P. fixing 13.07.2021 for S.R. & A.D.

The petitioner is directed to file postal receipts by 13.07.2021.

The Operation of the impugned award dated 14.09.2019 be stayed until further order.

Dictated & Corrected by me.

Sd/-Mohammad Showkat Ali Chowdhury
District Judge, Dhaka.

১১. বিগত ইংরেজী ২৭.১১.১৮ তারিখে সম্পাদিত আরবিট্রেশন চুক্তিপত্রের প্রথম পক্ষ আর্মি ওয়েলফেয়ার ট্রাস্ট অবসর প্রাপ্ত জেলা জজ আনিসুজ্জামানকে তাদের সালিশকারী নিয়োগ করেন। অতঃপর প্রথম পক্ষ আর্মি ওয়েলফেয়ার ট্রাস্ট এর সালিশকারীর উপস্থিতিতে সালিশী কার্যক্রম শুরু হয়। অবসর প্রাপ্ত জেলা জজ আনিসুজ্জামান সালিশী কার্যক্রম চলাকালে এক পর্যায়ে কোন কারণ উল্লেখ না করে সালিশী কার্যক্রম থেকে নিজেকে প্রত্যাহার করেন। অতঃপর সালিশী ট্রাইব্যুনাল বিগত ইংরেজী ১৪.০৯.২০১৯ তারিখে সালিশী রোয়েদাদ প্রদান করেন। উপরিল্লিখিত সালিশী রোয়েদাদ প্রাপ্তির ১৮৮ দিন পর সালিশী চুক্তির প্রথম পক্ষ আর্মি ওয়েলফেয়ার ট্রাষ্ট সালিশী রোয়েদাদ বাতিলের নিমিত্তে সালিশী আইন ২০০১ এর ধারা ৪২ মোতাবেক দরখাস্ত দাখিল করলে বিজ্ঞ জেলা জজ ১৮৮ দিন বিলম্ব মওকুফ করে দরখাস্তটি শুনানীর জন্য গ্রহণ করেন। জেলা জজ, ঢাকা কর্তৃক উপরিল্লিখিত বিলম্ব মওকুফের বিগত ইংরেজী ১৩.০৬.২০২১ তারিখের আদেশে সংক্ষুব্ধ হয়ে দরখাস্তকারী অত্র সিভিল রিভিশন মোকদ্দমা দাখিল করে।

১২. অত্র মোকদ্দমায় আদালতের সামনে প্রশ্ন হলো- সালিশী আইন, ২০০১ এর ৪২ ধারায় প্রদত্ত ৬০ (ষাট) দিন সময়সীমা অতিক্রান্ত হওয়ার পর কোন পক্ষ কর্তৃক সালিশী রোয়েদাদ বাতিলের আবেদন দাখিলে তামাদি আইনের ৫ ধারার সুযোগ পেতে হকদার কিনা? অর্থাৎ সালিশী রোয়েদাদ বাতিলের আবেদন আইনে বর্ণিত নির্ধারিত সময় অতিক্রান্ত হওয়ার পর সংক্ষুব্ধ পক্ষ বিলম্বের দরখাস্তসহ দাখিল করতে আইনগতভাবে এখতিয়ার সম্পন্ন কিনা?

১৩. গুরুত্বপূর্ণ বিধায় The Limitation Act, 1908 Contents (As modified up to 2007) এর ধারা ৩ নিম্নে অবিকল অনুলিখন হলোঃ

"3.Dismissal of suits, etc. instituted, etc., after period of limitation- Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred and application made, after the period of limitation prescribed thereof by the first schedule shall be dismissed, although limitation has not been set up as a defence."

" ধারা ৩। তামাদির মেয়াদ শেষে দায়েরকৃত মামলা ইত্যাদি খারিজ।- এই আইনের ৪ থেকে ২৫ ধারার (উভয় ধারাসহ) সাপেক্ষে প্রথম তফসিলে এতদ্দ্দুশ্যে নির্ধারিত তামাদির মেয়াদ উর্ত্তীণ হওয়ার পর মামলা, আপীল বা দরখাস্ত দায়ের বা দাখিল করা হলে বিবাদী পক্ষ যদি তামাদির প্রশ্ন উত্থাপন নাও করে, তবুও উক্ত মামলা, আপীল বা দরখাস্ত খারিজ বলে বিবেচিত হবে।"

(তামাদি আইনঃ তত্ত্ব ও বিশ্লেষণ, মোঃ আব্দুল হালিম, ব্যারিস্টার-এট-ল এর বই হতে সংগৃহীত)

১৪. উপরিল্লিখিত তামাদি আইনের ধারা ৩ মোতাবেক তামাদি আইনের ৪ থেকে ২৫ ধারার (উভয় ধারাসহ) বিধান সাপেক্ষে তামাদি আইনের প্রথম তফসিলে প্রদত্ত নির্ধারিত সময় উত্তীর্ণ হওয়ার পর *মামলা, আপিল* বা *দরখাস্ত* দায়ের করলে বিবাদীপক্ষ বা প্রতিপক্ষ বা অপরপক্ষ তামাদির প্রশ্ন উত্থাপন নাও করলে উক্ত মামলা, আপীল বা দরখাস্ত খারিজ বলে বিবেচিত হবে। অর্থাৎ তামাদি আইনের প্রথম তফসিলে বর্ণিত সময়ের মধ্যেই সকল মামলা, আপীল বা দরখাস্ত দাখিল করতেই হবে।

১৫. এখন আমরা দেখব এর কোন ব্যতিক্রম করা যায় কিনা? উত্তর হল হ্যাঁ করা যায়। কতিপয় বিশেষ ক্ষেত্রে প্রথম তফসিলে বর্নিত মেয়াদ বৃদ্ধি করা যাবে। সে সম্পর্কে তামাদি আইনের ধারা ৫ এ বর্ণিত হয়েছে। গুরুত্বপূর্ণ বিধায় The Limitation Act, 1908 এর ধারা ৫ নিম্নে অবিকল অনুলিখন হলোঃ

*"**5.** Any appeal or application for a revision or a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."*

"ধারা ৫। কতিপয় বিশেষ ক্ষেত্রে মেয়াদ বৃদ্ধিকরণ।- কোন আপীল বা রায় পুনর্বিচার বা পুনরীক্ষণের দরখাস্ত বা আপীল করার অনুমতি প্রার্থনার দরখাস্ত বা অন্য কোন দরখাস্ত, যার উপর এই ধারা বর্তমানে কার্যকর অন্য কোন আইনের দ্বারা বা অধীনে প্রযোজ্য করা হয়, তার নির্দিষ্ট তামাদির মেয়াদ উত্তীর্ণ হওয়ার পর গৃহীত হতে পারে, যদি আপীলকারী বা দরখাস্তকারী এই মর্মে আদালতকে সন্তুষ্ট করতে পারে যে, নির্ধারিত মেয়াদের মধ্যে আপীল দায়ের বা দরখাস্তটি দাখিল না করার যথেষ্ট কারণ ছিল।"

(তামাদি আইনঃ তত্ত্ব ও বিশ্লেষণ, মোঃ আব্দুল হালিম, ব্যারিস্টার-এট-ল এর বই হতে সংগৃহীত)

১৬. উপরিল্লিখিত ধারা ৫ সহজ সরল পাঠে এটি কাঁচের মত স্পষ্ট যে, কোন আপীল বা রায় পুনর্বিচার বা পুনরীক্ষণের দরখাস্ত বা আপীল করার অনুমতি প্রার্থনার দরখাস্ত বা অন্য কোন দরখাস্ত, যার উপর এই ধারা বর্তমানে কার্যকর অন্য কোন আইনের দ্বারা বা অধীনে প্রযোজ্য করা হয়, তার নির্দিষ্ট তামাদির মেয়াদ উত্তীর্ণ হওয়ার পর গৃহীত হতে পারে, যদি আপীলকারী বা দরখাস্তকারী এই মর্মে আদালতকে সন্তুষ্ট করতে পারে যে, নির্ধারিত মেয়াদের মধ্যে আপীল দায়ের বা দরখাস্তটি দাখিল না করার যথেষ্ট কারণ ছিল।

১৭. *অর্থাৎ কোন আপীল দায়েরে, রায় পুনর্বিচার দায়েরে, পুননিরিক্ষনের দরখাস্ত দায়েরে আপীল করার অনুমতি প্রার্থনায় এবং অন্য কোন দরখাস্ত দায়েরে বর্তমানে কার্যকর কোন আইন দ্বারা বা কোন আইনের অধীন তামাদি আইনের ৫ ধারার বিধান প্রযোজ্য করা হলে তামাদির নির্দিষ্ট মেয়াদ উত্তীর্ণ হওয়ার পরও আদালতের সন্তুষ্টি সাপেক্ষে আপীল দায়ের বা দরখাস্ত গৃহীত হতে পারে।*

১৮. গুরুত্বপূর্ণ বিধায় The Limitation Act, 1908 Contents (As modified up to 2007) এর ধারা ২৯ নিম্নে অবিকল অনুলিখন হলোঃ

"29. Savings-(1) Nothing in this Act shall affect section 25 of the Contract Act, 1872.

***(2) Where any Special law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply,** as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special law-*

(a) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special law; and

(b) the remaining provisions of this Act shall not apply.

(3) Nothing in this Act shall apply to suits under the Divorce Act, 1869.

(4) Sections 26 and 27 and the definition of "easement" in section 2 shall not apply to cases arising in territories to which the Easements Act, 1882, may for the time being extend."

"২৯। সংরক্ষণ।-(১) এই আইনের কোন বিধান ১৮৭২ সালের চুক্তি আইনের (১৮৭২ সালের ৯নং আইন) ২৫ ধারাকে প্রভাবিত করবে না।

***(২)যে ক্ষেত্রে কোন বিশেষ আইনে কোন মামলা, আপীল বা দরখাস্তের জন্য এই আইনের প্রথম তফসিলে নির্ধারিত মেয়াদ অপেক্ষা ভিন্নতর তামাদির মেয়াদের বিধান আছে, সেক্ষেত্রে এই আইনের ৩ ধারার বিধানসমূহ এমনভাবে প্রযোজ্য হবে,** যেন উক্ত ভিন্নতর মেয়াদ এই আইন অনুযায়ী কোন মামলা, আপীল বা দরখাস্তের তামাদির মেয়াদ গণনার উদ্দেশ্যে-*

(ক) এই আইনের ৪ ধারা, ৯ থেকে ১৮ ধারা ও ২২ ধারার বিধানসমূহ সেই পরিমাণে প্রযোজ্য হবে, যে পরিমাণ তা উক্ত বিশেষ আইনের স্পষ্ট বহির্ভূত না, এবং

(খ) এই আইনের অবশিষ্ট বিধানসমূহ প্রযোজ্য হবে না।

(৩) এই আইনের কোন বিধান বিবাহ বিচ্ছেদ আইন (১৮৬৯ সালের ৪নং আইন) অনুসারে আনীত মামলার ক্ষেত্রে প্রযোজ্য হবে না।

(৪) যে সকল এলাকা ১৮৮২ সালের সুখাধিকার আইনের আওতাভুক্ত সে সকল এলাকা থেকে উদ্ভুত মামলার ক্ষেত্রে আইনের ২৬ ও ২৭ ধারা এবং ২ ধারায় বর্ণিত 'সুখাধিকার' এর সংজ্ঞা প্রযোজ্য হবে না। ''

(তামাদি আইনঃ তত্ত্ব ও বিশ্লেষণ, মোঃ আব্দুল হালিম, ব্যারিস্টার-এট-ল এর বই হতে সংগৃহীত)

১৯. তামাদি আইনের উপরিল্লিখিত ধারা ২৯(২) মোতাবেক যে ক্ষেত্রে কোন বিশেষ আইনে কোন মামলা, আপীল বা দরখাস্তের জন্য তামাদি আইনের প্রথম তফসিলে নির্ধারিত মেয়াদ অপেক্ষা ভিন্নতর তামাদির মেয়াদের বিধান আছে, সেক্ষেত্রে এই আইনের ৩ ধারার বিধানসমূহ এমনভাবে প্রযোজ্য হবে, যেন উক্ত ভিন্নতর মেয়াদ এই আইন অনুযায়ী কোন মামলা, আপীল বা দরখাস্তের তামাদির মেয়াদ গণনার উদ্দেশ্যে-এই আইনের ৪ ধারা, ৯ থেকে ১৮ ধারা ও ২২ ধারার বিধানসমুহ সেই পরিমাণে প্রযোজ্য হবে, যে পরিমাণ তা উক্ত বিশেষ আইনের স্পষ্ট বহির্ভুত না, এবং তামাদি আইনের অবশিষ্ট বিধানসমূহ প্রযোজ্য হবে না।

২০. প্রথমত কোন বিশেষ আইনে কোন মামলা, আপীল বা দরখাস্ত দাখিলের জন্য তামাদি আইন, ১৯০৮ এর প্রথম তফসিলে বর্ণিত নির্ধারিত মেয়াদ অপেক্ষা ভিন্নতর তামাদির মেয়াদের বিধান থাকলে, অর্থাৎ তামাদি আইনের প্রথম তফসিলে মামলা, আপীল বা দরখাস্ত দাখিলে যে মেয়াদ বা সময় দেওয়া সে মেয়াদ ও সময়ের পরিবর্তে ভিন্নতর তামাদির মেয়াদ বা সময় দেওয়া থাকলে তামাদি আইনের ২৯(২)(ক) মোতাবেক বিশেষ আইনের যে পরিমান সরাসরি বহির্ভূত না হবে সে পরিমান তামাদি আইনের ৪ ধারা, তামাদি আইনের ৯ থেকে ১৮ ধারা এবং ২২ ধারার বিধান সমূহ প্রযোজ্য হবে এবং ২৯(২)(খ) মোতাবেক তামাদি আইনের ২৯(২)(ক) ধারার বিধান ব্যতীত তামাদি আইনের অবশিষ্ট বিধান সমূহ প্রযোজ্য হবে না।

২১. অর্থাৎ বিশেষ আইনে ভিন্নতর তামাদির মেয়াদের বিধান সুনির্দিষ্ট থাকলে তামাদি আইনের ধারা ২৯(২) মোতাবেক তামাদি আইনের ধারা ৫ প্রযোজ্য হবে না।

২২. গুরুত্বপূর্ণ বিধায় সালিশী আইন, ২০০১ এর ধারা ৪২ নিম্নে অবিকল অনুলিখন হলোঃ

৪২। সালিসী রোয়েদাদ বাতিলের আবেদন- *(১) কোন পক্ষ কর্তৃক সালিসী রোয়েদাদ প্রাপ্তির ষাট দিনের মধ্যে দাখিলকৃত আবেদনের ভিত্তিতে আদালত আন্তর্জাতিক বাণিজ্যিক সালিসে প্রদত্ত রোয়েদাদ ব্যতীত এই আইনের অধীন প্রদত্ত কোন সালিসী রোয়েদাদ বাতিল করিতে পারিবে।*

(২) কোন পক্ষ কর্তৃক সালিসী রোয়েদাদ প্রাপ্তির ষাট দিনের মধ্যে দাখিলকৃত আবেদনের ভিত্তিতে হাইকোর্ট বিভাগ বাংলাদেশে অনুষ্ঠিত আন্তর্জাতিক বাণিজ্যিক সালিসে প্রদত্ত কোন সালিসী রোয়েদাদ বাতিল করিতে পারিবে।

২৩. উপরিল্লিখিত ধারা ৪২ সহজ সরল পাঠে এটি কাঁচের মত স্পষ্ট যে, সালিশী রোয়েদাদ প্রাপ্তির ৬০ (ষাট) দিনের মধ্যে সংক্ষুব্ধ পক্ষকে বাংলাদেশে অনুষ্ঠিত আন্তর্জাতিক বাণিজ্যিক সালিশী রোয়েদাদ বাতিলের ক্ষেত্রে হাইকোর্ট বিভাগে এবং আন্তর্জাতিক বাণিজ্যিক সালিশে প্রদত্ত রোয়েদাদ ব্যতীত সালিশী আইন, ২০০১ এর অধীন প্রদত্ত সালিশী রোয়েদাদ বাতিলের ক্ষেত্রে জেলা জজ আদালতে আবেদন দাখিল করতে হবে।

২৪. যেহেতু সালিশী আইন, ২০০১ এর ৪২ ধারার দরখাস্ত দায়েরে ৬০ (ষাট) দিন সময় প্রদত্ত হয়েছে সেহেতু তামাদী আইনের ২৯(২) ধারার বিধান মোতাবেক তামাদি আইনের ৫ ধারা প্রযোজ্য নয়। ফলে সালিশী আইন, ২০০১ এর ৪২ ধারায় বর্ণিত ৬০ (ষাট) দিন অতিবাহিত হওয়ার পর রোয়েদাদ বাতিলের দরখাস্ত আইন দ্বারা বারিত।

২৫. অত্র মোকদ্দমায় আর্মি ওয়েলফেয়ার ট্রাষ্ট এর উপর সালিশী আইন, ২০০১ এর ৪২ ধারার বিধান মোতাবেক সালিশী রোয়েদাদ প্রাপ্তির ৬০ (ষাট) দিনের মধ্যে সালিশী রোয়েদাদ বাতিলের আবেদন জেলা জজ আদালতে দাখিল করার বাধ্যবাধকতা ছিল। কিন্তু আর্মি ওয়েলফেয়ার ট্রাষ্ট সালিশী রোয়েদাদ প্রাপ্তির ১৮৮ দিন পর সালিশী আইন, ২০০১ এর ৪২ ধারা মোতাবেক সালিশী রোয়েদাদ বাতিলের নিমিত্তে আরবিট্রেশন মিস কেইস নং- ১৬৬/২০২১ তামাদি আইন এর ৫ ধারার দরখাস্তসহ দাখিল করেন।

২৬. যেহেতু আর্মি ওয়েলফেয়ার ট্রাষ্ট সালিশী আইন, ২০০১ এর ৪২ ধারায় বর্ণিত সময়সীমা তথা ৬০ (ষাট) দিনের মধ্যে সালিশী রোয়েদাদ বাতিলের দরখাস্ত দাখিল করেন নাই, সেহেতু বিজ্ঞ জেলা জজ, ঢাকা কর্তৃক উক্ত দরখাস্ত সরাসরি প্রত্যাখান করা উচিত ছিল। কিন্তু বিজ্ঞ জেলা জজ, ঢাকা আইনের ভুল ব্যাখ্যা করে আর্মি ওয়েলফেয়ার ট্রাষ্ট কর্তৃক দাখিলকৃত সালিশী রোয়েদাদ বাতিলের দরখাস্ত দাখিলে ১৮৮ দিন বিলম্বের দরখাস্ত এখতিয়ার বহির্ভূতভাবে গ্রহণ করে এবং উক্ত বিলম্ব মওকুফ করে রোয়েদাদ বাতিলের দরখাস্তটি শুনানীর জন্য গ্রহণ করেছেন বিধায় বিজ্ঞ জেলা জজ, ঢাকার উপরিল্লিখিত আদেশটি হস্তক্ষেপে যোগ্য। অত্র রুলটি চূড়ান্ত যোগ্য।

২৭. অতএব, আদেশ হয় যে, অত্র রুলটি বিনা খরচায় চুড়ান্ত করা হলো।

২৮. বিজ্ঞ জেলা জজ, ঢাকা কর্তৃক আরবিট্রেশন মিস কেস নং ১৬৬/২০২১-এ দরখাস্তকারী আর্মি ওয়েলফেয়ার ট্রাষ্ট এর ১৮৮ দিন বিলম্বের দরখাস্ত গ্রহণ এবং বিলম্ব মার্জনা করে প্রদত্ত আদেশ বেআইনী ও এখতিয়ারবিহীন ঘোষণাক্রমে এতদ্বারা বাতিল করা হলো। মিস কেস নং ১৬৬/২০২১ এতদ্বারা সরাসরি খারিজ করা হলো।

২৯. অত্র রায়ের অনুলিপি সহ নথি সংশ্লিষ্ট আদালতে দ্রুত প্রেরণ করা হউক।

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HIGH COURT DIVISION
(STATUTORY ORIGINAL JURISDICTION)

Admiralty Suit No. 92 of 2016

Chattogram Dry Dock Ltd
....Plaintiff
Vs.
M.T. Fadl-E-Rabbi (IMO No. 9078177) and others
.... Defendants

Mr. Saifur Rashid, Advocate
..... For the Plaintiff
Mr. Md. Belayet Hossain, Advocate
....For the Defendants

Mr. Kamal-Ul Alam, Senior Advocate with
Mr. Golam Arshed and
Ms. Shahnaj Akhtar Advocates
... For the Applicant (Auction purchaser)
Ms. Kazi Zinat Haque, DAG
...For the Customs-Authority

The 16th April, 2019

Present:
Mr. Justice Muhammad Khurshid Alam Sarkar

Editors' Note:
The plaintiff (the applicant-auction purchaser) was the highest bidder of the auction-sold vessel who prayed for an order from the High Court Division for a direction to the Marshall of the Court to deliver the auction-sold vessel to him without payment of any customs duties and VAT. He claimed that previously the Assistant Commissioner of Customs of Chattogram had informed that there was no scope for assessing custom duties against the said vessel and, as such he is now barred by estoppel to demand any custom duties. Moreover, for claiming custom duties on a foreign vessel ordered by the Court to be sold as scarp, Bill of Entry is required. The High Court Division, however, analyzing sections 18, 23, 43, 44, 45, 51, 52, 53 and 79 of Customs Act and relevant provisions of the Import and Export Act held that when a foreign vessel is brought into or comes in Bangladesh, with or without Bills of Entry, it is dutiable. Consequently, the rule is discharged with the direction to take delivery of the vessel upon payment of the customs duties and other Government dues.

Key Words:
Estoppel; Customs Duty; Bill of Entry; Imported goods; Section 115 of the Evidence Act, 1872; Section 18, 23, 43, 44, 45, 51, 52, 53 and 79 of the Customs Act, 1969; Section 2(c), 3(1) and 3(2) of the Imports and Exports (Control) Act, 1950

The meaning of estoppel:
The meaning of estoppel that this Court finds from the statute book and Black's Law Dictionary is that a party is prevented by his own acts from claiming a right to the detriment of the other party who was entitled to rely on such conduct and has acted accordingly. (Para 17)

The logical question that arises in this circumstance is that if the auction-purchaser wants to employ the doctrine of estoppels as a shield on the ground of non-mentioning of the payment of customs duties in the auction notice, then, resorting to the same doctrine, he should not have paid off all other dues, taxes and charges, such as sale tax, Port dues and wage men's charges which were also not mentioned in the auction notice published in the newspapers. The true scenario, as surfaces from the conducts of the auction-purchaser and from the explanations received from the team of Marshall, is that it was notified to all the bidders that they were at liberty either to submit their proposal agreeing with these "Further Conditions" or they might abstain from submitting their proposals. Therefore, it is amply clear to me that upon accepting the above conditions, all the bidders have participated in the bid and this applicant became the highest bidder upon agreeing with and accepting the condition that customs duties and other Government dues are to be paid off on top of his offer of Taka 8,50,00,000/-. More so, on 10.07.2018, since the offer of the highest bidder was accepted and confirmed by this Court subject to the payment of all the Government tax, duties and charges, and given the fact that the auction-purchaser (applicant) received this Court's aforesaid Order dated 10.07.2018 without raising any objection thereto, the auction-purchaser evidently had reconfirmed his position that he was purchasing the vessel upon agreeing with the conditions of payment of all the Government dues and, that is how, he had waived his right to question about payment of Government dues, which includes customs duties. (Para-19)

<u>Section 23 Customs Act 1969:</u>
The marginal note of the above law includes not only 'goods' .... 'wreck', but also 'ETC', meaning that if any foreign thing/object, whether it is goods or something else, comes into Bangladesh, it shall be considered as "imported goods". In the light of admitted fact that the goods in question (the vessel) has come into Bangladesh from a foreign country, it shall be considered as "imported goods" at the time of its sale/transfer, as per the provisions of Section 23 of the Customs Act. (Para 26)

<u>Sections 18, 23, 43, 44, 45, 51, 52, 53 and 79 of Customs Act 1969:</u>
From a careful examination of the relevant provisions of the Customs Act, namely, Sections 18, 23, 43, 44, 45, 51, 52, 53 and 79 and relevant provisions of the Import and Export Act, it leads me to hold that when any foreign thing, object, goods, which would include a foreign vessel, is brought into or comes in Bangladesh, be it without or with Bills of Entry, it is dutiable, as per the prevailing rate prescribed in the Bangladesh Customs Tariff, if the same is picked up/collected/arrested for the purpose of home consumption, warehousing, selling to local or foreign national/country or for any other lawful purpose. (Para-28)

<u>Advocates should not expect detailed Judgment on the side-issue of a suit/matter, which is already well-settled by the Apex Court</u>
While an Advocate would be seen by this Court to be fully justified in receiving a detailed Judgment on finishing hearing of a suit or any other original substantive matter (such as Admiralty Suit, Writ Petition, Company Matter) even if the Court expresses its views dismissing the suit/discharging the Rule, however, as an officer of the Court, an Advocate is expected to assist this Court in saving its time by non-prosecuting an interlocutory application, when the same would be found by the Court without any substance after affording the opportunity of placing the arguments at length. It is to be borne in mind by the learned Advocates that since the number of Judges of this country are very negligible in comparison to the case-load, it has become very difficult for the

learned Judges of this country to dispose of the substantive suit/matters and, therefore, the learned Advocates should not expect detailed Judgment on the side-issue of a suit/matter, which is already well-settled by the Apex Court of our jurisdiction.

(Para-30)

JUDGMENT

Muhammad Khurshid Alam Sarkar, J:

1. This application has been filed by the highest bidder of auction-sold vessel MT FADL-E-RABBI (hereinafter, the aforesaid highest bidder would be referred to as either 'the applicant' or 'the auction purchaser' or 'the applicant-auction purchaser) challenging the legality and propriety of the claim of customs duties and VAT of an amount of Taka 64,68,025/- by the Chattogram Customs Authority from the applicant. The applicant further prays for an Order from this Court directing the Marshall of this Court to deliver the auction-sold vessel M.T. FADL-E-RABBI (defendant no.1 of the suit) to the applicant without payment of any customs duties and VAT.

2. The background facts against which the instant application arises are as follows: the plaintiff filed this Admiralty Suit No. 92 of 2016 against the defendant no. 1-vessel (M. T. FADL-E-RABBI, IMO No. 9078177 flying Panama flag and currently lying at the Dry Dock, Chattogram Port) and its owners praying for a decree for recovery of its dry docking charges amounting to Taka 6,76,01,325/- with interest thereon @ 20% per annum. On the application of the plaintiff, the defendant no. 1-vessel (M.T. FADL-E RABBI) was arrested on 12.12.2016. Thereafter, as per this Court's Order dated 30.05.2017, which was passed pursuant to the plaintiff's application, the Marshall prepared and submitted on 02.07.2017 an inventory of the defendant no. 1-vessel (M.T. FADL-E-RABBI) for auction-sale of the same. Subsequently, in response to this Court's Order dated 01.11.2017, the Chattogram Port Authority by their letter dated 05.02.2018 informed the Court that a sum of Taka 1,23,200/- was due up to 04.02.2018 as Watchman Charges and by letter dated 08.11.2017 a further information was passed onto this Court by the Chattogram Port Authority that a sum of Taka 53,17,627/59 was due up to 10.11.2017 as Port dues. Later on, the Assistant Commissioner of Customs of Chattogram vide its letter dated 09.11.2017 informed this Court that there was no scope to assess the customs duties of the said defendant no. 1-vessel (M.T. FADL-E-RABBI) at that stage.

3. It is stated in the application that with the above information and preparation, the auction notice for sale of the defendant no. 1-vessel (M.T. FADL-E-RABBI) was published in the Newspapers on 26.05.2018 in the Daily Financial Express and Daily Purbokon without containing any terms for payment of any outstanding customs duties. It is further stated that placing full reliance on the said auction notice, the applicant (auction-purchaser) submitted his auction bid on 29.05.2018 and became the highest bidder and, subsequently, in response to the proposal made by the auctioneer, agreed to enhance his auction bid to Taka 8,50,00,000/-. Then, the same was accepted and confirmed by this Court vide Order dated 10.07.2018 with direction upon the Marshall of this Court to deliver possession of the auction-sold vessel subject to payment of all encumbrances, charges etc, if any, in respect of the said vessel. Thereafter, in response to the Marshall's letter dated 12.07.2018 for realization of outstanding customs duties and charges, if any, and to issue a No Objection Certificate (NOC) against the defendant no. 1-vessel, the Assistant Commissioner of Customs, Chattogram informed the Marshall vide her letter dated 23.07.2018 that there was no scope

for the customs authority to claim duty as the vessel had not been presented before them for assessment of duties. After receiving the aforesaid letter, the Marshal issued the sale certificate of the auction-sold defendant no. 1-vessel (M.T. FADL-E-RABBI) on 26.07.2018. Subsequent thereto, the Marshall of the Court by letter dated 29.07.2018 asked the auction purchaser to take delivery of the auction-sold defendant no. 1-vessel at 11am on 01.08.2018 at Bandar Bhaban.

4. It is stated in the application that the Assistant Commissioner of Customs, Chattogram suddenly took a U-turn and vide her letter dated 30.07.2018 informed the Marshall of the Court that since the defendant no. 1-vessel (M.T. FADL-E-RABBI) flying a foreign flag had been auction-sold by this Court, the same, as scrap-vessel having LDT 2771 MT, is liable to be assessed for custom duties under HS Code no. 8908.00.00 of the First Schedule to the Customs Act, 1969 (hereinafter, referred to as the Customs Act) and the same has been assessed accordingly at a total amount of Taka 64,48,025/-. The Assistant Commissioner of Chattogram Customs House in the aforesaid letter requested the Marshall for taking steps directing the auction-purchaser to obtain NOC upon due payment of the said amount of customs duties with a note that the earlier related memo dated 23.07.2018 issued by the customs authority had been withdrawn.

5. Against the auction purchaser's instant application, the defendant no. 9 (Commissioner of Customs, Chattogram) filed an affidavit-in-opposition contending, *inter alia*, that in response to the letter dated 12.07.2018 of the Registrar General of the Supreme Court (the Marshall of the Admiralty Court), initially, the Assistant Commissioner of Customs, Chattogram on behalf of the Commissioner of Customs, Chattogram vide letter dated had 23.07.2018 mistakenly informed the Marshall that though an order had been passed by the Court for assessing the customs duties, but it was not being possible to assess the customs duties because of non-presentation of the vessel before the customs authority. It is stated that by a subsequent letter dated 30.07.2018, the earlier memo dated 23.07.2018 had been withdrawn having informed the Marshall that since the defendant no. 1-vessel (M.T. FADL-E-RABBI) is a foreign vessel and has been auction-sold by this Court, the same is leviable as scrap-vessel having LDT 2771 MT and is to be assessed for customs duties against HS Code no. 8908.00.00 as specified in the First Schedule to the Customs Act. By the aforesaid letter, the customs authority claimed a total amount of Taka 64,48,025/- and requested the Marshall for taking steps directing the auction purchaser to obtain NOC upon payment of the said amount of customs duties.

6. Having found the above inconsistent position of the Chattogram Customs Authority, this Court issued a show cause notice upon the Assistant Commissioner of Customs, Chattogram, seeking an explanation as to why she had previously informed this Court's Marshall that there was no scope for assessing customs duties against the vessel at the relevant time. In response to this Court's aforesaid show cause notice dated 08.08.2018, the Assistant Commissioner of Customs, Chattogram vide letter dated 12.08.2018 expressed unconditional apology to this Court claiming that it was a bonafide mistake on part of a junior officer.

7. Mr. Kamal-Ul Alam, the learned Senior Advocate, makes his first submission on the doctrine of estoppels. He takes me through (i) the letter written by the Assistant Commissioner of Customs, Chattogram dated 09.11.2017, (ii) the auction notice for sale of the defendant no. 1-vessel published in the newspapers on 26.05.2018 and, side by side, (iii) the letter dated 30.07.2018 issued by the Chattogram Customs Authority, and submits that

since by the earlier letter 09.11.2017 the customs authority had informed the Court's Marshall that no customs duty was due against the defendant no.1-vessel and since in the auction notice no term for payment of any outstanding customs duties on the defendant no. 1-vessel was disclosed, the applicant placing full reliance thereon submitted his auction bid, which having been accepted and confirmed by this Court the sale certificate was issued by the Marshall, the Assistant Commissioner of Customs, Chattogram was not justified in law and equity in subsequently issuing the impugned memo dated 30.07.2018 for the first time disclosing that the defendant no. 1-vessel flying a foreign flag having been sold in auction by this Court the same as scrap vessel was liable to be assessed for customs duties, inasmuch as any such claim by the Chattogram Customs Authority would be hit by doctrine of estoppels. In elaborating his submissions on the doctrine of estoppels, he argues that once the customs authority has issued the letter dated 09.11.2017 and, also, the letter dated 23.07.18 stating that there is no dues in respect of the ship M.T. Fadl-E-Rabbi, the customs authority is estopped under Section 115 of the Evidence Act, 1872 (shortly, the Evidence Act) from claiming any customs duties from the importer or the auction purchaser as the importer (vessel owner) or the auction purchaser acted upon the assurance given by the customs authority cannot retrace its steps and ask for duty, as claimed by them by the subsequent letter dated 30.7.2018. In support of his submissions, he refers to the case of Collector of Customs, Chattogram Vs A. Hannan reported in 42 DLR (AD) 167 and the case of Guzrat Estate Financial Corporation Vs Messrs Lotus Hotel Private Limited reported in AIR 1983(SC) 848.

8. Mr. Kamal-Ul Alam, the learned Senior Advocate, then, takes me through the provision of Section 18 of the Customs Act and submits that the provision is only applicable for import and export of commodity by the importers or exporters, but in the instant case the auction purchaser is neither an importer nor an exporter. He argues that this applicant has purchased the vessel in auction from the custody of the Court as per auction notice published by the Court "as is where is basis", in other words, as per the present condition of the vessel whatever and wherever it is (যেখানে যে অবস্থায় সে অবস্থার ভিত্তিতে), and as such Section 18 of the Customs Act is not applicable in the instant case for the applicant. He submits that customs duty is primarily leviable on goods 'imported' into or exported from Bangladesh. In an effort to show the literal meaning of the word 'importation', Mr. Alam places its meaning from Black's Law Dictionary, and submits that 'importation' is defined therein as 'the act of bringing goods and merchandise into a country from a foreign country' and 'imported' in general, has the same meaning in the tariff laws that its etymology shows, in porto, to carry in. That is to say, to 'import' is to bear or carry into, for, an imported article is one brought or carried into a country from abroad, Mr. Alam continues to submit. In support of his above arguments, he also refers to Wharton's Law Lexicon to show the meaning of the terminology 'import' and submits that the meaning of the word is 'goods or produce brought into a country from abroad'. Thereafter, Mr. Kamal-Ul Alam places before this Court the provisions of Section 2(c) of the Imports and Exports (Control) Act, 1950 (shortly, Imports and Exports Act) and submits that the aforesaid law defines the terminology 'import' as 'bringing into Bangladesh'. Mr. Alam professes that under Section 3(1) of the aforesaid Act, the Government by order declares Import Policy each year and under Section 3(2) thereof no goods can be 'imported' without a license to be issued by the Chief Controller or any other officer of the Government. Mr. Kamal-Ul Alam argues that when in compliance with the aforesaid provisions of law any goods is imported in Bangladesh, then, as per the requirements of the provisions of Section 43, 44 and 45 of the Customs Act, the conveyance bringing such goods in Bangladesh has to declare and file import manifest specifying all goods 'imported' in such conveyances to the Port Authorities. He contends that since it is an admitted position that the defendant no. 1-vessel has entered into Bangladesh as an ocean-

going-liner-vessel carrying cargos from abroad, therefore, after discharging the cargo in the ordinary course, it would have left the Port area upon obtaining Port clearance under Sections 51, 52 and 53 of the Customs Act. He strenuously argues that the defendant no. 1-vessel has never been brought into Bangladesh as 'imported goods', as defined in the provisions of Sections 2(c), 3(1) and 3(2) of the Imports and Exports Act and as such Section18 of the Customs Act, under which customs duties is leviable on 'imported goods', has no manner of application whatsoever for imposition and assessment of customs duties on the defendant no. 1-vessel for not being an 'imported goods' and as such the auction purchaser is not liable under any provision of law to pay any customs duty whatsoever on his auction-purchased defendant no. 1-vessel.

9. Mr. Alam, then, takes me through Section 79 of the Customs Act and submits that as per the aforesaid provision, a Bill of Entry must be submitted by the owner of any imported goods for home consumption or warehousing or for any other approved purpose by delivery to the appropriate officer, but since the vessel has not been imported by the auction purchaser, question of submitting of any Bill of Entry to the customs house does not arise and calculating any customs duty does not arise either. Therefore, as Mr. Kamal-Ul Alam continues to argue, the Assistant Commissioner of Customs, Chattogram was wholly wrong in law in asserting that non-filing of Bill of Entry under Section 79 of the Customs Act by the defendant no. 1-vessel prevented the customs authority on earlier occasions in determining and assessing the customs duties on the defendant no. 1-vessel inasmuch as under Section 79 of the Customs Act, a Bill of Entry is required to be delivered to the appropriate officer of customs by the owner of any 'imported goods', and in view of the admitted fact that the defendant no. 1-vessel has not been brought into Bangladesh as goods or scrap-vessel, the requirement of Section 79 of the Customs Act for filing Bill of Entry for the 'imported goods' has no manner of application in the case of defendant no. 1-vessel.

10. He next submits that the H.S. Code No. 8908.00.00 is applicable to a vessel and other floating structures imported for breaking up in the country, but as a matter of fact, the instant vessel having not been imported by the auction purchaser for breaking up, question of levying any customs duty does not arise at all in respect of vessel M.T. Fadl-E-Rabbi. He argues that since the auction purchaser is not importer of any vessel, rather purchaser of a vessel from the home market, as such he is not liable to pay any import duty. Had it been so, it was to be paid by the owner of the vessel who has brought the vessel to Bangladesh, Mr. Kamal-Ul Alam continues to argue.

11. By making the above submissions, the learned Senior Advocate for the applicant (auction-purchaser) prays that the claim of the defendant no. 9 (customs authority) made by their letter dated 30.7.2018 be declared illegal and the physical possession of the vessel M.T. Fadl-E-Rabbi be delivered to the auction-purchaser along with a compensation of the sum of Taka 100,000/- per diem on and from 01.8.2018 to the actual date of delivery of possession of the vessel M.T. Fadl-E-Rabbi for the ends of justice.

12. Per contra, Ms. Kazi Zinat Haque, the learned DAG, appearing for the customs authority, places the latest edition of the Bangladesh Customs Tariff for the year 2017 containing HS Codes, names/descriptions of the goods for imposition of customs duties and the rates of customs duties and submits that when the law imposes customs duties on importation of foreign scrap-vessel, there should not be any debate on the issue. She refers to the case of Bashiruddin Ahmed Vs Secretary, Bangladesh, 3 BLC(AD) 179 and submits that since the issue has been settled by the Honorable Appellate Division long ago, the learned

Advocate for the auction-purchaser should non-prosecute this application, otherwise this Court should slap an exemplary costs upon the applicant.

13. After hearing the learned Senior Advocate for the auction-purchaser and the learned DAG and on perusing the application, the impugned letter together with other letters issued by the Chattogram Customs Authority and upon examination of the relevant laws, it appears to me that mainly two issues are to be adjudicated upon by this Court, namely (i) whether the Chattogram Customs Authority is estopped by Section 115 of the Evidence Act to claim the customs duty and VAT from the auction-purchaser and (ii) in order for claiming customs duties on a foreign vessel ordered by the Court to be sold as scrap, whether Bill of Entry is required.

14. Let me take up the first issue, namely, (i) whether the Chattogram Customs Authority is estopped by Section 115 of the Evidence Act to claim the customs duty and VAT from the auction-purchaser. Section 115 of the Evidence Act merits quotation here, which is as under;

> **Estoppel-**When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

15. From a minute perusal of the law, the plain understanding thereof by anyone would have is that when a person acts on the basis of another person's words/action/omission believing it to be true, the later is estopped from saying/doing otherwise.

16. The provision of estoppel is placed under Part III of the Evidence Act and this part's provisions deal with production and effect of witnesses. By the rule of evidence under Section 115, the Legislature intended that a person shall not be allowed to allege and prove a thing under the following circumstances; (i) when a person makes a representation (declaration/action/omission) to another and (iii) the other has acted upon the said representation to his detriment. In other words, on the basis of a person's representation when another person does something, subsequently the person who had made such representation shall not be allowed to deny the truth of his representation. Before incorporation of this provision in the Act of Parliament, namely, the Evidence Act, 1872, the doctrine of estoppels was evolved by the Courts on the principles of equity in order to avoid injustice so that where one party by his words/conducts enticed another party to do something, that conducts/words would be binding upon the former who would not be entitled to go back from it. Black's Law Dictionary provides the following meaning of the word 'estoppel'.

> "A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or that has been legally established as true."

17. Thus, the meaning of estoppel that this Court finds from the statute book and Black's Law Dictionary is that a party is prevented by his own acts from claiming a right to the detriment of the other party who was entitled to rely on such conduct and has acted accordingly.

18. Now, it is to be seen by me whether the Chattogram Customs Authority had previously made any representation to the auction-purchaser and whether the auction-purchaser has acted on the basis of the said representation. Upon making a thorough scrutiny of the Order-sheets together with the administrative file of this suit, it transpires that the

formats of the notice of auction in Bengali and English were prepared by the Marshall on 08.05.2018. The said format contains two parts; one part is auction notice for publication in the daily newspapers and the other part is under the heading of "Further Conditions" which is for information of the participants who are present in the auction-room. As many as five "Further Conditions" have been stipulated and condition no. 3 reads as follows: *"Bidding money offered for the purchase of the ship will be exclusive of outstanding Port dues, Customs duties, Sale tax and other charges payable to the Government. Those dues, duty, tax and other charges shall be paid by the purchaser"*. On a query by me to the team of Marshall, it was confirmed by them that before receiving the auction-bids (proposals) from the bidders, a copy of the "Further Conditions" was disseminated among them. Moreover, the conditions were read out loudly in the auction-room. The concerned officials informed me that the practice of non-mentioning the above-mentioned conditions in the auction-notice published in the newspapers is being followed since time immemorial i.e. from the date of establishment of the Admiralty Court. The above contention of the office of the Marshall appears to me to be true for the reason that although there is no mentioning about the payment of Port-dues, sale tax and other charges in the auction-notice published in the Daily Financial Express and the Daily Purbakon on 26.05.2018, the auction-purchaser after becoming the highest bidder in the auction held on 29.05.2018 paid Port dues, sale tax, watchmen's charge etc. But the auction-purchaser is not willing to pay the customs duties on the plea that there was no mentioning about the payment of customs duties in the auction notice published in the newspapers.

19. The logical question that arises in this circumstance is that if the auction-purchaser wants to employ the doctrine of estoppels as a shield on the ground of non-mentioning of the payment of customs duties in the auction notice, then, resorting to the same doctrine, he should not have paid off all other dues, taxes and charges, such as sale tax, Port dues and wage men's charges which were also not mentioned in the auction notice published in the newspapers. The true scenario, as surfaces from the conducts of the auction-purchaser and from the explanations received from the team of Marshall, is that it was notified to all the bidders that they were at liberty either to submit their proposal agreeing with these "Further Conditions" or they might abstain from submitting their proposals. Therefore, it is amply clear to me that upon accepting the above conditions, all the bidders have participated in the bid and this applicant became the highest bidder upon agreeing with and accepting the condition that customs duties and other Government dues are to be paid off on top of his offer of Taka 8,50,00,000/-. More so, on 10.07.2018, since the offer of the highest bidder was accepted and confirmed by this Court subject to the payment of all the Government tax, duties and charges, and given the fact that the auction-purchaser (applicant) received this Court's aforesaid Order dated 10.07.2018 without raising any objection thereto, the auction-purchaser evidently had reconfirmed his position that he was purchasing the vessel upon agreeing with the conditions of payment of all the Government dues and, that is how, he had waived his right to question about payment of Government dues, which includes customs duties.

20. So, clearly it is not the scenario that the auction-purchaser has acted (i.e. participated in the auction and, later on, accepted this Court's Order dated 30.07.2018) on a representation which was not disclosed/notified to him. The true fact is that the auction-purchaser is taking a chance of the wordings employed by a novice Customs Officer of the rank of Assistant Commissioner (Assistant Commissioner is the entry post of the BCS-Customs) who wrote to the Marshall twice (firstly on 09.11.2019 following the first auction and, second time, on 23.07.2018 following the second auction) in the following words "........... যেহেতু এই জাহাজটি

শুল্কণয়নের জন্য এই দপ্তরে দাখিল করা হয়নি বিধায় এ পর্যায়ে শুল্ক করাদি আদায়ের কোন সুযোগ/পাওনা নাই ....", plain meaning of which is that since the vessel has not been presented before the customs office (i.e. since no Bill of Entry has been submitted), at this stage there is no scope for the customs authority to make assessment of the customs duties. The tenderfoot having been under an impression that without receiving a Bill of Entry, she is not in a position to assess the customs duties. In any event, no one with ordinary prudence would interpret the afore-quoted Bengali sentences that there is no requirement of payment of customs duties or there is no claim of customs duties against the vessel. If the auction-purchaser wants to capitalize the expression "পাওনা নাই" (there is no dues) embodied in the aforesaid letter, it is my view that since the phraseology was employed after the mark of slash (/), it does not make any sense. The wordings might have been inserted by the novice officer herself at the request of the auction-purchaser or by the concerned clerk at the behest of the auction-purchaser with an ill motive of taking undue advantage thereof. Whatever the case may be, subsequently when the aforesaid junior customs officer herself comes up with proper explanations about her own letter, there cannot be any debate on the meaning of the wordings employed by her. It is my considered view that since the aforesaid letters were not written before the holding of the auction, and since the letters were not addressed/written to the auction-purchaser by the customs authority but was rather written specifically addressing the Marshall, therefore, no sensible person would argue that the auction-purchaser had made the offer on the basis of the aforesaid letters.

21. Two cases, namely, Collector of Customs, Chattogram Vs A. Hannan reported in 42 DLR (AD) 167 and Guzrat Estate Financial Corporation Vs Messrs Lotus Hotel Private Limited reported in AIR 1983(SC) 848 have been referred to by the learned Advocate for the auction-purchaser. In the cited Indian case, when Guzrat Estate Financial Corporation, being a statutory body, declined to disburse loan-money to Messrs Lotus Hotel Private Ltd despite execution of mortgage documents by the latter in favour of the former resulting in stoppage of construction of a 4-star hotel in the mid-path causing huge financial loss, the Indian Supreme Court held that principle of promissory estoppel shall stop the Corporation from backing out of its obligation. In the cited landmark case of our jurisdiction (A. Hannan's case), the Government by publishing Gazette Notification declared that if the importers open their L/Cs for importation of sugar within 31.10.1984 and the ship arrived within 30.11.1984, they shall enjoy certain amount of exemption in paying customs duty and sales tax. Subsequently, the Government withdrew the facility on 06.11.1984. Although the importer (A. Hannan) opened his L/C within time and the vessel carrying sugar arrived on 24.11.1984, the customs authority declined to grant the exemption to the importer. The Appellate Division in the circumstances held that since the importer acted upon the Government's assurance, the Government cannot retrace its steps.

22. While *ratio* laid down in the case of Indian Supreme Court has only persuasive value in adjudicating upon any case by the Courts of Bangladesh, the *ratio* laid down in the celebrated case of A. Hannan by the Apex Court of Bangladesh on the issue of doctrine of estoppels is to be applied mandatorily in a proper and fit case, for, this Court is constitutionally duty bound to apply any *ratio* propounded by the Appellate Division. But the facts of the present case having no nexus with the doctrine of estoppels, question of application of the *ratio* laid down in the A. Hannan's case does not arise. The inevitable conclusion on the first issue of the instant petition is that there is no scope of application of the provisions of Section 115 of the Evidence Act in the case of the auction-purchaser.

23. Now, let me see whether Bill of Entry is required for levying customs duties. For this purpose, I need to look at the provisions of Section 18 of the Customs Act, which is reproduced below:

> **Goods dutiable-** (1) Except as hereinafter provided, customs-duties shall be levied at such rates as are prescribed in the First Schedule or under any other law for the time being in force on-
> (a) goods imported into, or exported from, Bangladesh;
> (b) goods brought from any foreign country to any customs-station, and without payment of duty there, transshipped or transported for, or thence carried to, and imported at, any other customs-station; and
> (c) goods brought in bond from one customs-station to another
> Provided that no customs-duty under this Act or other tax leviable by a Customs officer under any other law for the time being in force shall be levied or collected in respect thereof, if-
> (a) in value of the goods in any one consignment do not exceed one thousand Taka; and
> (b) the total amount of such duty and tax does not exceed Taka one thousand.

24. While Section 18(1) of the Customs Act states about the rate of duty, the features/identity of the goods for imposing duties are enunciated in its Clause (a) to (c). So, all that I find from Section 18(1) of the Customs Act is that if any good is imported into Bangladesh, duties shall be levied at a rate prescribed in the First Schedule to the Customs Act (Bangladesh Customs Tariff). This piece of Legislation does not require presentation of Bills of Entry as a precondition for levying of customs duties. All that it require is that the goods must be imported, and the meaning of the words 'import' or 'importation' given in the Black's Law Dictionary, Wharton's Law Lexicon and in Section 2(c) of the Imports and Exports Act is that when any goods/produce is brought into the country from a foreign country, it would be called 'import'/'importation'. None of the above authority states about the purpose of bringing the goods into the country.

25. In the case in hand, the ship is indisputably a foreign one which initially came for the purpose of carrying cargo and, later on, in a compelling circumstances it is being sold as wreck or scrap-vessel. Therefore, I find that the provision of Section 23 of the Customs Act squarely fits into the facts and circumstances of the present case and, hence, for adjudication upon the issue, Section 23 of the Customs Act is quoted below:

> GOODS, DERELICT, WRECK, ETC.-All goods, derelict, jetsam, flotsam and wreck, brought or coming into Bangladesh shall be dealt with as if they were imported into Bangladesh.

26. The marginal note of the above law includes not only 'goods' .... 'wreck', but also 'ETC', meaning that if any foreign thing/object, whether it is goods or something else, comes into Bangladesh, it shall be considered as "imported goods". In the light of admitted fact that the goods in question (the vessel) has come into Bangladesh from a foreign country, it shall be considered as "imported goods" at the time of its sale/transfer, as per the provisions of Section 23 of the Customs Act.

27. With the above conclusion that the vessel in question is an "imported goods", I now should find out the rate of duty of this "imported goods". And, I find in the Bangladesh Customs Tariff for the relevant period of 29.05.2018 (when the vessel in question was

auction-sold) that it prescribes at its Chapter 89 under the HS Code No. 8908.00.00 that vessels and other floating structures for breaking up are liable to a customs duties of BDT 1500/- per LDT.

28. I have minutely perused the provisions of Sections 43, 44, 45, 51, 52, 53, & 79 of the Customs Act as well as the relevant provisions of the Imports and Exports Act which were placed before this Court by the learned Senior Advocate for the auction-purchaser, Mr. Kamal-Ul Alam, in an effort to convince this Court that there is a legal requirement of presentation of Bill of Entry, and I am of the view that in the backdrop of operation of the provisions of Section 23 of the Customs Act, the arguments placed by the learned Senior Counsel Mr. Kamal-Ul Alam on the terminology "import" as well as on the requirement of presentation of Bills of Entry, do not deserve any consideration. From a careful examination of the relevant provisions of the Customs Act, namely, Sections 18, 23, 43, 44, 45, 51, 52, 53 and 79 and relevant provisions of the Import and Export Act, it leads me to hold that when any foreign thing, object, goods, which would include a foreign vessel, is brought into or comes in Bangladesh, be it without or with Bills of Entry, it is dutiable, as per the prevailing rate prescribed in the Bangladesh Customs Tariff, if the same is picked up/collected/arrested for the purpose of home consumption, warehousing, selling to local or foreign national/country or for any other lawful purpose.

29. I find it pertinent to record here that, initially, the learned Advocate Mr. Golam Arshed was trying his best to make out a case in his favour showing an obsolete Bangladesh Customs Tariff containing 0% duties on this item. But when this Court, upon obtaining an updated/appropriate copy of the Bangladesh Customs Tariff, suggested him to pay the customs duties claimed by the customs authority and, thereby, take the delivery of the vessel without wasting this Court's valuable time on this issue, few days later, he engaged Mr. Kamal-Ul Alam as the Senior Counsel in this matter. Mr. Alam, then, put his best effort to demonstrate the advocacy of the stature of a true Senior Counsel by presenting some legal issues. However, after concluding the hearing of the instant application at length, this Court expressed its views in open Court to the filing-lawyer Mr. Golam Arshed (Mr. Kamal-Ul Alam was not present at that point of time) that this Court does not find any substance in this application and the learned Advocate may non-prosecute the application to assist this Court in saving its valuable hours which would require delivering a full-fledged Judgment. I reminded him that since the issue raised by him has been finally settled by the Apex Court of our jurisdiction in the case of Bashiruddin Ahmed Vs Secretary, Bangladesh Government, 3 BLC(AD) 179, there is no point of insisting upon this Court to deliver a detailed Judgment on the same issue. But the learned Advocate Mr. Golam Arshed wished to receive a full-fledged Judgment.

30. While an Advocate would be seen by this Court to be fully justified in receiving a detailed Judgment on finishing hearing of a suit or any other original substantive matter (such as Admiralty Suit, Writ Petition, Company Matter) even if the Court expresses its views dismissing the suit/discharging the Rule, however, as an officer of the Court, an Advocate is expected to assist this Court in saving its time by non-prosecuting an interlocutory application, when the same would be found by the Court without any substance after affording the opportunity of placing the arguments at length. It is to be borne in mind by the learned Advocates that since the number of Judges of this country are very negligible in comparison to the case-load, it has become very difficult for the learned Judges of this country to dispose of the substantive suit/matters and, therefore, the learned Advocates should not expect detailed Judgment on the side-issue of a suit/matter, which is already well-settled by the Apex Court of our jurisdiction.

31. In the result, the Rule issued by this Court in this application is discharged, however, without any order as to costs.

32. The auction-purchaser is hereby directed to take delivery of the vessel upon payment of the customs duties and other dues to the Government, if incurred any in the meanwhile.

17 SCOB [2023] HCD 93

HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Civil Revision No. 5314 of 1998

Abul Kasem and another
...Petitioners
Vs.
Mrs. Ummul Hasnat Mahmud Ahmed being dead his heirs Asfaque Ahmed and another
....Opposite parties

Mr. Md. Zinnat Ali Advocate with
Mr. Syed Jahangir Alam Advocate
… for petitioner No.1
Mr. A.M. Amin Uddin, Senior Adv. with
Mr. Mokarramus Shaklan Advocate
… for opposite party Nos. 1(a) - 1(d)
Mr. Abdul Wadud Bhuiyan, Senior Advocate
… for added opposite party No.2

Heard on : 11.08.2022, 21.08.2022 and 23.08.2022.
Judgment on : 25.08.2022.

Present:
Mr. Justice Md. Badruzzaman.

Editors' Note:
This is a suit for declaration that the impugned registered sale deed was forged, illegal, inoperative and not binding upon the plaintiff. The trial court decreed the suit but the appellate court allowing the appeal reversed the judgment and decree of the trial court. The plaintiffs as petitioners preferred civil revision before the High Court Division. The High Court Division on assessment of the relevant provisions of law held that from the endorsement of the sub-registrar the document achieved strong presumptive evidence of its due registration and thus, the burden of proof was upon the plaintiff which he failed to discharge. Moreover, the defendant has proved the execution of the deed and possession both by oral and documentary evidence. The High Court Division found that the trial court tried to establish plaintiff's case through the weakness of the defendant which is against the settled principle of law that the plaintiff must prove his case in order to get a decree. Further, the High Court Division held that as the plaintiff's title was also in question, the plaintiff should have filed suit for a decree of declaration of title as principal relief along with other consequential relief regarding the forged deed. In the result, the High Court Division discharged the rule.

Key Words:
Section 31, 32, 34, 35, 41, 43, 52, 58, 59, 60, 69, 75, 77, 88, 89 of the Registration Act, 1908; Section 115(1) of the Code of Civil Procedure; Suit for declaration; Maintainability of suit; Proof of title and possession; Onus of proof; Execution and registration of deed;

The jurisdiction of the High Court Division while hearing a revision petition is purely discretionary and the discretion is to be exercised only when there is an error of law resulting in an error in the decision and by that error failure of justice has been occasioned and interference is called for the ends of justice and not otherwise. Error in

the decision of the sub-ordinate Courts do not by itself justify interference in revision unless it is manifested that by the error substantial injustice has been rendered. The decision which is calculated to advance substantial justice though not strictly regular may not be interfered with in revision. (Para-18)

Power of revision is intended to be exercised with a view to sub-serve and not to defeat the ends of justice. The above principles of law, the High Curt Division is required to follow while adjudicating upon a matter in exercise of its revisional jurisdiction under section 115(1) of the Code of Civil Procedure. Here, it must not be overlooked that there is a lot of difference between a revision and appeal. An appeal confers a right on the aggrieved party to complain in the prescribed manner to the higher forum whereas the supervisory or revisional power has for its objects the right and responsibility of the higher forum to keep the sub-ordinate Courts within the bounds of law. (Para-19)

The plaintiffs filed the present suit for mere declaration that impugned registered kabala deed was collusively made and obtained by forgery and not binding upon them. The plaintiffs filed the suit as the disputed kabala cast cloud upon title of the plaintiffs to the suit land and on the basis of the deed in question, the defendant claimed title to the suit land. Since, before filing of the suit, a cloud has been cast upon the plaintiffs' title to the suit land and that the defendant denied their title therein by dint of a registered kabala, the plaintiffs should have filed the suit for a decree of declaration of title to the suit land as principal relief along with other consequential relief that impugned registered kabala deed was collusively made and obtained by forgery and not binding upon them, as provided under section 42 of the Specific Relief Act. Accordingly, this suit as framed is not maintainable. (Para-28)

It appears that the whole proceeding in regards execution and registration of the deed in question and endorsement of the Sub-Registrar therein as provided under sections 31, 32, 34, 35, 52, 58, 59 and 60 of the Registration Act, as stated above, were done in accordance with those provisions of the Act and the document achieved strong presumptive evidence as to its due registration. Accordingly, burden was upon the plaintiffs to rebut such evidence by adducing strong evidence to prove that the deed in question was a product of forgery. But the plaintiffs failed to discharge the onus. (Para-40)

I have already found that Ishaque Mia was the identifier of all executants and he also took the L.T.Is of three executrix and identified their L.T.Is and he did not put any L.T.I in the deed as executant. It appears that the learned Judge of the appellate Court also misconstrued the deed in question on this point. Such misconstruction on the part of the appellate Court could not invalidate the deed and affect the merit of the case. (Para-41)

The trial Court held that the defendant could not prove that Abdul Ali and Anwar Ali were the sons of Ashraf Ali and Anwar did not go to India. The appellate Court, upon evaluating the evidence, reversed the finding of the trial Court holding that it was the duty to prove such assertion by the plaintiffs by adducing relevant papers or by circumstantial evidence but the plaintiffs did not try to do so. This view of the appellate Court also based on proper appreciation of the evidence and materials on record. (Para-45)

As a whole, the judgment of the trial Court is founded on mere assumption and presumption of facts and not on proper appreciation of the evidence on record. The learned Judge of the trial Court has embarked upon the loopholes and weaknesses of the defendant's case to establish the case of the plaintiff against the settled principle of law that the plaintiff must prove his case in order to get a decree in his favour and the weakness of the defendants case is no ground for passing a decree in favour of the plaintiff. (Para-50)

JUDGMENT

Md. Badruzzaman, J:

1. This Rule was issued calling upon the opposite party to show cause as to why judgment and decree dated 21.07.1998 (decree signed on 27.7.1998) passed by learned Additional District Judge, 8th Court, Dhaka in Title Appeal No. 18 of 1998 reversing those dated 17.11.1997 (decree signed on 20.11.1997) passed by learned Senior Assistant Judge, 2nd Court, Dhaka in Title Suit No. 238 of 1997 decreeing the suit should not be set aside.

2. This Rule was earlier heard by a Single Bench of this Court who, vide judgment dated 17.11.2009, made the Rule absolute, against which the heirs of sole defendant-opposite party preferred Civil Appeal No. 190 of 2015 before the Hon'ble Appellate Division and the Appellate Division, after hearing, vide judgment dated 12.02.2020, set aside the judgment passed by the High Court Division and sent back the matter before this Division for hearing and pronouncement of judgment in accordance with law and thereafter, this matter was fixed for hearing by me on 2.8.2022 at the instance of opposite party Nos. 1(a) to 1(d).

3. Relevant facts, for the purpose of disposal of this Rule, are that the petitioners as plaintiffs filed suit for declaration that registered sale deed No. 6288 dated 26.10.1964 in favour of the defendant in respect of total 1.33 acre land, as described in schedule 'Ka', 'Kha' and 'Ga' of the plaint, was forged, illegal, inoperative and not binding upon the plaintiffs stating, *inter alia,* that Bazlul Karim was the owner in possession of .45 acre land of C.S plot No. 8, as described in 'Ka' schedule of the plaint, who transferred the same vide registered sale deed being No. 6718 dated 24.07.1962 in favour of Ashraf Ali, Taher Ali, Ishque Ali, Abdul Aziz and Anwar Ali and delivered possession thereof to them. Abdul Mazid, Abdur Noor Mia and Abdul Mannaf Mia were the owners in possession of .30 acre land of C.S plot No. 9 as described in schedule 'Kha' who transferred the same vide registered sale deed No. 5747 dated 13.04.1963 in favour of Ashraf Ali (father of plaintiffs No.1 and brother of plaintiff No.2) and delivered possession thereof to him. Gedu Mia was the owner in possession of .58 acre land of C.S plot No. 224, as described in schedule 'Ga', who transferred the same vide registered sale deed No. 11745 dated 12.08.1963 in favour of said Ashraf Ali and delivered possession thereof to him.

4. While said Ashraf Ali was owning and possessing 'Ka', 'Kha' and 'Ga' schedule suit land the Government acquired .08 acre land of plot No. 8 and .68 acre land of other plot vide L.A. Case No. 53/1963-64 and compensation award was prepared in his name and the Deputy Collector gave notice to Ashraf Ali on 01.12.1992 requesting him to receive compensation award within 25.02.1993.

5. Safaruddin died leaving behind five sons including the plaintiff- No. 2, two daughters and one wife. He had no sons namely Abdul Ali and Anwar Ali. Anwar Ali son of Safar Uddin left for India in 1962 and he never came back. It is presumed that he died there unmarried. Ashraf Ali, plaintiff No.2 Abdul Aziz, Taher Ali and Ishaque Ali were possessing 'Ka' schedule land jointly by turning it to a brick field and Ashraf Ali had been possessing the land of schedules 'Kha' and 'Ga' exclusively as brick field. Ashraf Ali died leaving behind 4 sons including plaintiff No. 1, four daughters and mother, while Taher Ali died leaving behind mother and one son and Ishaque Ali died leaving behind 4 brothers including plaintiff No. 2 and two sisters. Plaintiff No.1, after receiving notice issued from Dhaka Collectorate in the name of his father, went to the L.A Department on 25.2.1993 for receiving award money and for the first time he came to learn that the defendant was trying to withdraw the award money claiming the acquired land by purchase and thereafter, the plaintiffs have learnt about the forged deed on 20.6.1993 after collecting certified copy thereof. The plaintiffs also learnt that the defendant created forged sale deed being No. 6288 dated 26.10.1964 showing herself as vendee and the heirs of the grandfather of plaintiff No.1 and father of plaintiff No.2 as vendors and said deed has cast cloud upon title and possession of the plaintiffs in the suit land. By dint of said forged deed the defendant never went into possession of the suit land. The deed was created by false personification. The suit deed never acted upon.

6. The defendant [predecessor of opposite party Nos. 1(a)-1(d)]contested the suit by filing written statement denying material averments as made out in the plaint stating that the suit is not maintainable in its present form; that suit is bad for defect of parties and is barred by limitation and under section 42 of the Specific Relief Act; that the plaintiffs have no title to and possession in the suit land and that without praying for a decree of declaration of title to and recovery of khas possession of the suit land the present suit is not maintainable. The positive case of the defendant, in brief, is that Ashraf Ali Bepari, Taher Ali Bepari, Ishaque Ali Bepari @ Ishaque Bepari, Abdul Ali Bepari @ Abdul Bepari and Anwar Ali Bepari @ Ansar Ali all were sons of Safaruddin and were owners in possession of 'Ka' schedule suit land by purchase vide two registered sale deeds dated 14.7.1962. Then Ishaque Ali died leaving behind two sisters namely, Jaitunnessa & Mahitunnessa, mother Aymunnessa and four brothers namely, Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari and Anwar Ali Bepari as his heirs who inherited his share. Ashraf Ali Bepari alone purchased 'Kha' and 'Ga' schedule suit land on 13.04.1963 and 12.08.1963 respectively. While Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari, Anwar Ali Bepari, Aimannessa, Jaitannessa and Mahitannessa were owning and possessing 'Ka' 'Kha' and 'Ga' schedule suit land they jointly sold the same to the defendant vide registered sale deed dated 26.10.1964 being No. 6288 at a consideration of total Tk. 30,000/- out of which Ashraf Ali received Tk. 16,000/- against 'Kha' and 'Ga' schedule suit land and Ashraf Ali and others jointly received Tk. 14,000/- against 'Ka' schedule suit land and handed over possession thereof to her. The defendant has been possessing the suit land on payment of rent after mutating the same and by growing crops therein. The plaintiffs have no right, title, interest and possession in the suit property and as such, the suit is liable to be dismissed.

7. At the trial, the plaintiffs adduced two witnesses and the defendants examined six witnesses along with documentary evidence to prove their respective claim. The trial Court decreed the suit in favour of the plaintiffs vide judgment and decree dated 17.11.1997 against which the defendant filed Title Appeal No. 18 of 1988 before the learned District Judge, Dhaka which was transferred to learned Additional District Judge, 8th Court Dhaka for

disposal who, upon hearing, allowed the appeal vide judgment and decree dated 21.7.1998 and reversed the judgment and decree of lower Court.

8. Being aggrieved by and dissatisfied with the judgment and decree passed by the appellate Court the plaintiffs as petitioners have preferred this revision under section 115(1) of the Code of Civil Procedure and obtained the Rule, as stated above.

9. During hearing of the Rule opposite party No.2 was added vide order dated 14.08.2022. The case of added opposite party No. 2 is that he purchased .30 acre land of C.S plot No. 9 (Kha schedule suit land) from Abul Kashem son of late Ashraf Ali Bepari vide registered sale deed being No. 12651 dated 4.12.2014 and he muttaed his name in the revenue office and paying rents thereof. He also supports the case of the plaintiff-petitioners.

10. Initially, the sole opposite party filed Vokalatnama to contest the Rule and after her death, her heirs are contesting the Rule as opposite party Nos. 1(a) to 1(d) by filing Vokalatnama.

11. Mr. Md. Zinnat Ali learned Advocate appearing with Mr. Syed Jahangir Alam learned Advocate for petitioner No.1 and Mr. Abdul Wadud Bhuiyan learned Senior Advocate appearing for added opposite party No.2 made similar submissions. They mainly submitted that the Court of appeal misdirected itself in its total approach of the matter and misread and misappropriated the evidence on record; that the appellate Court came to a wrong decision without considering the fact that L.T.I. No. 6212 of Ishaque Miah was shown as an executant in the deed in question and as such, his thumb impression in said deed (Exhibit No. 'Ga') creates a doubt about the genuineness of the deed; that the learned Judge of the appellate Court failed to appreciate the findings of the trial Court to the effect that the suit deed was not property executed and registered; that the appellate Court did not properly consider the statements of the witnesses and misread the evidence adduced by the parties and as such, has come to a wrong decision; that the appellate Court ought to have considered the statement of P.W 2 who clearly supported the case of the plaintiffs; that the appellate Court totally ignored that the Additional Deputy Collector of the Government had sent notice in the name of Ashrf Ali on 01.12.1992 to withdraw compensation money of the acquired suit land including other land within 25.02.1993 and the plaintiffs had received the notice; that the appellate Court erred in holding that the plaintiffs could not prove their assertion that Safaruddin had no son namely, Ansar Ali and Abdul Ali and that another son Anwar Ali left for India in 1962 and never came back; that the trial Court, upon proper appreciation of the evidence and materials on record, came to its findings and decision and decreed the suit but the appellate Court, as the last Court of facts, by misreading and non-consideration of material evidence and without reversing the findings of the trial Court came to wrong findings and decision and illegally reversed the judgment and decree of the trial Court and accordingly, committed an error of law resulting in an error in the decision occasioning failure of justice; that added opposite party No.2 acquired title to .30 acre land out of the suit land from the son of original owner Ashraf Ali and he has been owning and possessing the same by mutating his name and on payment of rent and as such, his claim may be considered by this Court.

12. Per contra, Mr. A. M. Amin Uddin, learned Senior Advocate appearing with Mr. Mokarramus Shaklan learned Advocate for opposite party Nos. 1(a) - 1(d) submitted that the trial Court by misreading and non-consideration of the evidence on record came to its findings and decision and decreed the suit without considering that the suit is not

maintainable under section 42 of the Specific Relief Act and that the suit is bad for defect of parties and the plaintiffs could not prove their title and possession in the suit land; that the appellate Court, as the last Court of facts, upon proper appreciation of the materials and evidence on record and by sifting evidence independently came to its findings and decision and rightly reversed the findings and decision of the trial Court; that considering the evidence on record the trial Court should have dismissed the suit; that the plaintiffs could not able to disprove execution and registration of the sale deed in question by reliable oral and documentary evidence but the trial Court, upon misconstruing the deed in question, came to erroneous finding that the same was not properly executed and registered; that the appellate Court did not misconstrued or misread the evidence and accordingly, interference is not called for by this Court.

13. Since, the question arises as to misreading, non-consideration of material evidence affecting the merit of the suit, misconception of law committed by the Courts below, I have scrutinized and gone through the pleadings of the parties, evidence, both oral and documentary and relevant provisions of law to come to a proper conclusion.

14. Upon the pleadings, trial Court framed following issues:

(a) Is the suit maintainable in its present form?
(b) Is the suit barred by limitation?
(c) Is the suit bad for defect of parties?
(d) Is the suit deed illegal, inoperative and binding upon the plaintiffs?
(e) Is the plaintiffs entitled to get any relief as prayed for?

15. Trial Court, upon consideration of evidence, both oral and documentary, decided all issues in favour of the plaintiffs and decreed the suit. On perusal of the judgment of the trial Court, it appears that the learned Judge did not decide whether plaintiffs have title to the suit land but found possession on basis of oral testimony of PW-1 and PW-2 who stated that the plaintiffs were possessing the suit land by turning it to brick field. No documentary evidence like mutation, rent receipt or trade license was produced on behalf of the plaintiffs. The defendant claimed that after purchase she has been possessing the suit land through bargadars and adduced DW 2 and DW 3 who supported the claim of the defendant. The defendant produced and proved certified copies of mutation Khatians (Exts. Gha series), DCR (Exts. Uma series) and rent receipts (Exhibits- Cha series). The trial Court did not discuss the documentary evidence of the defendants to ascertain possession of the defendant. The trial Court only emphasized upon the genuineness of the deed in question and found that the deed in question (Ext. Ga) was not executed by Ashraf Ali and others. It appears that the appellate Court reversed the findings of facts of the trial Court with reference to evidences of the parties and found that the plaintiff could not prove possession in the suit land. The Court of appeal did not give any finding as to acquisition of title to the suit land by the plaintiffs but after consultation of the deed in question and other evidence held that the plaintiffs could not able to prove that the impugned deed was not executed and registered properly.

16. It appears that both the Courts below did not decide the issue of maintainability of the suit with reference to settled principle of law. The Court of appeal also did not decide the issue of defect of parties but dismissed the suit as the plaintiffs could not prove their possession in the suit land and could not prove that the impugned deed was not executed and registered properly.

17. Now question arises whether there is any justification to interfere with the findings and decision of the Court of appeal in revisional jurisdiction of this Court.

18. The scope of the revisional power under section 115(1) of the Code of Civil Procedure as it stands now may be seen. The jurisdiction of the High Court Division while hearing a revision petition is purely discretionary and the discretion is to be exercised only when there is an error of law resulting in an error in the decision and by that error failure of justice has been occasioned and interference is called for the ends of justice and not otherwise. Error in the decision of the sub-ordinate Courts do not by itself justify interference in revision unless it is manifested that by the error substantial injustice has been rendered. The decision which is calculated to advance substantial justice though not strictly regular may not be interfered with in revision.

19. Power of revision is intended to be exercised with a view to sub-serve and not to defeat the ends of justice. The above principles of law, the High Curt Division is required to follow while adjudicating upon a matter in exercise of its revisional jurisdiction under section 115(1) of the Code of Civil Procedure. Here, it must not be overlooked that there is a lot of difference between a revision and appeal. An appeal confers a right on the aggrieved party to complain in the prescribed manner to the higher forum whereas the supervisory or revisional power has for its objects the right and responsibility of the higher forum to keep the sub-ordinate Courts within the bounds of law.

20. The High Court Division while exercising its revisional jurisdiction is competent to reverse the judgment of the courts below when the same has been made either upon misreading or non-consideration of the material evidence caused failure of justice; or when the same has been passed on the basis of evidence which cannot be considered as legal evidence and had the same been not taken into consideration the judgment would not have been one as has been made; or when the appellate Court in giving a particular finding has committed any error of law resulting in an error in the decision occasioning failure of justice or such finding is found to have resulted from glaring misconception of law; or when the findings arrived at by the appellate Court is contrary to the evidence; or when there appears error of law apparent on the face of the record occasioning failure of justice. It is also of the view of the Apex Court that once the conditions in section 115(1) of the Code of Civil Procedure are satisfied and the High Court's jurisdiction to interfere is established, the proceedings as a whole from start to finish can be scrutinized and any order necessary for doing justice may be passed. There is no limit to the area in which the revisional power is to be exercised by the High Court Division in the facts and circumstances of each case. [Ref. 11 BLT (AD) 60, 15 BLR (AD) 319, 33 BLD (AD) 93, 22 BLT (AD) 486, 22 BLC (AD) 254].

21. When a finding of fact is based on consideration of the materials on record, those findings are immune from interference by the revisional Court and the High Court Division has no jurisdiction to sit on appeal over a finding of fact. [Ref: 33 BLD (AD) 93, 70 DLR (AD) 168]. Without reversing the findings of facts concurrently arrived at by the Courts below on the grounds covered by section 115 C.P.C the High Court Division has no jurisdiction to disturb the findings of facts. It cannot superimpose itself as a third Court for fresh appreciation of the evidence on record, this being not the function of a Court of revision [Ref. 3 MLR (AD) 196].

22. Now, reverting back to the case in hand. In view of the submissions of the learned Advocates for both parties I have to decide, at first, whether the suit is maintainable under the provision of section 42 of the Specific Relief Act and bad for defect of parties.

23. The plaintiffs filed the suit for simple declaration that the sale deed in question (Ext. Ga) was forged, collusive and not binding upon them. As per plaint, Ashraf Ali (father of plaintiff No.1 and brother of plaintiff No.2), Taher Ali, Ishaque Ali, Abdul Aziz (plaintiff No.2) and Anwar Ali purchased .45 acre land of C.S plot No. 8 ("Ka" schedule of the plaint) vide registered sale deed Nos. 6718 and 6706 dated 14.07.1962 [Exts. 1(ka) & 1= Exts. Kha & Kha (1)] and said Ashraf Ali purchased .30 acre land of C.S plot No. 9 (schedule 'Kha') vide registered sale deed No. 5747 dated 13.04.1963 [Ext. 2= Ext. Kha(2)] and Ashraf Ali also purchased .58 acre land of C.S plot No. 224 (schedule 'Ga') vide registered sale deed No. 11745 dated 12.08.1963 [Ext. 2(Ka) = Ext. Kha (3)]. The defendant admitted those purchased deeds but claimed that Abdul Aziz (plaintiff No.2) was not co-purchaser of .45 acre land. On perusal of sale deed Nos. 6718 and 6706 dated 14.7.1962 it appears that i said deeds five persons namely Ashraf Ali (father of plaintiff No.1), Taher Ali, Ishaque Ali, Abdul Ali and Anwar Ali are the vendors. The deed does not contain the name of Abdul Aziz (plaintiff No.2) as vendee which suggests that plaintiff No. 2 could not acquire title to 'Ka' schedule suit land vide sale deeds dated 14.7.1962 because of the fact that oral evidence cannot override documentary evidence.

24. The plaintiffs also claimed that while Ashraf Ali was owning and possessing his share to the suit land died leaving behind 4 sons including plaintiff No.1, four daughters and mother, while Taher Ali died leaving behind mother and one son and Ishaque Ali died leaving behind 4 brothers including plaintiff No.2 and two sisters. As per plaint, other three sons, four daughters and mother of Ashraf Ali and one son of Taher Ali, other heirs of Ishaque Ali and other purchaser namely Anwar Ali and Abdul Ali were co-sharers in total 1.33 acre suit land. Moreover, as per plaint .08 acre land out of .45 acre suit land was acquired by the Government vide L.A Case No. 53/63-64. In the plaint, the plaintiffs did not state anything as to how they have acquired title over entire 1.33 acre suit land. The plaintiffs did not led any evidence as to how they acquired title from other admitted co-sharers and acquired their title to entire 1.33 acre suit land. Moreover, the plaintiffs did not make other co-sharers including the Government as parties to the suit. So, on the face of the plaint, the suit is bad for defect of parties but the trial Court wrongly held that the suit is not bad for defect of parties by shifting the onus upon the defendant that she could not produce the names of left out persons.

25. Moreover, plaintiff No.1 claimed title to the suit land without ascertaining his share therein. As per claim of the plaintiffs .08 acre suit land was acquired by the Government and there were other co-sharers in the suit land. In such situation the plaintiffs are not entitled to claim title to the entire suit land. Accordingly, I am of the view that the plaintiffs could not prove title to the suit land but the trial Court without ascertaining the title of the plaintiffs decreed the suit.

26. Now question arises whether the plaintiffs are entitled to get such a decree of declaration simpliciter that a registered kabala is collusive without establishing their title to the suit land.

27. In the case of Ratan Chandra Dey and others vs. Jinnator Nahar and others reported in 61 DLR (AD) 116 the appellate Division held as follows:

> "As it appears, the High Court Division discharged the Rule on holding that the plaintiff-petitioners instituted the suit for a mere declaration that the disputed ewaznama deeds in favour of the defendant-respondent No.1 is fraudulent and void whereas the respondent No.1 contested the suit contending that the suit as framed was not maintainable and the petitioners had no title and possession in the land covered by the alleged exchange deeds; in the case of Md. Joshimuddin vs. Md. Ali Ashraf reported in 1991 BLD (AD) 101=42 DLR (AD) 289 it has been held that the plaintiff is not entitled to a simple declaration that the appellant's kabala is false and fraudulent without first establishing his title to the suit land; in the case of Munsur Ali Malik vs. Md. Nurul Hoque Malik reported in 1986 BCR (AD) 58 the High Court Division dismissed the suit on the ground that the defendant in the suit having challenged the possession of the plaintiff, it was incumbent upon the plaintiff to file regular suit for declaration of title and confirmation of possession and the suit is not maintainable for his failure to ask consequential relief, and in the case of Sahara Khatun vs. Anowara Khatun reported in 1 BCR 126 it has been held that before the plaintiff can be given a declaration that a decree or kabala is fraudulent and not binding upon her, it is not enough for her just to make out a *prima facie* case that she has right , title and interest in the suit property but she has to prove that she had the legal character or the right to property she claimed and unless she could prove such legal character or right to property she could not be given any such declaratory relief, and the facts and circumstances of the above reported cases being similar to the facts and circumstances of the present case, the principle laid down therein are applicable in the present case and accordingly the petitioners ought to have filed a suit for declaration of title and partition of the suit land."

28. This decision of the Appellate Division is squarely applicable considering the facts and circumstances of the present case. The plaintiffs filed the present suit for mere declaration that impugned registered kabala deed was collusively made and obtained by forgery and not binding upon them. The plaintiffs filed the suit as the disputed kabala cast cloud upon title of the plaintiffs to the suit land and on the basis of the deed in question, the defendant claimed title to the suit land. Since, before filing of the suit, a cloud has been cast upon the plaintiffs' title to the suit land and that the defendant denied their title therein by dint of a registered kabala, the plaintiffs should have filed the suit for a decree of declaration of title to the suit land as principal relief along with other consequential relief that impugned registered kabala deed was collusively made and obtained by forgery and not binding upon them, as provided under section 42 of the Specific Relief Act. Accordingly, this suit as framed is not maintainable.

29. On the other hand, question arises whether the defendant acquired title to the suit land by dint of disputed deed. The defendant admitted the ownership and possession of Ashraf Ali Bepari, Taher Ali Bepari, Ishaque Ali Bepari @ Ishaque Bepari, Abdul Ali Bepari @ Abdul Bepari and Anwar Ali Bepari @ Ansar Ali all are sons of Safaruddin in respect of 'Ka' schedule suit land who purchased the same vide two registered sale deeds dated 14.7.1962. The defendant also stated that Ishaque Ali died leaving behind two sisters namely, Jaitunnessa & Mahitunnessa, mother Aymunnessa and four brothers namely, Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari and Anwar Ali Bepari as his heirs who inherited his share. This genealogy has not been denied by the plaintiffs. The defendant also admitted the ownership and possession of Ashraf Ali Bepari in 'Kha' and 'Ga' schedule suit land who

purchased the same on 13.04.1963 and 12.08.1963 respectively. The defendant further claimed that while Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari, Anwar Ali Bepari, Aimannessa, Jaitannessa and Mahitannessa were owning and possessing 'Ka' 'Kha' and 'Ga' schedule suit land they jointly transferred the same to the defendant vide registered sale deed dated 26.10.1964 being No. 6288 in favour of the defendant at a consideration of total Tk. 30,000/- out of which Ashraf Ali received Tk. 16,000/- against 'Kha' and 'Ga' schedule suit land and Ashraf Ali and others jointly received Tk. 14,000/- against 'Ka' schedule suit land and handed over possession thereof to her. Surprisingly, neither the vendors of the deed nor their successors except the plaintiffs have challenged the deed dated 26.10.1964 being No. 6288. The defendant produced the original sale deed dated 26.10.1964 which was marked as Exhibit-Ga. To prove its execution and registration she adduced two attesting witnesses of the deed namely, Md. Abdul Majid (DW-4) and Sayebur Rahman (DW-5) who admitted their signature in the deed as witnesses and identified their signatures. Though the signature of DW-4 was not marked as exhibit but the signature of DW-5 was marked as Exhibit. Ga(1). Syed Mohammad Ali Advocate deposed as DW-6 who stated that he drafted the deed in question and signed the deed as witness No.1. He identified his signature which was marked as exhibit-Ga(2). DWs 4-6 categorically stated that the vendors executed the deed in question in their presence by putting their signatures and thumb impressions and the consideration money was paid by the husband of the defendant to the vendors in their presence. In cross-examination they did not deviate from their assertions, made in examination-in-chief. The trial Court did not discuss the evidence of these DWs but upon consulting the deed in question found that out of seven vendors only four vendors admitted their execution and the names of three vendors namely, Mst. Aymonnessa, Jaitunnessa and Mahitannessa were penned through and also found that 'one Ishaque Mia was shown as identifier in that an L.T.I was put by Ishaque Mia bearing No. 6212 as 'executant' and by referring to the statement of PW-1, the son of the defendant who could not say whether the transferors and the attesting witnesses were present in the S.R office at the time of registration of the deed, disbelieved the execution and registration of the deed. The Court of appeal reversed said finding of the trial Court stating that DW-1 was not supposed to know whether the executants of the suit deed appeared before the concerned S.R personally. The Court of appeal found that seven persons executed the deed out of whom the executrixes namely, Mst. Aymonnessa, Jaitunnessa and Mahitannessa wer identified by Ishaque Mia. It also found that in the back page of the first page of the suit deed Ishaque Mia put his L.T.I bearing No.6212 and he also put his signature beside this L.T.I. The Court of appeal also observed that as identifier of some executants Ishaque Mia put his signature. The Court of appeal also did not discuss the evidence of DWs 4-6 but finally reversed the finding of the trial Court saying that " *the lower Court illegally arrived at a decision that the suit deed was not executed and registered properly*".

30. On the face of above conflicting findings of the Courts below I have perused the original sale deed in question (Ext. Ga). On perusal of Exhibit-Ga, it appears that it is drafted in English containing total 14 pages and registered before Sadar Joint Sub-Registrar, Dacca. At the top of first 13 pages and in the heading of 'EXECUTANTS' at last page four vendors namely, Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari and Anwar Ali Bepari put their signatures and other three vendors namely Mst. Aymonnessa, Jaitunnessa and Mahitannessa put their L.T.Is and their L.T.Is were took by Ishaque Mia by putting his signatures just beside each LTI. At the last page of the deed under the heading 'WITNESSES' 1. Syed Mohammad Ali Advocate (DW'6) 2. Md. Abdul Majid (DW -4), 3. Sayebur Rahman (DW -5) and 4. Ishaque Mia put their signatures.

31. In the left side of reverse page of the 1st page of the deed, the Sub-Registrar endorsed that the deed was presented for registration at 11 a.m on 26th day of October 1964 at the Sadar Joint Sub-Registry Office, Dacca by Ashraf Ali Bepari on behalf of the executants, who then signed as presenter and then the Sub-Registrar put his signature and affixed office seal and date 26.10.1964 and thereafter, Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari and Anwar Ali Bepari put their signatures as executants and thereafter, Ishaque Mia put his signature and four executants affixed four thumb impressions just left to their respective signatures in serial Nos. 6209, 6210, 6211 and 6212. In the right side of that page, the Sub-Registrar made an endorsement '**Execution is admitted**' by 1. Ashraf Ali Bepari, 2. Taher Ali Bepari, 3. Abdul Ali Bepari 4. Anwar Ali Bepari all sons of Safaruddin Bepari and then penned through the names of 5. Mst. Aymonnessa, 6. Jaitunnessa and 7. Mahitannessa by putting his initials against each name and then made endorsement that the executants were identified by Eshaque Miah son of Kadam Ali and at last the Sub-Registrar put his signature and affixed office seal and date 26.10.1964.

32. Similarly, in the left side of the reverse page to 2nd page of the deed Mst. Aymannessa, Jaitunnessa and Mahitannessa put three thumb impressions as executrix in serial Nos. 219, 220 and 221 and beside each thumb impression Ishaque Mia put his signature by writing " Ning, bong" and then he put another signature. In Bengali, 'Ning' means who put thumb impression and 'Bong' means who took the thumb impression which suggest that Ishaque Ali took the L.T.Is of three executrixes and he was their identifier. In right portion of that page, the Sub-Registrar made an endorsement stating " *having visited the residence of Aynunnessa wife of……….., Jaitunnessa wife of ………….Mahitunnessa wife of ……………..at 17 Larmani Street, P.S Sutrapur, Dacca I have this day examined the said Aymonnessa, Jaitunnessa and Mahitannessa who have been identified at my satisfaction by Eshaque Miah son of………and the said Aymonnessa, Jaitunnessa and Mahitannessa admitted the execution of this document*" and then put his signature and affixed date as 1st November, 1964. At the reverse page of the last page of the deed the Sub-Registrar endorsed certificate containing the word "**Registered**" and then wrote the words "Book No. 1, Volume No. 107, Page 154 to 164, Being No. 6288 for the year 1964" and then put his signature and affixed office seal and date 23.11.1964.

33. Registration Act, 1908 provides procedure relating to the registration of documents. As per section 31 of the Registration Act, ordinarily a document shall be presented and registered at the office of the Sub-Registrar provided that on special cause he may attend at the residence of any person desiring to present a document for registration and accept for registration. Section 32 stipulates that except in cases provided in section 89 every document to be registered shall be presented by the executants or his representative while section 34(1) of the Act stated that subject to the provisions contained in Part VI and in sections 41, 43, 69, 75, 77, 88 and 89 no document shall be registered under the Act unless the executant or his agent appears before the registering officer. Proviso to section 34 gives an opportunity to the absente executants who could not appear due to unavoidable circumstances to appear again before the registering officer within four months for registration. Section 34(2) provides that appearances under section 34(1) may be simultaneous or at different time. Section 34(3) also provides that the registering officer shall thereupon enquire whether or not such document was executed by the persons by whom it purports to have been executed; satisfy himself as to the identity of the persons appearing before him alleging that they have executed the document. Section 35 provides that if all persons executing the document appear personally or by a representative before the registering officer and if he is satisfied that they are the

persons they represents themselves to be and if they admit the execution of the document, the registering officer shall register the document as directed under sections 58-61.

34. Section 52 provides that the signature of every person presenting a document for registration shall be endorsed on every document and every document admitted to registration shall be copied in the book appropriated thereof. Section 58 of the Act, relates to endorsement of the particulars in the document like 'the signature and addition of every person admitting the execution of the document or refusal of the registering officer to endorse the same. Section 59 provides that the registering officer shall affix the date and his signature to all endorsements made under section 52 and 58, relating to the same document and made in his presence on the same day. Section 60(1) of the Act provides that after compliance of provisions under sections 34, 35, 58 and 59 the registering officer shall endorse in the document a certificate containing the word "registered" together with the number and page of the book in which the document has been copied and as per section 60(2), such certificate shall be signed, sealed and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in the manner provided by the Registration Act.

35. The provisions under sections 31, 32, 34, 52, 58, 59 and 60 read together suggest that the registering officer may accept a document for registration in his office or for special cause, at the residence of the executants on commission (ref: section 31). The document must be presented for registration by the executant or his representative or attorney (ref: section 32). The executants or their representatives must appear before the registering officer within the time allowed for presentation under sections 23 -26 or if they could not appear in the stipulated time due to urgent necessity or unavoidable accident they must appear before him within four months (ref: section 35). After the document was presented by a proper person to the satisfaction of the registering officer, he would be under a duty to enquire whether or not such document was, in fact, executed by the persons by whom it purports to have been executed and after satisfying himself as to the identity of the persons appearing before him admitting that he had executed the deed, the registering officer shall register the document (ref: section 35) and when all those formalities as required under sections 34, 35, 58 and 59 have been complied with, the registering officer shall endorsed thereon a certificate containing the word "registered" and the said document shall then be admissible for the purpose of proving that the document has been duly registered and that the facts mentioned in the endorsement have occurred as therein mentioned (ref: section 60).

36. Such endorsement of the registering officer i.e "**Registered**" would be strong presumptive evidence of the fact that the document was explained to the executant before registration who admitted his execution and the receipt of consideration and that the whole proceeding and endorsement made therein were regular and in order and the said endorsement could only be rebutted by the plaintiff by adducing strong evidence proving the allegation that fraud was committed upon the Sub-Registrar. (Ref. Haji Kari Abdur Rahman vs. Abdur Rahim Gazi, 35 DLR 132).

37. Now question arises whether the deed in question was registered in compliance of the provisions under the Registration Act, 1908.

38. In the instant case, the endorsements of the then concerned Sadar Joint Sub-Registrar, Dacca at the back page of the first page of the deed and the particulars contained therein suggest that on 26.10.1964 at 11 a.m. the deed was presented for registration by Ashraf Ali

Bepari, one of the executants and he himself along with Taher Ali Bepari, Abdul Ali Bepari and Anwar Ali Bepari appeared before the Sub-Registrar and admitted their execution and they were identified by Ishaque Mia and they put four signatures as executants and put four L.T.Is (left thumb impressions) in serial Nos. 6209, 6210, 6211 and 6212 and Ishaque Mia signed as identifier as fifth signatory and the Sub-Registrar, being satisfied that the vendors were the persons they represent themselves to be and admitted their execution, made endorsement to that effect put his signature and affixied seal and date. It appears that due to space constraint the thumb impression of 4th executant namely, Anwar Ali Bepari was put beside the signature of Ishaque Mia. On 26.10.1964, three other female executrix did not appear before the Sub-Registrar and accordingly, he penned through those names by putting his initials.

39. On the other hand, the endorsement made by the Sub-registrar on 01.11.1964 appeared in back page of the 2nd page and other particulars contained therein clearly suggests that on 1st November, 1964 the Sub-Registrar himself visited the residence of Aymannessa, Jaitunnessa and Mahitannessa at 17 Larmani Street, Sutrapur, Dhaka on commission and the deed was again presented before him for registration. Then he examined the executrixes who were identified by said Ishaque Mia and being satisfied with their identity and acceptance of their execution made an endorsement to that effect. It also appears that Sub-Registrar endorsed the deed twice on 26.10.1964 and 01.11.1964 when the same was placed before him for registration and also affixed the date and his signature and office seal against all endorsements as required under section 59 of the Registration Act. Finally, the registering officer endorsed, at the back page of the last page, a certificate containing the words ‘**Registered**’ together with Book No.1, Volume- No. 107 page No. 154 to 164, in which the document has been copied and also he put his signature and affixed office seal and date 23.11.1964. Accordingly, the deed in question finally registered on 23.11.1964 as per section 60 of the Registration Act.

40. It appears that the whole proceeding in regards execution and registration of the deed in question and endorsement of the Sub-Registrar therein as provided under sections 31, 32, 34, 35, 52, 58, 59 and 60 of the Registration Act, as stated above, were done in accordance with those provisions of the Act and the document achieved strong presumptive evidence as to its due registration. Accordingly, burden was upon the plaintiffs to rebut such evidence by adducing strong evidence to prove that the deed in question was a product of forgery. But the plaintiffs failed to discharge the onus.

41. It appears that the trial Court upon misconstruction of the deed in question and ignorance of law, as discussed above, came to the wrong finding that Ishaque Mia, the identifier, put L.T.I as executant of the deed and disbelieved its execution and registration. The Court of appeal though set aside the finding of the trial Court and found the document to be genuine and gave a finding that Ishaque Mia was identifier of three female executrix but wrongly held that he put his L.T.I in L.T.I. serial No. 6212. The was no reason on the part of the identifier to put L.T.I in the deed in question but the learned Judge argued that such mistake (though there was no question of such mistake) might happened beyond the knowledge of the Sub-Registrar. I have already found that Ishaque Mia was the identifier of all executants and he also took the L.T.Is of three executrix and identified their L.T.Is and he did not put any L.T.I in the deed as executant. It appears that the learned Judge of the appellate Court also misconstrued the deed in question on this point. Such misconstruction on the part of the appellate Court could not invalidate the deed and affect the merit of the case.

42. Now question arises, whether the defendant acquired title to the suit land.

43. The defendant denied the plaintiffs' claim of acquisition of .08 acre suit land by the Government. She claimed that she acquired title to the suit land vide the disputed deed dated 26.10.1964 from Ashraf Ali Bepari and six others (Ext. Ga). Except a notice dated 1.12.1992 purported to have issued by L.A. Collectorate, Dhaka vide L.A Case No. 53/63-64 (Ext. 3), the plaintiffs could not produce any paper to show that said land was acquired by the Government and vested in it.

44. In the case of Abani Mohan Saha vs. Assistant Custodian, reported in 39 DLR (AD) 223 the Apex Court in paragraph 26 held as follows:

> " Certificate for the registration raises a presumption as to the admission of execution by the executant, but such admission cannot be evidence of due execution against third parties. The execution of a document is to be proved in a manner as provided in section 67 of the Evidence Act and when witnesses are available to prove the questioned document the court may not take recourse to any presumption under section 60(2) of the Registration Act, as the Registrar's endorsement under that section cannot be treated as a conclusive proof of execution;…".

45. To prove execution of the deed in question, the defendant adduced two attesting witnesses namely, Md. Abdul Majid (DW-4) and Sayebur Rahman (DW-5) who admitted their signatures as witnesses of the execution of the vendors and identified their signatures in the deed. But the signature of DW-4 was not marked as exhibit. The signature of DW-5 was marked as Exhibit Ga (1). Syed Mohammad Ali Advocate deposed as DW-6 who stated that he drafted the deed in question and signed the deed as witness No.1. He identified his signature which was marked as exhibit-Ga(2). DWs 4-6 categorically stated that the vendors executed the deed in question in their presence by putting their signatures and thumb impressions and the consideration money was paid by the husband of the defendant to the vendors in their presence. In cross-examination they did not deviate from their assertions made in their examination-in-chief. During their testimony DW-4 was 61 years, DW- 5 was 71 years and DW-6 was 79 years old and they were not interested witnesses but old persons. Accordingly, there is no reason to disbelieve their evidence. On the other hand, the case of the plaintiffs was that there was no son of Ashraf Ali namely, Abdul Ali and Anwar Ali and Anwar Ali was unmarried and he went to India in 1962 and he never came back and died there. The trial Court held that the defendant could not prove that Abdul Ali and Anwar Ali were the sons of Ashraf Ali and Anwar did not go to India. The appellate Court, upon evaluating the evidence, reversed the finding of the trial Court holding that it was the duty to prove such assertion by the plaintiffs by adducing relevant papers or by circumstantial evidence but the plaintiffs did not try to do so. This view of the appellate Court also based on proper appreciation of the evidence and materials on record.

46. Moreover, deed in question dated 26.10.1964 attained 30 years of age at the date when it tendered to evidence on 29.3.1997, original of which was produced from proper custody. As per section 90 of the Evidence Act, it is to be presumed as genuine document. The plaintiffs could not rebut such presumption by adducing any credible evidence.

47. In that view of the matter it can be safely concluded that the defendant has able to prove the execution of the deed in question by credible and reliable evidence. Since the execution and registration of the deed in question has proved by evidence the same is a

genuine one and by this deed the defendant has acquired title to the suit land. Accordingly, I am of the view that the Court of appeal committed no illegality in reversing the finding of the trial Court that the deed in question was not executed and registered properly.

48. In regards possession of the parties, though the trial Court found possession of the plaintiff in suit land on the basis of oral testimony of the PW-2 but the appellate Court, as the last Court facts, after considering the oral evidence of P.Ws 2 and 3 (the bargaders of the defendant) and documentary evidence like mutation kahtian, DCR and rent receipts appeared in the name of the defendant found that the defendant could prove possession in the suit land and reversed the finding of the trial Court. It appears from the evidences adduced by the parties in regards possession that the Court of appeal, after due consideration of the evidence and materials on record, took the right view.

49. Added opposite party No.2 claims title to .30 acre land of C.S plot No. 9 ('Kha' schedule suit land) from Abul Kashem son of late Ashraf Ali Bepari vide registered sale deed being No. 12651 dated 4.12.2014. Since the title of Ashraf Ali Bepari has extinguished by transfer of his entire share in the suit land vide impugned sale deed dated 26.10.1964, his son Abul Kashem did not acquire title to .30 acre land as his heir and he had no saleable interest in the suit land and to transfer the same to added opposite party No.2. Accordingly, added opposite party No.2 could not acquire title to his claimed land.

50. As a whole, the judgment of the trial Court is founded on mere assumption and presumption of facts and not on proper appreciation of the evidence on record. The learned Judge of the trial Court has embarked upon the loopholes and weaknesses of the defendant's case to establish the case of the plaintiff against the settled principle of law that the plaintiff must prove his case in order to get a decree in his favour and the weakness of the defendants case is no ground for passing a decree in favour of the plaintiff.

51. On perusal of the entire evidence adduced by the parties, pleadings, as well as other materials on record, I am of the view that the appellate Court, as the last Court of facts, upon due consideration of evidence came to definite findings and decision that the plaintiff could not prove title and possession in the suit land and accordingly, rightly reversed the findings and decision of the trial Court. Learned Advocate for the petitioner could not show that the judgment of the appellate Court is based on misreading or non-consideration of any evidence which may affect the merit of the case or its findings are resulted from glaring misconception of law and accordingly, I am of the view that the judgment of the appellate Court is a proper judgment of reversal.

52. In view of the above, I find no merit in this Rule which should be discharged.

53. In the result, the Rule is discharged however, without any order as to casts.

54. Sent down the L.C.R, along with a copy of this judgment to the Courts below at once.

17 SCOB [2023] HCD 108

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICITON)

WRIT PETITION NO. 2904 OF 2020.

Mohammad Mominul Islam
.........Petitioner
Vs.
Government of Bangladesh represented by the Secretary, Ministry of Civil Aviation and Tourism, Bangladesh and others
.......Respondents

Mr. Salah Uddin Dolon, Senior Advocate with
Mr. Muhammad Mizanur Rahaman and
Mrs. Nahid Sultana Jenny, Advocates
…..For the Petitioner
Mr. Mehedi Hasan Chowdhury, Additional Attorney General with
Mr. Nawroz Md. Rasel Chowdhury, DAG
Mr. MMG Sarwar (Payel) and
Ms. Yeshita Parvin, AAGs
....For the respondent No.1
Mr.Probir Neogi, Senior Advocate with
Mr. Md. Ekramul Haque, Advocate
....For the respondent Nos.2-3

Heard on: 02.02.2022 and 09.02.2022, 16.02.2022 and 06.03.2022
Judgment on: 06.04.2022.

Present:
Mr. Justice Zafar Ahmed
And
Ms. Justice Kazi Zinat Hoque

Editors' Note:
In the instant case the petitioner challenged his retirement from service by the CEO of Biman Bangladesh Airlines Ltd on the ground of malafide. The respondent argued that the CEO and Managing Director has the power and authority to pass the order of retirement and the allegation of malafide is baseless. Further submission of the respondent was that illustration (e) to Section 114 of the Evidence Act presumes that official acts are done rightly and regularly in accordance with law and the petitioner failed to rebut the presumption contained in illustration (e). The High Court Division, however, analyzing applicable laws and examining materials on record found that for retiring any person from office a resolution from board of directors of Biman Bangladesh Airlines is required and without having such board resolution and delegated authority the order of the CEO was without jurisdiction, arbitrary and malafide.

Key Words:
Rule 5(Ka) of "বাংলাদেশ বিমান কর্পোরেশন কর্মচারী (অবসরভাতা ও আনুতোষিক) বিধিমালা, ১৯৮৮; Bangladesh Biman Corporation Ordinance, 1977; principle of approbation and reprobation; Section 114 of the Evidence Act, 1872

Bangladesh Biman Corporation Ordinance, 1977:
Bangladesh Biman Corporation was dissolved on 22.07.2007. Biman Bangladesh Airlines Ltd. was registered as public company on 23.07.2007. The entire undertaking of

the Corporation has been transferred to and vested in the Company. However, the Ordinance, 1977 is still effective subject to subsequent developments done pursuant to Section 28A of the Ordinance. (Para 17)

<u>Articles of Association are to be followed mandatorily if they are not in conflict with the company law:</u>
It is settled principle of law that memorandum and articles of association being the constitution of the company regulate the affairs of the company including the powers of the board of directors and others and thus, articles are mandatory to be followed if they are not in conflict with the company law. (Para 26)

<u>Without reference of the decision of the Board of Directors, note mentioning the consent of the board is an after thought act and was created to justify the malafide action of the Managing Director and CEO of the Biman:</u>
It appears from the above that in note No. 15 dated 25.02.2020 the approval/decision/resolution of the board was not mentioned, but surprisingly in note No. 13 dated 25.02.2020 of a separate Nothi it is stated that the board had given consent to retiring the petitioner with benefit. It further appears from note No. 12 of the same note sheets that those were placed before the Managing Director and CEO on 25.02.2020. The impugned order was issued on 25.02.2020. So, when did the board of directors decide the matter and gave consent to the same? Is it on 25.02.2020? What is the number of the board meeting? Where are the minutes of the meeting? The respondents could not give any answer to these questions. No decision of the board was placed before us. We have examined the personal file of the petitioner and the connected file provided by the Biman. We have not found any decision of the board. Mr. Dolon submits that Note No. 13 is after thought and was created to justify the malafide action of the Managing Director and CEO of the Biman. The impugned order does not mention any decision of the Board of directors of the Biman, whereas, it is already noted that in the matter of removal from the service, the Biman follows article 59(b) of its articles of association and in the respective office orders reference of the decision of the board is mentioned. In the circumstances, the respondents are not allowed to rely on the case of *Md. Yousuf Haroon* on the basis of the principle of approbation and reprobation. (Para 36, 37)

<u>Presumption of regularity of the official acts and burden of proof in such cases:</u>
In judicial review of administrative actions, the Court has to start with the presumption of regularity of the official acts which is incorporated in illustration (e) to Section 114 of the Evidence Act. The burden of proof is on the party who alleges the contrary. In the present case, the petitioner has successfully rebutted the presumption. The case of *Shinepukur Holdings Ltd.,* 50 DLR (AD) 189 is of no assistance to the respondents.
(Para 38)

<u>In absence of delegated authority and without any decision of the board of directors the Managing Director and CEO of the Biman has no power to retire anyone from service:</u>
In the case in hand, the Managing Director and CEO of the Biman issued the impugned order retiring the petitioner from service without any decision of the board of directors. No power was delegated to him to take the decision. Therefore, he was not competent authority to retire the petitioner. For this reason coupled with the attending facts and circumstances of the case, the unauthorised exercise of power by the Managing Director and CEO of the Biman is also without jurisdiction, arbitrary and malafide. Accordingly, we find merit in the Rule. (Para 40)

JUDGMENT

Zafar Ahmed, J:

1. This Court on 02.03.2020 issued a Rule Nisi calling upon the respondents to show cause as to why the order issued under Nothi No. 30.34.0000.068.02.056.20.311 dated 25.02.2020 by the respondent No. 3 Managing Director and CEO, Biman Bangladesh Airlines Ltd. (Annexure P) giving retirement to the petitioner under rule 5(Ka) of "বাংলাদেশ বিমান কর্পোরেশন কর্মচারী (অবসরভাতা ও আনুতোষিক) বিধিমালা, ১৯৮৮" should not be declared to have been issued without lawful authority and is of no legal effect and as to why the respondents should not be directed to reinstate the petitioner in the post of Director of Biman Bangladesh Airlines Ltd. and allow him to continue in service till the age of 59 years.

2. At the time of issuance of the Rule, this Court directed the respondent Biman Bangladesh Airlines Ltd. (in short, the 'Biman') to bring the personal file of the petitioner along with the connected file on the basis of which the impugned order was passed for perusal of this Court. The respondents were further directed to maintain status quo in respect of appointment to the post held by the petitioner.

3. The respondent No. 1 (Ministry of Civil Aviation and Tourism) entered appearance in the Rule, but did not file any affidavit-in-opposition.

4. The respondent Nos. 2 and 3, namely Biman Bangladesh Airlines Ltd. and the Managing Director and CEO of the Biman jointly entered appearance in the Rule and filed two sets of affidavit-in-opposition. They also brought the personal file of the petitioner and the connected file as per order of this Court.

5. The petitioner also filed a supplementary affidavit and affidavit-in-reply.

6. The petitioner joined in the service of the then Biman Bangladesh Airlines as Junior Security Officer on 03.11.1986. His service was confirmed on 10.05.1987. Eventually, he was promoted to the post of Executive Director of the Biman on 19.04.2017 and was posted as Director (Administration). He was given additional responsibility of Director (Procurement and Logistic Support) for the period from 02.07.2017 to 19.09.2018. While the petitioner was discharging his responsibilities as Director of the Biman, the respondent No. 3 (Managing Director and CEO of Biman) issued the order dated 25.02.2020 retiring him from service under rule 5(Ka) of "বাংলাদেশ বিমান কর্পোরেশন কর্মচারী (অবসরভাতা ও আনুতোষিক) বিধিমালা, ১৯৮৮" (Bangladesh Biman Corporation Employees (Pension and Gratuity) Rules, 1988) (hereinafter referred to as 'Rules, 1988') after completion of 25 years of service (Annexure-P) which is the subject matter of the Rule.

7. The relevant portion of the impugned order is quoted below:

নম্বর: ৩০.৩৪.০০০০.০৬৮.০২.০৫৬.২০.৩১১ তারিখ:২৫ ফেব্রুয়ারি ২০২০

<u>আদেশ</u>

যেহেতু, বিমান বাংলাদেশ এয়ারলাইন্স লিমিটেড এর পরিচালক জনাব মোহাম্মদ মমিনুল ইসলাম (পি-৩৩৭৪০) গত ০৩ নভেম্বর ১৯৮৬ তারিখে জুনিয়র সিকিউরিটি অফিসার হিসাবে চাকুরিতে যোগদান করেন এবং ইতোমধ্যে তার চাকুরিকাল ২৫ (পঁচিশ) বছর পূর্ণ হয়েছে; এবং

০২। যেহেতু, বিমান বাংলাদেশ এয়ারলাইন্স লিমিটেড এর স্বার্থে তাঁকে চাকুরি থেকে অবসর প্রদান করা প্রয়োজন;

০৩। সেহেতু, বিমান বাংলাদেশ এয়ারলাইন্স লিমিটেড কর্তৃক গৃহীত ও "অনুসৃত বাংলাদেশ বিমান কর্পোরেশন কর্মচারী (অবসরভাতা ও আনুতোষিক) বিধিমালা, ১৯৮৮" এর বিধি ৫(ক) অনুযায়ী তাকে বিমান বাংলাদেশ এয়ারলাইন্স লিমিটেড এর চাকরি হতে অবসর প্রদান করা হলো।
০৪। তিনি বিধি মোতাবেক অবসরজনিত সুবিধাদি প্রাপ্য হবেন।
০৫। জনস্বার্থে জারিকৃত এই আদেশ অবিলম্বে কার্যকর হবে।

(মোঃ মোকাব্বির হোসেন)
ব্যবস্থাপনা পরিচালক ও সিইও
বিমান বাংলাদেশ এয়ারলাইন্স লিমিটেড
তারিখ: ২৫ ফেব্রুয়ারি ২০২০

8. Mr. Md. Salahuddin Dolon, the learned Senior Advocate of the petitioner, assails the impugned order on two grounds: firstly, the Managing Director and CEO of the Biman had no authority to give retirement to the petitioner under rule 5(Ka) of Rules, 1988, only the Board of Directors of the Biman preserves such power, and secondly, the order of retirement was malafide. In support of the argument, Mr. Dolon refers to various provisions of the relevant statutory laws, rules and the Articles of Association of the Biman and materials on record.

9. Mr. Probir Neogi, the learned Senior Advocate appearing with Mr. Md. Ekramul Hoque the learned Advocate of the respondent Biman and its Managing Director and CEO, refers to the cases of ***Bangladesh Biman Corporation and others vs. Md. Yousuf Haroon and others,*** 10 BLT (AD) 22= 54 DLR (AD) 161 and ***Bangladesh Biman Airlines Limited vs. Captain Mir Mazharul Huq and others,*** 70 DLR (AD) 16 and submits that the Managing Director has the power and authority to pass the order of retirement. Mr. Neogi further submits that the allegation of malafide is baseless and is not supported by any materials. Mr. Neogi also refers to illustration (e) to Section 114 of the Evidence Act, 1872 and ***Shinepukur Holdings Ltd. and others vs. Securities and Exchange Commission and another,*** 50 DLR (AD) 189 and submits that illustration (e) to Section 114 presumes that official acts are done rightly and regularly in accordance with law. Mr. Neogi submits that in the instant case, the petitioner failed to rebut the presumption contained in illustration (e).

10. Mr. Md. Mehedi Hasan Chowdhury, the learned Additional Attorney General appearing for the respondent No. 1, adopts the arguments of Mr. Neogi.

11. A brief discussion of the history of the inception of the Biman as a statutory body under the nomenclature "Bangladesh Biman Corporation" and then conversition of the same into "Biman Bangladesh Airlines Ltd." is relevant to appreciate the factual and legal issues raised in the case.

12. Bangladesh Biman was established by the Bangladesh Biman Order, 1972 (P.O. No. 126 of 1972). The said P.O. was repealed by the Bangladesh Biman Corporation Ordinance, 1977. Under Section 3 of the Ordinance Bangladesh Biman Corporation was established. All assets, rights, powers, authorities, privileges, properties including aircrafts etc. of the Biman established by the P.O. stood transferred to and vested in the Corporation.

13. Section 28A was inserted into the Ordinance by Bangladesh Biman Corporation (Amendment) Act, 2009 (Act No. XX1 of 2009) with effect from 11.07.2007.

14. Section 28A is reproduced below:

> "28A.(1) Notwithstanding anything contained to the contrary in this Ordinance, Government may, in public interest, convert the Corporation into a public limited company under the Company Act, 1994 (Act no. XVIII of 1994) [**কোম্পানী আইন, ১৯৯৪** (**১৯৯৪ সনের ১৮ নং আইন**)].
>
> (2) The Government may, by agreement, transfer the entire undertaking of the Corporation to the Company referred to in sub-section (1) on such terms and conditions as may be specified in the agreement.
>
> (3) As soon as the Corporation has been converted into a public limited company and undertaking of the Corporation has been transferred to the Company, the Government shall notify the fact in the official Gazette and shall, by the same notification, declare that the corporation has been dissolved.
>
> Explanation: The word "undertaking of the Corporation" includes its employees, business, projects, schemes, assets, rights, powers, authorities and privileges, its properties, movable and immovable, reserve funds, investments, deposits, borrowings, liabilities and obligations of whatever nature.
>
> (4) The Government may, for the purpose of removing any difficulty in relation to the transfer of the undertaking of the Corporation under sub-section (2) or the dissolution thereof under sub-section (3), make, by a notification published in the official Gazette, such order as it considers expedient and any such order shall be deemed to be, and given effect to as, part of the provisions of this Ordinance."

15. On 23.07.2007 Biman Bangladesh Airlines Limited was registered as a public limited company under the Company Act, 1994. Pursuant to Section 28A, the Government on 31.07.2007 by S.R.O. No. 191-Ain/2007 converted Bangladesh Biman Corporation into Biman Bangladesh Airlines Limited and transferred the entire undertaking of the Corporation to the Biman Airlines Ltd. and dissolved the Corporation with effect from 31.07.2007. The said SRO No. 191-Ain/2007 was published in the Official Gazette on 02.08.2007 in additional issue. Thereafter, by another S.R.O. No. 268-Ain/2009 dated 21.12.2009 (published in the gazette on 27.12.2009 in additional issue) the earlier S.R.O. was amended and the date of dissolution of the Corporation was given effect from 22.07.2007.

16. The Ordinance, 1977 was declared void and non est by the apex Court on 01.02.2010 in Civil Petition Nos. 1044-1045 of 2009 (commonly known as the Constitution 5th Amendment Case, reported in 2010 BLD Special issue, p.1). Subsequently, the Ordinance was made effective retrospectively as an Act of Parliament by Section 4 of "১৯৭৫ সালের ১৫ আগস্ট হইতে ১৯৭৯ সালের ৯ এপ্রিল তারিখ পর্যন্ত সময়ের মধ্যে জারিকৃত কতিপয় অধ্যাদেশ কার্যকরন (বিশেষ বিধান) আইন, ২০১৩."

17. The upshot of the above discussions is that Bangladesh Biman Corporation was dissolved on 22.07.2007. Biman Bangladesh Airlines Ltd. was registered as public company on 23.07.2007. The entire undertaking of the Corporation has been transferred to and vested in the Company. However, the Ordinance, 1977 is still effective subject to subsequent developments done pursuant to Section 28A of the Ordinance.

18. For the purpose of disposal of the Rule, which involves determination of the legality of the order retiring the petitioner from service by the Managing Director and CEO of the

Biman Bangladesh Airlines Ltd., the applicable laws are ─ the Ordinance, 1977 and Rules, 1988 made under the Ordinance. Since the Biman has been converted into a public limited company under the Company Act, 1994 the memorandum and the articles of association of the company have to be examined to see whether they contain any provision regarding removal of its employee.

19. There is an issue. Bangladesh Biman Corporation is dissolved. Biman Bangladesh Ltd. was born under Section 28A of the Ordinance and the same was incorporated under the Company Act. Now, the question is whether judicial review is maintainable against the Biman which is now a company limited by shares. The issue was not raised by the learned Advocate of the respondents.

20. In ***Md. Arif Sultan vs. Chairman, Dhaka Electric Supply Authority and others,*** 60 DLR (2008) 431, a Full Bench of this Division was called upon to decide two questions: (1) whether lifting the veil would be necessary in a case where the impugned order is issued by a company limited by shares held by the Government, and (2) whether the company, entire share of which is held by the Government, comes within the meaning of "local authority" so as to maintain writ petition against the same.

21. Same issue was raised in respect of Teletalk Bangladesh Ltd. (TBL) in ***Mahbubur Rahman vs. Bangladesh and others,*** 66 DLR (2014) 615 wherein the following passage from *Md. Arif Sultan* was quoted,

> "In this age of survival of the fittest, the company must have the option to fire its employees in order to hire the most skilled ones. With the advent of the welfare state, it began to be increasingly felt that the frame-work of civil service was not sufficient to handle the new tasks which are often of specialized and highly technical character. The inadequacy of civil service to deal with the new problems came to be realized and it became necessary to form companies incorporated under the Companies Act by the Government. But it is important to note that the company must be allowed to determine its own fate according to Memorandum and Articles of Associations after its incorporation and that so long that is not allowed the company is deemed to be an instrumentality or agency of the Government or local authority. The interest of the Government will be taken care of by its nominated directors and not by the Government itself."

22. Referring to *Md. Arif Sultan,* it was observed in *Mahbubur Rahman,*

> "The Court then proceeded to lay down a five-fold test to determine whether a company is an instrumentality or agency of the Government. The five-critera test put in place appears not to be meant as exhaustive rather in the sense that the cumulative effect assessed on the criteria should indicate the answer. The conditions enumerated are as follows:
> 1. If the entire share capital of the company is held by the Government, it will go a long way towards indicating that the company is an instrumentality or agency of the Government.
> 2. Existence of deep and pervasive control of the Government.
> 3. The true rationale in setting up the company.
> 4. The company is fully dependent on the financial assistance of the Government.

> 5. The company is not run by the Memorandum and Articles of Association."

23. It was further observed in *Mahbubur Rahman*,

> "Here in this case it is difficult to identify TBL as an identity distinct from the Government. The huge venture is still entirely dependent on the public exchequer for its finance. Its Board is predominantly manned by the public functionaries who hold the position ex officio as servants of the Republic. All the Directors are nominated by the Government. The Board is substantially dependent on the Government for every major policy decision of the company. Exactly as is done by a government department, TBL acts under direction and supervision of the Ministry and keep the Ministry informed at least about important official transactions. Government control on TBL management and policy is as unusually deep and pervasive as to admit of no separate corporate autonomy or character of its own. It has no independent will distinct from the Government. All the indicators available on records lead to the irresistible conclusion that TBL as a company is nothing but a sham or facade. It is only identifiable as an instrumentality or agency of the Government. It follows that TBL must be subjected to same constitutional and public law limitation as the Government is."

24. Reverting back to the case in hand, rule 5 (Ka) of Rules, 1988, which was made by the Government in exercise of the powers conferred upon it by Section 30 of the Ordinance, 1977, was invoked in giving retirement to the petitioner after completion of 25 years of service.

25. Having gone through the memorandum and articles of association of the Biman, the Ordinance and other materials on record and being fortified with the principles laid down in *Md.Arif Sultan,* 60 DLR 431 and *Mahbubur Rahman,* 66 DLR 615 and the fact that the statutory Rules, 1988 is still being followed by the Biman, we have no hesitation to hold that the instant writ petition is maintainable.

26. It is settled principle of law that memorandum and articles of association being the constitution of the company regulate the affairs of the company including the powers of the board of directors and others and thus, articles are mandatory to be followed if they are not in conflict with the company law.

27. Article Nos. 58 and 59 of the Articles of Association of the Biman deal with powers and duties of directors. Article 59 (b) states,

> "To manage all concerns and affairs of the Company, to appoint, recruit and employ officers, organizers, workmen, day labourers for the purpose of the Company and <u>to remove or dismiss them</u> and appoint others in their place and to pay such persons as aforesaid such salaries, wages or other remuneration as may be deemed fit and proper." *(emphasis supplied)*

28. The power to appoint, recruit and to remove or dismiss employees by the board of directors is not expressly provided in Section 8 of the Ordinance, 1977 which states that general power of superintendence of the affiars and business of the Corporation (now dissolved) shall vest in the board of directors subject to rules and regulations made under the Ordinance and the board may exercise all powers and do all acts and things which may be

exercised or done by the Corporation. Under article 59(x) of the Articles of Association of the Biman, the board of directors is authorised to delegate all or any of its powers and authorities to the Managing Director, who is also the Chief Executive Officer (CEO) of the Biman. Similar provision is contained in Section 10 of the Ordinance so far as it relates to delegation of authority to the Managing Director by the board of directors.

29. Rule 5 (Ka) of the Rules, 1988 provides that the Corporation may retire any of its employees after he has completed 25 years of service if it considers that he should be retired from the service in the interest of the Corporation.

30. In ***Bangladesh Biman vs. Md. Yousuf Haroon,*** 10 BLT (AD) 22, which has been relied on by the respondent Biman, two employees of the Biman holding the post of General Manager and Chief Purser respectively were given retirement under Section 9(2) of the Public Servants (Retirement) Act, 1974 on completion of 25 years of service. The retirement order also quoted Bangladesh Biman Corporation Employees (Service) Regulations, 1979 and Rules, 1988. This Division set aside the order of retirement. The apex Court allowed the appeal filed by the Biman. The apex Court observed,

> "Under section 10 of the Ordinance of 1977 Managing Director is the Chief Executive of the Corporation and shall exercise such power and perform such functions as may be assigned to him by the Board of Directors of the Biman Corporation of which he is a member or as may be prescribed. Prescribed means u/s 2(f) prescribed by rules or regulations made under the Ordinance. Under regulation 2(g) competent authority in relation to exercise of any power or performance of any function means the Board, the Chairman, Managing Director or any other person duly authorized to perform such duty. There is nothing in the Regulations and Rules what powers and functions may be exercised or performed by the Managing Director. Under Section 8 of the Ordinance subject to the Rules and Regulations general direction and Superintendence of the affairs and business of the Corporation shall vest in the Board of Directors. In the writ petitions respective petitioner (respondent No. 1) alleged that there is no decision of the Board of Directors approving the respective impugned order of retirement. But there is no challenge to the authority of the Managing Director to pass such an order. In the affidavits-in-opposition appellants asserted that the Managing Director as the Chief executive of the Corporation has the power and competence to pass the impugned orders. No affidavit-in-reply has been filed by the respective respondent No. 1 denying the assertion made in the affidavit-in-opposition filed in the respective writ petition. When power and competence of the Managing Director has not been challenged by the respective respondent No. 1 High Court Division was not justified in holding in W.P. No. 779 of 1998 that the order of retirement of the writ petitioner (respondent No. 1 of C.A. 37/1999) passed by the Managing Director without approval of the Board of Directors was without jurisdiction. When Managing Director has power and authority to pass an order of retirement approval of the Board of directors is not at all necessary." *(emphasis supplied)*

31. Mr. Salah Uddin Dolon draws our attention to documents annexed to the affidavit-in-reply filed by the petitioner and submits that it is now consistent practice of the Biman that

the board of directors either takes the decision in matters relating to removal of its employees from service or delegates that power to the Managing Director and CEO.

32. Upon perusal of the documents, it appears that the Chief Engineer (Engineering Services) of the Biman was suspended, vide memo dated 04.09.2019 under regulation 58 of the Service Regulations, 1979 as per decision of board of directors taken in its 228th meeting. Similarly, the Deputy General Manager of the Biman was suspended, vide memo dated 21.01.2020 under regulation 58 as per the board's decision taken in its 234th meeting. It further appears that in the 265th meeting of the board of directors of the Biman, the board delegated its power to remove the cockpit crews (special pay group) against whom allegations were made to the Managing Director and CEO of the Biman. In exercise of the said power, the Managing Director and CEO of the Biman terminated the service of a Captain of the Biman, vide memo dated 29.11.2021. It was stated in the said memo, *"In exercise of the power conferred under Article 59 (b) of the Articles of Association of Biman Bangladesh Airlines Ltd and such power is conferred/delegated to MD and CEO by the 265th meeting of the Board of Directors, Biman Bangladesh Airlines on 31st October, 2021, accordingly, your service is terminated with immediate effect as per decision of Biman Bangladesh Arilines Ltd". (emphasis supplied)*

33. It is apparent from the above that under the changed circumstances as to the identity of the Biman following the amendment of the Ordinance and giving effect to the same by dissolving the Corporation and converting it into a public limited company, the Biman gave effect to article 59(b) of the articles of association in consonant with other applicable laws/rules/regulations which are still effective subject to developments taken place after insertion of Section 28A to the Ordinance. *Md. Yousuf Haroon* was decided on 22.05.2000 *i.e.* prior to insertion of Section 28A to the Ordinance, 1977 and dissolution of the Corporation and conversion of the same into a public limited company. In captain *Mir Mazharul Huq,* 70 DLR (AD) 16 (decided on 11.04.2017) the apex Court endorsed the views taken in *Md. Yousuf Haroon*. The ratio laid down in *Md. Yousuf Haroon* to the effect, *"When Managing Director has power and authority to pass an order of retirement approval of the Board of Directors is not all necessary"* is no longer being followed by the Biman itself. In our view, the Biman rightly applied article 59(b) of the articles of association since the same is not in conflict with applicable laws/rules/regulations rather a coherent interpretation and application of article 59(b) has been given effect to in the backdrop of applicable legal regime. For this reason the Biman did not follow and apply *Md. Yousuf Haroon* after dissolution of the Corporation and conversion of the same into company due to change of circumstances and accordingly, it obtained prior approval and/or authorisation of the board in the matter of removal of its employees from service in other cases discussed above.

34. In the affidavit-in-opposition dated 27.01.2022 note sheets under Nothi No. 30.34.0000.068.02.056.20 have been annexed as Annexure-2. It is stated in note No. 14, dated 24.02.2020, "বর্নিত অবস্থায় জনাব মমিনুল ইসলাম, পি-৩৩৭৪০ পরিচালক প্রকিউরমেন্ট এন্ড লজিস্টিক সাপোর্ট এর বিষয়ে করণীয় সম্পর্কে সিদ্ধান্তের জন্য পেশ করা হল". Note No. 15 signed by Managing Director and CEO on 25.02.2020 runs as follows:

"১৫। নথির নোটানুচ্ছেদ- ১ থেকে ১৪ এবং আনুসঙ্গিক ও নথি পত্র পর্যালোচনা করা হলো। পর্যালোচনায় প্রতীয়মান হয় বিমান বাংলাদেশ এয়ারলাইন্স লিমিটেডের স্বার্থে বিবেচ্য কর্মকর্তা জনাব মমিনুল ইসলাম (পি-৩৩৭৪০) ডিপিএলএস কে কোম্পানীর দায়িত্বে বহাল না রাখাই এয়ারলাইন্স এর জন্য মঙ্গলজনক/বাঞ্চনীয়। বিমান বাংলাদেশ এয়ারলাইন্স কর্তৃক গৃহীত ও অনুসৃত বাংলাদেশ বিমান কর্পোরেশন কর্মচারী (অবসর ও অনুতোষিক) বিধিমালা ১৯৮৮ এর বিধি ৫(ক) অনুযায়ী সংস্থার স্বার্থে ২৫ বৎসর চাকুরি সমাপনান্তে অবসর প্রদান করা প্রয়োজন মনে করলে কর্মকর্তা/কর্মচারীকে অবসর প্রদান করা যাবে। জনাব মমিনুল ইসলাম (পি-৩৩৭৪০) গত ০৩/১১/১৯৮৬ খ্রিঃ তারিখে জুনিয়র সিকিউরিটি অফিসার হিসেবে চাকুরিতে যোগদান করেছেন এবং ইতোমধ্যে চাকুরিকাল ২৫(পঁচিশ) বৎসর পূর্ণ হয়েছে, বিমান বাংলাদেশ এয়ারলাইন্স লিমিটেডের স্বার্থে বর্ণিত বিধিমালা ১৯৯৮ এর বিধি ৫(ক) অনুযায়ী জনাব মমিনুল ইসলাম (পি-৩৩৭৪০) ডিপিএলএসকে অবসর প্রদান করা হলো-যা অদ্য ২৫/২/২০২০ থেকে কার্যকর গন্য। পরিচালক প্রশাসন জনাব জিয়াউদ্দিন অহমেদ (জি-৫১৩৯৪) পরবর্তী নির্দেশ প্রদান না করা পর্যন্ত নিজ দায়িত্বের অতিরিক্ত ডিপিএলএস এর দায়িত্ব পালন করবেন। আদেশ জারী করুন।"

35. In the affidavit-in-opposition dated 07.02.2022 separate note sheets under reference No. 30.34.0000.68.10.005.20 have been annexed as Annexure-22. Note No. 13 of the said Nothi, which was signed by the Managing Director and CEO on 25.02.2020, is quoted below,

"১৩। অনুচ্ছেদ-৮ থেকে ১২ দেখলাম।

জনাব মুমিনুল ইসলাম পরিচালক হিসেবে দায়িত্বে পালনে যথাযথ ভূমিকা রাখার পরিবর্তে নানাবিধ ঝামেলা সৃষ্টি করছেন। বিষয়টি পরিচালনা পর্ষদকে অবহিত করা হয়েছে। পরিচালক হিসেবে কোন পদেই যেহেতু তিনি মানসম্মত দায়িত্ব পালন করতে পারছেন না এবং স্বল্প সময়ের মধ্যে অত্যান্ত তিনটি পরিচালকের পদে দায়িত্ব প্রদান করেও তেমন উন্নতি হয়নি। পরিচালনা পর্ষদ তাকে with benefit চাকুরি থেকে অবসর প্রদানের সম্মতি দিয়েছে। সার্বিক বিষয়াদি প্রতীয়মান হয় বিমান বাংলাদেশ এয়ারলাইন্স লিঃ এর স্বার্থে জনাব মুমিনুল হককে চাকুরি থেকে অবসর প্রদান করা প্রয়োজন। এ প্রেক্ষাপটে, বিমান বাংলাদেশ এয়ারলাইসেন্স লিঃ গৃহীত ও অনুসৃত বাংলাদেশ বিমান কর্পোরেশন কর্মচারী (অবসরভাতা ও অনুতেষিক) বিধিমালা, ১৯৮৮ এর বিধি ৫(ক) অনুযায়ী জনাব মুমিনুল হককে বিমান বাংলাদেশ এয়ারলাইসেন্স এর চাকরি হতে অবসর প্রদান করা হলো। আদেশ স্বাক্ষর করা হলো। জারী করুন।" *(emphasis supplied)*

36. It appears from the above that in note No. 15 dated 25.02.2020 the approval/decision/resolution of the board was not mentioned, but surprisingly in note No. 13 dated 25.02.2020 of a separate Nothi it is stated that the board had given consent to retiring the petitioner with benefit. It further appears from note No. 12 of the same note sheets that those were placed before the Managing Director and CEO on 25.02.2020. The impugned order was issued on 25.02.2020. So, when did the board of directors decide the matter and gave consent to the same? Is it on 25.02.2020? What is the number of the board meeting? Where are the minutes of the meeting? The respondents could not give any answer to these questions. No decision of the board was placed before us. We have examined the personal file of the petitioner and the connected file provided by the Biman. We have not found any decision of the board. Mr. Dolon submits that Note No. 13 is after thought and was created to justify the malafide action of the Managing Director and CEO of the Biman.

37. The impugned order does not mention any decision of the Board of directors of the Biman, whereas, it is already noted that in the matter of removal from the service, the Biman

follows article 59(b) of its articles of association and in the respective office orders reference of the decision of the board is mentioned. In the circumstances, the respondents are not allowed to rely on the case of *Md. Yousuf Haroon* on the basis of the principle of approbation and reprobation.

38. In judicial review of administrative actions, the Court has to start with the presumption of regularity of the official acts which is incorporated in illustration (e) to Section 114 of the Evidence Act. The burden of proof is on the party who alleges the contrary. In the present case, the petitioner has successfully rebutted the presumption. The case of ***Shinepukur Holdings Ltd.,*** 50 DLR (AD) 189 is of no assistance to the respondents.

39. The ratio laid down in ***Bangladesh Shipakala Academy vs. Shahidul Islam and another,*** 50 DLR (AD) 1 in respect of competency of the authority in the matter of removal/dismissal from the service is relevant here. It was held,

> "It is true that the Director General was authorised to take all action under the said Rules but in order to take the decision of dismissal of the respondent it was clearly necessary to authorise the Director General in specific terms in that behalf since he was not the appointing authority of the respondent. Dismissal from service is a serious matter and only a competent authority under the law is entitled to pass an order of dismissal. If the Parishad decided that the Director General should be invested with the power to dismiss a Director who has been appointed by the Parishad then a very clear and explicit resolution was required to be taken authorising the Director General to pass an order of dismissal of a Director who was appointed by the Parishad. The resolutions which have been relied upon by the learned Advocate for the appellant are clearly not adequate enough to read in them a power authorising the Director General to dismiss a person appointed by the Parishad." *(emphasis given)*

40. In the case in hand, the Managing Director and CEO of the Biman issued the impugned order retiring the petitioner from service without any decision of the board of directors. No power was delegated to him to take the decision. Therefore, he was not competent authority to retire the petitioner. For this reason coupled with the attending facts and circumstances of the case, the unauthorised exercise of power by the Managing Director and CEO of the Biman is also without jurisdiction, arbitrary and malafide. Accordingly, we find merit in the Rule.

41. In the result, the Rule is made absolute. The impugned order dated 25.02.2020 (Annexure-P) giving retirement to the petitioner is declared to have been passed without any lawful authority and is of no legal effect. The respondents are directed to reinstate the petitioner in the service forthwith with arrear salary and other attendant benefits.

42. Communicate the order to the respondents at once.

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HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Civil Revision No. 594 of 2020

Anamika Corporation Ltd. and others
.....Petitioners
Vs.
Humayun Mazhar Chowdhury and others
---- Opposite parties

Mr. Kamal Ul Alam, Senior Advocate with Ms. Shahnaj Akther, Advocate with Mr. A.K.M Zakir Uzzaman Khan, Advocate
------ For the petitioners

Mr. M.I. Farooqui, Senior Advocate with Mr. M. Sadekur Rahman, Advocate with Ms. Razia Sultana, Advocate
---- For the opposite parties

Heard on: 01.02.2022, 20.02.2022, 23.02.2022, 01.03.2022, 02.03.2022 and Judgment on 13.03.2022.

Present:
Madam Justice Kashefa Hussain

Editors' Note:
In the instant Civil Revision question arose whether the learned District Judge while entertaining an application under section 7ক of the Arbitration Act 2001 can pass an order under section 45 of the Evidence Act, 1872. The petitioner Anamika Corporation Ltd. filed an Arbitration Miscellaneous Case under section 7ক of the Arbitration Act, 2001 before the court of learned District Judge praying for an order to restrain the opposite parties from transferring or entering into deed of agreement or otherwise disposing of the scheduled property to any third party until disposal of the arbitration proceedings under section 7A(a)(b) and section 7A(1)(c) of the same Act. The opposite parties denying the existence of an agreement made an application under Section 45 of the Evidence Act, 1872 for examination of the signature of the opposite parties by hand writing expert. The Court of the learned District Judge allowed, in part, the application for examining the signature of the opposite parties by hand writing expert against which the petitioner filed this Civil Revision. The High Court Division held that the power to issue an order for examination of a signature by hand writing expert has been conferred upon the Arbitral Tribunal only under the provisions of section 17(ka) of the Arbitration Act, 2001. While issuing an order of ad-interim restraint or injunction whatsoever, the learned District Judge is not empowered to pass an order under section 45 of the Evidence Act. Civil court cannot travel beyond the limited powers of passing ad-interim orders in a situation of urgency conferred upon it under Section 7ক of the Act. In the result, the rule was made absolute.

Key Words:
Order 7 Rule 11 of the Code of Civil Procedure,1908 ; Section 45 of the Evidence Act, 1872 ; Section 2, 7A, 10, 17(ka), 19(1)(4), and 32 of the Arbitration Act, 2001; Expert opinion; Valid arbitration agreement; Ad-interim injunction

<u>7ক (1) of the Arbitration Act, 2001:</u>
The substantive prayer in the Arbitration Miscellaneous case No. 7 of 2019 under section 7ক (1) of the Arbitration Act, 2001 is basically a prayer for an order of restraint till arbitration proceedings are initiated and nothing else. Further I am also of the

considered view that section 7ক (1) sub-section Uma including other sections only contemplate the passing of an ad-interim order in case of urgency to address certain circumstances or situations either during an arbitration proceeding or before an arbitration case is initiated. (Para-32)

The provisions of any special statutory enactment must be construed strictly unless a different intention is otherwise implied:
Arbitration Act, 2001 is a special enactment of law and the provisions of any special statutory enactment must be construed strictly unless a different intention is otherwise implied anywhere in any other law. I am of the considered opinion that if the legislature intended to confer the power upon the learned District Judge besides what is expressly stated in section 7ka (1) of the Arbitration Act, 2001 in that event it would not have expressly laid the specified conditions and situations under which an order may be passed under section 7ক (১) sub Rule (ক-ছ) including an order of ad-interim injunction (অন্তবর্তীকালীন নিষেধাজ্ঞা) under sub Rule 'ঙ'. (Para-33)

It is a principle of law that a statute in particular where a statute is a special piece enactment of law and addressing certain situations and circumstances, in that event unless a different intention is expressed elsewhere in the law the statute must be construed and interpreted in accordance with the strict meaning of the language as it expressly appears. The language of section 17(ka) is quite clear and there is no ambiguity as such in the provision. It is also a settled principle of law that where a specific provision of law is expressly stated such specific provision shall prevail over the general law. (Para 42)

Section 19(1) and 19(2) read with section 17(ka) of the Arbitration Act, 2001:
Section 19(1) provides that any objection challenging the jurisdiction of the tribunal shall not be raised later than the submissions of the statement of defence. Section 19(2) of the Act contemplate a situation where any objection may be raised that the tribunal is exceeding the scope of its authority in that event such objection shall be raised as soon as the allegation is raised. Therefore it clearly appears that section 19(1) and 19(2) read along with other provisions of chapter 5 including section 17(ka) also contemplate that an objection against the jurisdiction of the tribunal shall also be heard by the tribunal itself and not by any other forum. (Para-43)

The power to decide on the existence of a valid arbitration agreement has been conferred upon the arbitral tribunal not upon the learned District Judge:
After perusal of section 17(ka) read along with the other provisions of chapter 5 particularly section 19(1), 19(2) of the Arbitration Act, 2001, I am of the considered view that the power to decide on the existence of a valid arbitration agreement has been conferred upon the arbitral tribunal under a specific enactment of law by way of the Arbitration Act, 2001 and has not been conferred upon the learned District Judge. If the intention of the law was to confer simultaneous or parallel jurisdiction to the learned District Judge in that case the statutory provision of Section 17 would not have expressly contemplated and stated the power so unambiguously as it has been expressly and unambiguously stated in section 17 of the Arbitration Act, 2001 including section 17(ka-Uma) and for our purpose particularly section 17(ka) of the Arbitration Act, 2001. (Para-44)

The existence of an arbitration agreement may be decided by the civil court being the learned District Judge, but where the existence of an arbitration agreement so far as its validity is challenged or under question that question must be decided by the arbitral tribunal following the provisions of section 17(ka) of the Arbitration Act, 2001.

(Para-47)

The legislature has conferred the power to decide as to whether a valid arbitration agreement is in existence upon the tribunal only:

Section 19(2)(c) of the Act of 2001also contemplates a situation on the existence of an arbitration agreement when the arbitration agreement alleged by one party is not denied by the other. Therefore it is clear that to constitute a valid arbitration agreement within the meaning of the Act of 2001 the existence of the agreement must be agreed upon by both parties. In this case it is clear that the opposite parties denies the existence of the agreement itself. Therefore under the provisions of Section 17(ka) of the Arbitration Act, 2001 read with other provisions of the Act it is my considered view that the legislature has conferred the power to decide as to whether a valid arbitration agreement is in existence upon the tribunal only. (Para 49)

Section 7ক of the Arbitration Act of 2001:

While issuing an order of ad-interim restraint or injunction the learned District Judge is not empowered to pass an order under section 45 of the Evidence Act, 1872:

While issuing an order of ad-interim restraint or injunction whatsoever, the learned District Judge is not empowered to pass an order under section 45 of the Evidence Act, 1872 for purpose of having any signature examined by a hand writing expert. It is also necessary to be reminded that a report under section 45 of the Evidence Act, 1872 submitted by a hand writing expert is not a conclusive evidences of finding of facts but which must be corroborated by supporting evidences. It is needless to state that such assessment and adducing of such evidences is a longer process under the relevant procedural law. By no stretch of imagination can it be contemplated that section 7ক of the Arbitration Act, 2001 including section 7ক (১) ঙ contemplate the power of a District Judge for passing of the ad-interim order beyond a situation of urgency. Section 7ক (১) particularly sub section (ঙ) of the Act of 2001, does not contemplate a lengthy trial pursuant to adducing evidences whatsoever. Therefore the provision of Section 7ক is limited to passing certain orders under certain situations and circumstances. The intention of the legislators in enacting of those provision also upon comparison and analogy with Order 39 Rule (1) and (2) of the Code of Civil Procedure, 1908 is to address circumstances of urgency and nothing beyond.

(Para-51, 52)

The power to issue an order for examination of any signature by hand writing expert is conferred upon the arbitral tribunal only under the provisions of section 17(ka) of the Arbitration Act, 2001. Section 7ক has limited powers and the civil court cannot travel beyond the limited powers while exercising the power conferred upon it under Section 7ক of the Act of 2001. (Para - 54)

JUDGMENT

Kashefa Hussain J:

1. Rule was issued in the instant Civil Revisional application calling upon the opposite parties to show cause as to why the order dated 26.01.2020 passed by the learned District Judge and Arbitration Court, Cumilla in Arbitration Miscellaneous Case No. 07 of 2019 in

allowing the application filed by the opposite parties under Section 45 of the Evidence Act for identification of hand writing by expert should not be set aside and or pass such other order or further order or orders as to this court may seem fit and proper.

2. The instant petitioners Anamika Corporation Ltd. represented by its Managing Director as appellant filed Arbitration Miscellaneous Case No. 07 of 2019 under section 7(ka) of the Arbitration Act 2001 before the court of learned District Judge inter alia praying for an order of restraining the opposite parties in transferring, encumbering, entering into deed of agreement or otherwise disposing of the schedule property to any third party or otherwise create any interest therein and also prayed for directing the parties to maintain status-quo with respect of the ownership and possession of the schedule property until disposal of the arbitration proceedings under Section 7A(a)(b) and Section 7A(1)(c) of the Arbitration Act, 2001.

3. The court of learned District Judge initially admitted the Arbitration Miscellaneous Case by its order No. 1 dated 07.10.2019 and also passed an ad-interim injunction for transferring, encumbering, entering into deed of agreement or otherwise disposing of the schedule property to any third party or otherwise create any interest therein and also directed the parties to maintain status-quo in the meantime on the ownership of the property.

4. Subsequently the trial court passed several orders on 28.10.2019, 24.10.2019, 4.11.2019, 18.11.2019, 09.01.2020, 16.01.2020, 19.01.2020 and finally passed order No. 9 dated 26.01.2020 which is the impugned order. Previous to the impugned order dated 26.01.2020 the court of learned District Judge inter alia on the application of the opposite parties in the Arbitration Miscellaneous Case (opposite party here) passed an order for hearing of the opposite parties application under Order 7 Rule 11 of the Code of Civil Procedure along with Section 17(ka) of the Arbitration Act, 2001 including other applications filed by the opposite parties which is on record. The opposite parties made an application under Section 45 of the Evidence Act, 1872 for examination of the signature of the opposite parties by hand writing expert in accordance with the relevant laws and procedures attached to it. The court of learned District Judge fixed 26.01.2020 for objection if any by the petitioners and also for hearing of the application under Section 45 of the Evidence Act, 1872 subject to obtaining the relevant documents by its order No. 8 dated 19.01.2020. The court also passed an order that the application under 7 Rule 11 read along with Section 7(ka) of the Arbitration Act, 2001 and the application filed by the opposite parties praying for vacating the order of status-quo dated 7.10.2019 be all kept for hearing. The court of learned District Judge passed the impugned order by its order No. 9 dated 26.01.2020 and allowed in part the application of the instant opposite parties for examining the signature of the opposite parties by hand writing expert under the provisions of section 45 of the Evidence Act, 1872. It appears from the record that the instant civil revision being Civil Revision No. 594 of 2020 was filed and Rule and stay of the impugned order was granted by this Division on 10.03.2020. In this matter it appears from order No. 10 dated 12.03.2020 passed by the learned District Judge that the hand writing expert had already submitted its report on 09.03.2020. By the last order of the learned District Judge that is order No. 11 dated 9.03.2020 the court of learned District Judge, issued an order that all further proceedings of the Arbitration Miscellaneous Case be stayed for a period of 06(six) months pursuant to the Rule and stay order granted by this division by its order dated 10.03.2020 in the instant Civil Revision.

5. It appears that an application was filed by the opposite parties land owner for discharging the Rule as being infructuous against the Order of Rule and stay granted by this Division. The opposite parties land owner filed an application for Stay before the Chamber Judge court of the Appellate Division and the learned Chamber Judge sent it to the full bench of our Apex court. Civil Petition for Leave to Appeal No. 1758 of 2020 was filed by the opposite parties land owner and the full bench of the Appellate Division by its order dated 03.01.2021 dismissed the Civil Petition for Leave to appeal as being infructuous. However the Appellate Division dismissed the petition filed by the opposite parties in the Civil revision as being infructuous since the opinion of the hand writing expert has been already received by the learned District Judge by giving its report. The order dated 03.01.2021 passed by our Apex court dismissing the petition as being infructuous is annexure 1 of the application. Against the order passed by the full bench dated 07.01.2021 the instant petitioners (developer) filed a Civil Review Petition No. 164 of 2021. After hearing the civil review petiton No. 164 of 2021 the Appellate Division issued an order that the rule itself be disposed of on the merits by this division presided by this particular single bench.

6. The relevant facts for purpose of disposal of the instant Rule inter alia is that the instant petitioners (developer) as petitioner filed the Arbitration Miscellaneous Case No. 07 of 2019 under Section 7(ka)/7(a) of the Arbitration Act, 2001 impleading the opposite parties (landowner) as opposite parties in the Arbitration Miscellaneous Case inter alia praying for restraining order against the opposite parties (landowner).

7. The opposite parties landowner entered into a contract and executed 4 deeds of agreements along with 4(four) deeds of power of attorney. The instant opposite parties landowner initially entered into a contract and thereby executed 4(four) deeds of agreement. The opposite parties Nos. 1 and 2 executed four deeds of agreement in favour of Anamika Corporation Limited upon receiving their proportionate share of consideration money. The opposite parties executed a deed of agreement dated 22.12.2011 in favour of Anamika Corporation Ltd, deed of agreement dated 18.11.2012, deed of agreement dated 22.04.2014 and deed of agreement dated 13.07.2017 along with registered power of attorney. All these agreements were executed between the petitioners (company) Anamika Corporation Limited and the opposite parties (landowner) and which deed of agreements are admitted. It also admitted that the agreements were executed for purpose of development of the land by way of real estate. Subsequently however all the four deed of agreements were admittedly cancelled and the power of attorney were also cancelled. Admittedly all the agreements were cancelled on separate dates that is on 18.11.2012, 22.04.2014, 13.07.2017, 21.04.2019 along with all the registered power of attorneys also being cancelled. The cancellation of these deeds originally executed however are admitted facts.

8. The dispute arises from the fact that Anamika Corporation Ltd. claims that on the same date that is on 21.04.2019 the land owner executed a fresh deed of agreement and power of attorney dated 21.04.2019. It is the petitioner's claim that although a fresh power of attorney was executed on 21.04.2019 between the instant petitioners (developer company) and the opposite parties landowner but however those deeds are not registered. The petitioners further claims that although subsequently through notice, reminder etc, the petitioner sought for registering the fresh deed of agreement but the opposite party refrained from doing so including denying granting of fresh power of attorney. The opposite parties landowner evidently deny the execution of the fresh deed of agreement on 24.09.2019 and also deny granting any fresh power of attorney on the same date to the petitioner developer. Therefore the dispute arising out of which the Arbitration Miscellaneous Case No. 7 of 2019 was filed

under section 7(ka) of the Arbitration Act, 2001 arose out of the fact that the instant petitioners (developer) claim that the fresh deed of agreement was executed between the parties on 21.04.2019 but the opposite parties deny the execution of any such agreement and power of attorney whatsoever. Hence the Arbitration Miscellaneous case which subsequently gave rise to the instant civil revision.

9. Learned Senior Advocate Mr. Kamal Ul Alam along with Ms. Shahanaj Akther, Advocate along with Mr. A.K.M Zakir Uzzaman, Advocate appeared for the petitioners while learned Senior Advocate Mr. M.I. Farooqui, learned Senior Advocate Mr. Mehedi Hasan Chowdhury along with Mr. M. Sadekur Rahman, Advocate along with Ms. Razia Sultana, Advocate represented the opposite parties.

10. Learned Senior Advocate Mr. Kamal Ul Alam on behalf of the petitioners submits that the court of learned District Judge upon arrogating the powers conferred on the arbitral tribunal wrongly issued the order for examination of the signature by hand writing expert under section 45 of the Evidence Act, 1872. He submits that the learned District Judge while entertaining the Miscellaneous Case filed under section 7 (ক) 1 of the Arbitration Act 2001 travelled beyond its jurisdiction in issuing the impugned order dated 26.01.2020 which order is not sustainable and ought to be set aside for ends of justice. He draws attention to the previous orders of the learned District Judge and submits that although the learned District Judge earlier issued order for hearing all the applications filed by the parties together, but however by its order dated 26.01.2020 he issued the order for hand writing expert without hearing of the learned Advocate for the developer company. Upon a query from this bench he argues that the learned Advocate for the developer company could not be found when the matter came up for hearing. The learned Advocate for the petitioners contended that an isolated inadvertent absence of the learned Advocate cannot deprive the parties from being heard on the matter. He argues that the court of learned District Judge without hearing or considering any of the other applications filed by the parties however only issued the order of the examination of signature by hand writing expert filed by the opposite parties. He vehemently asserts that the law does not confer such jurisdiction on the learned District Judge. Upon elaborating his submission the learned counsel submits that the Arbitration Act, 2001 is an enactment by way of special law and therefore the special statutory provision of the Arbitration Act, 2001 must be construed strictly. He reiterates that the Arbitration Miscellaneous Case No. 7 of 2019 was evidently filed under section 7(ka) of the Arbitration Act, 2001. Upon drawing this bench's attention to section 7(ka) of the Arbitration Act, 2001 he continues that it is evident from the prayer in the Arbitration Miscellaneous case No. 7 of 2019 that the ingredients of the prayer under Section 7(ka) shows that the prayer is within the ambits of Section 7(ka)-(Uma) of the Arbitration Act, 2001. He draws attention to Section 7(ka) of the Arbitration Act, 2001 and submits that from the head note of Section 7(ka) of the Arbitration Act, 2001 it is clear that Section 7(ka) only contemplates an ad-interim order (অন্তবর্তীকালীন আদেশ). He submits that 7(ka) of the Arbitration Act, 2001 clearly contemplates where a circumstance or circumstances may arise where a civil court meaning the court of District Judge and High Court Division may pass an ad-interim order under circumstances of urgency which by its very nature is a temporary order pending final hearing on the issue. He takes this bench through the provisions of section 7 (1) (ক) (Kha)(Ga)(Gha)(Uma)(Cha) and (Chha). He points out that section the provisions clearly set out the criteria and the circumstances under which a temporary order may be passed following an application filed under section 7ক of the Arbitration Act, 2001. He draws attention to Section 7ক (1) and sub-section (Uma) which provides (অন্তবর্তীকালীন নিষেধাজ্ঞা). Revolving around section 7ক (1) he submits that by no stretch of imagination can it be assumed that an ad-interim temporary

injunction (অন্তবর্তীকালীন নিষেধাজ্ঞা) may contemplate or include examination of signature by hand writing expert under the provisions of section 45 of the Evidence Act, 1872. Pointing out to sub-rules of section 7ka (1) he contends that the criteria and the circumstances under which an ad-interim order can be passed under section 7ka of the Arbitration act, 2001 is limited in its scope. He submits that none of the sub-rules under section 7ka (1) contemplate empowering the civil courts to issue any order under section 45 of the Evidence Act, 1872.

11. He next submits that while section 7(ka) of the Arbitration Act, 2001 does not contemplate conferring of any power to civil courts to pass an order under Section 45 of the Evidence Act, 1872, rather on the other hand Section 17(ka) of the Arbitration Act, 2001 expressly and specifically confers such power on the arbitral tribunal. He draws attention to Section 17(ka) of the Arbitration Act, 2001 and points out that Section 17(ka) clearly contemplates that unless it is otherwise upon agreed by the parties the arbitral tribunal may rule on its own jurisdiction on any question which include the existence of a valid arbitration agreement. The learned Advocate for the petitioner draws this Bench's attention to Section 17(ka) of the Arbitration Act, 2001 and points out that Section 17(ka) unambiguously and expressly states that the Arbitral tribunal shall give decision if the existence of a valid arbitration agreement is disputed. He submits that in this case it is clear that the petitioner claims that a fresh valid agreement was executed on 21.04.2019 while the opposite parties clearly deny the existence of any valid arbitration agreement. He submits that the gist of the opposite parties' contention is that the opposite parties never executed any fresh deed of agreement on 21.04.2019. He points out that therefore the pivotal issue to adjudicate upon in this matter is whether a valid deed of agreement was at all executed or not.

12. He continues that from the provisions of the Arbitration Act, 2001 it is clear that Section 17(ka) of the Arbitration Act, 2001 expressly confers the jurisdiction to decide and give finding on the existence of a valid arbitration agreement and/or validity thereof on the arbitral tribunal and not upon any civil court. He submits that the power conferred upon the learned District Judge and the High Court Division under Section 7ka is limited in its scope and no court can exceed the limits beyond those powers that has been conferred upon it. He argues that the learned District Judge by the impugned order dated 26.01.2020 evidently arrogated upon itself the powers conferred upon the tribunal under the Arbitration Act, 2001 which Act is a special enactment of law specifically enacted for purposes relating to any issues related to any Arbitration agreement. He continues that keeping the special nature of the law in mind, in this particular case since the existence of a valid arbitration agreement is in dispute and to be decided, therefore it can be decided only by an arbitrator tribunal following appointment of arbitrator in accordance with the provisions of the Act of 2001.

13. He next points out to section 19(1)(4) of the Arbitration Act, 2001 and contends that it is clear from this section that if any person has any objection to the jurisdiction of the arbitrator tribunal such objection may be raised only before the Arbitration tribunal itself. He submits that Section 17(ka) read with section 19(1)(4) clearly contemplate that if any person raises objection upon questioning or challenging the jurisdiction of an arbitral tribunal, the arbitral tribunal shall dispose of the matter itself on the jurisdictional issue and the tribunal shall also dispose of and decided upon it. He next points out to the provisions of section 32 of the Arbitration Act, 2001 and reads there from. He submits that section 32 clearly contemplate some of the powers conferred upon the Arbitrator Tribunal. He continues that upon scrutiny of Section 32 it shows that the arbitral tribunal is clearly conferred with the power to appoint experts, legal advisers to report on specific issues to be determined by the tribunal. He submits that the provisions of Section 32 particularly Section 32(ka) and (ga)

clearly contemplate that the tribunal shall also have the power to appoint expert which evidently include a hand writing expert within the meaning of section 45 of the Evidence Act, 1872.

14. He next submits that it is a settled principle of law that a statute must be read as a whole and not in part. He contends that upon a plain reading of the provisions of Section 7(ka) along with 17(ka) read with section 19(1)(4) and provisions of section 32 particularly Section 32 (ka) the scheme of the law clearly contemplate that the power of issuing an order to call for examination of signature or signatures whatsoever by hand writing expert or any other investigating power arising out of any matter shall be conferred upon the arbitrator tribunal and not upon any civil court.

15. Upon a query from this bench following the contention of the learned Advocate for the opposite party that the learned District Judge also has similar power to decide on the existence of a valid arbitration agreement including the power to call for hand writing expert, he controverts the learned Advocate for the petitioner. He argues that it would be absurd to presume that the law would confer simultaneous power on two entities. He continues that further more the provisions of section 7ka (1) of the Arbitration act, 2001 has clearly expressed the circumstances under which an ad-interim temporary order may be passed by the learned District Judge or by the High Court Division. He continues that therefore keeping with the criterias expressly set out in the sub rules of the provision it is clear that the learned District Judge has no power or jurisdiction to entertain any application under Section 45 of the Evidence Act, 1872 while entertaining an application under section 7ka(1) of the Arbitration Act, 2001. In support of his contentions, the learned Advocate for the petitioner cited two decisions including in the case of Eklas Khan and others Vs. Prajesh Chandara and others reported in 1987 BLD(AD) 142 and another in the case of Multiplan Limited Vs. Principal, Md. Zaynal Abedin reported in 23 BLC(2018) 561.

16. He next agitates that the Arbitration Act-2001 is a special statutory enactment and it is principle of rules of interpretation that special statutory enactments must be read strictly unless otherwise contemplated elsewhere. He continues that therefore in an application under Section 7ka(1) of the Arbitration Act, 2001 the learned District Judge clearly does not have any power beyond what is categorically conferred upon it. He further reiterates that Section 17(ka) of the Arbitration Act, 2001 has clearly conferred the power to decide inter alia the validity of an Arbitration agreement upon the arbitral tribunal and not upon any civil court. He submits that the Arbitration Act, 2001 has specified the particular power which has been conferred upon the tribunal specifically empowering the arbitral tribunal. He contends that upon examination of section 17 (ক) it clearly shows that section 17 (ক) does not contemplate the exercise of the expressly conferred powers upon the tribunal, to be exercised by any civil court nor any other forum to decide on the particular issue. He reiterates that by no stretch of imagination can it be presumed that the provisions of the Arbitration Act 2001 may contemplate the conferring of any of the powers conferred upon the Tribunal to be conferred upon any civil court nor any other forum. He submits that therefore the impugned order dated 26.01.2020 was passed by the learned District Judge beyond jurisdiction and beyond the powers conferred upon a civil court. He asserts that the learned District Judge clearly arrogated the powers specifically conferred upon the arbitral tribunal under the clear provisions of section 17 (ক) of the Arbitration Act. He concludes his submission upon assertion that therefore the impugned order dated 26.01.2020 was illegally passed by the learned District Judge and the impugned order dated 26.01.2020 ought to be set aside and the Rule bears merits ought to be made absolute for ends of justice.

17. On the other hand learned Senior Advocate Mr. M.I. Farooqui vehemently opposes the Rule. He agitates that the impugned order dated 26.01.2020 was lawfully passed and the judgment of the learned District Judge needs no interference with in revision. In support of his contention he submits that the provisions of the Evidence Act, 1872 including the provisions of the Code of Civil Procedure, 1908 and the Limitation Act, 1908 are not excluded by the Arbitration Act, 2001. He draws attention of this bench to the definition of terms in Section 2 of the Arbitration Act, 2001 and submits that Section 2 of the Arbitration Act, 2001 which is under chapter 2 of the Act of 2001 provides the definition of general provisions. He draws particular attention to Section 2, 2(Gha) (ঘ), 2(Uma)(ঙ), 2(Tha)(ঠ) of the Act. He contends that Section 2(Kha), 2(Uma) and 2(Tha) clearly contemplates that the provisions of civil law including those of the Limitation Act, Code of Civil Procedure, 1908 and the Evidence Act, 1872 respectively are not excluded by the Arbitration Act 2001. He submits that the Act does not intend to exclude the applicability of the provisions of the Code of Civil Procedure 1908, Evidence Act 1872, Limitation Act, 1908 and which feature in the definitions of general provisions under Section 2 in chapter 2 of the Arbitration Act, 2001. He argues that since the provisions of the Evidence Act, 1872 read with the Code of Civil Procedure, 1908 is expressly stated in Section 2 in the definition of General Provisions in Section 2 of the Acts, therefore it may be assumed that the Arbitration Act, 2001 clearly contemplate the powers that may be granted to a Civil Court including the power to call for hand writing expert under given circumstances under the provision of Section 45 of the Evidence Act, 1872. He agitates that given that the Code of Civil Procedure 1908 is not excluded by the Arbitration Act, 2001 therefore the learned District Judge is not committing any illegality while entertaining an application under Section 7(ka)(1) of the Arbitration Act, 2001. He submits that the learned District Judge certainly has the authority to scrutinize any documents under the authority conferred upon it under the Evidence Act, 1872 including the authority to examination any report by any expert over any disputed documents. He pursuades that the provisions of Arbitration Act, 2001 does not exclude the jurisdiction of a District Judge to issue an order for examination of any signature whatsoever by hand writing expert specifically the jurisdiction to issue any order under Section 45 of the Evidence Act including passing of any order under any other provision of Evidence Act, 1872 and the Code of Civil Procedure, 1908 etc. He continues that if the intention of the legislature is to exclude the applicability of the laws in that event the Arbitration Act, 2001 would not have included the Evidence Act, 1872 Code of Civil Procedure, 1908 including the Limitation Act, 1908 in section 2 of the Act. He persuades that in chapter 2 Section 2 of the Arbitration Act, 2001 these Acts have been defined in the definition clause (সংজ্ঞা). He contends that the learned District Judge, while sitting in court is not a persona designata rather he is a District Judge within the definition of law including the Code of civil Procedure 1908 and other laws.

18. He next also draws attention of this bench to Section 476 of the Code of Criminal Procedure, 1908 read along with section 195 and section 190 B and submits that upon perusal of the provisions it may be assumed that the learned District Judge has wide powers and jurisdiction. He also draws attention to Section 193 of the Penal Code, 1860 and submits that Section 193 confers the power to a normal criminal court to decide upon an allegation of giving false evidences. He submits that the Arbitration Act, 2001 does not debar the civil court or the learned District Judge from its power to examine any fraudulent and false evidences whatsoever.

19. Upon a query from this Bench regarding the Arbitration Act 2001 being a special statutory enactment, he argues that although a special law may be enacted by the legislature

but by such enactments previous laws are not repealed. He contends that the legislature also by enactment of Arbitration Act, 2001 did not contemplate the exclusion of the general laws which confers upon the District Judge wide powers under the Code of civil Procedure,1908 Code of Criminal Procedure,1898 Penal Code 1860 etc . On the same strain he continues that for issuing an order calling for hand writing expert lies within the purview of a District Judge's jurisdiction.

20. He draws attention to Broom's Legal Maxims 10th Edition and submits that the Maxim "generalia specialibus non derogant" entails that in the absence of an indication of a particular intention to the effect the presumption is that the general words were not intended to repeal the earlier and special legislation. He submits that since the Latin Maxim "Generalia Specialibus non Derogant" has been practiced in common law court including the courts in this country inter alia Civil courts, therefore it may be assumed that the legislator while enacting special provisions of law including section 17(ka) of the Arbitration Act, 2001 did not exclude or take away the powers of the learned District Judge which has been conferred upon him under the prevailing laws of the land including the Code of Civil Procedure 1908, The Code Criminal Procedure etc. Next he draws attention to Broom's Legal Maxims 10th Edition and submits that a provision which gives a new right does not destroy an existing statutory right, unless the intention of the legislators is clearly apparent that the two rights should not co-exist.

21. He reiterates that the District Judge has wide powers conferred under the Code of Civil Procedure 1908, Evidence Act, 1872 and the Code of Criminal Procedure to issue any orders calling for examination of any signature by hand writing expert under Section 45 of the Evidence Act, 1872 including conferring power of issuing other relevant orders. Controverting the submissions of the learned Advocate for the petitioner he contends that in this case the learned District Judge is not arrogating himself from the powers conferred upon the arbitral tribunal. On this point he continues that neither under the Arbitration Act, 2001 nor anywhere in any other law is it stated that the learned District Judge may not invoke the power to examine documents by hand writing expert under the provisions of Section 45of the Evidence Act 1872.

22. Regarding the contention of the petitioner on the issue of arrogation of power of the tribunal he argues that the learned District Judge here is not arrogating any of the powers conferred upon the tribunal since it did not decide on the merits of the Arbitration agreement but simply issued an order to verify some signatures by hand writing expert. He argues that Section 7(ka-1) including the provision of Section (ka-1)-Uma of the Arbitration Act, 2001 does not prohibit the learned District Judge from issuing any order which may be of assistance to the court while entertaining an application under section 7(ka) of the Arbitration Act, 2001. In support of his submissions he cites a few decisions particularly the decision in the case of Corona Fashion Vs. Milestone Clothing LCC reported in 71 DLR(2019)106. He assails that in this decision this division found that the court (learned District Judge) is competent to carry out necessary scrutiny as to the existence of an Arbitration agreement. Drawing support from this decision inter alia also relying on his submissions he submits that therefore the learned District Judge did not commit any illegality in passing the impugned order dated 26.01.2020 and therefore the learned District Judge acted within its jurisdiction and the impugned order needs no interference here.

23. Learned Senior Advocate Mr. M.I. Farooqui next draws attention to the application filed by the opposite parties for discharging the Rule as being infructuous. He draws attention

to the Civil Petition for Leave to Appeal No. 1758 of 2020 filed before the Appellate Division. The learned Senior Advocate draws attention to Annexure no. '1' of the application and agitates that the Apex court in its order in Civil Petition for Leave to Appeal No. 1758 of 2020 discharged the Rule as being infructuous mainly on the ground that the opinion of the hand writing expert has already been received by the court of District Judge previous to the order of stay passed by the High Court Division. He submits that therefore the Rule be also discharged as unfructuous. He however concludes his submission upon assertion that the Rule bears no merits ought to be discharged for ends of justice.

24. Next Learned senior Advocate Mr. Mehedy Hasan Chowdhury for the opposite parties submits that the Arbitration Miscellaneous Case No. 7 of 2019 is not maintainable in limine since there is no Arbitration agreement in existence at all. Drawing attention to the Order of the learned District Judge he points out that the opposite parties land owner made an application before the court of the learned District Judge for rejection of plaint under the provisions of Order 7 Rule 11 of the Code of Civil Procedure 1908. He draws attention to Section 7 and 7(ka) of the Arbitration Act, 2001 and draws attention to the word 'পক্ষগণ'. Revolving around the term 'পক্ষগণ' he argues that Section 7 and 7ka contemplate পক্ষ and পক্ষগণ which implies parties to an agreement and not parties to the arbitration case. He submits that therefore since in this case there is no arbitration agreement in existence at all therefore the arbitration miscellaneous case in limine is not maintainable. Next he draws attention to section 10 of the Arbitration Act, 2001 and argues that Section 10 also contemplates a situation when the arbitration agreement is admitted by both parties. He contends that in the instant case it is clear that the opposite parties do not acknowledge the agreement dated 21.04.2019 followed by power of attorney. He submits that Section 10(2) of the Arbitration Act, 2001 contemplates that only when the court is satisfied that an arbitration agreement exists, only then it shall refer the parties to arbitration and stay the proceedings unless in the event the court finds that the arbitration agreement is void, inoperative or is otherwise incapable of determination by arbitration. He submits that therefore the learned District Judge did not commit any illegality in passing the order to have the signature examined. He submits that depending on the result of the report the learned District Judges' decision shall decide the fate of the Miscellaneous case as to whether such Miscellaneous case under the provision of section 7 (ক) (1) of the Act is maintainable or not. In support of his submissions he cites a decision in the case of Corona Fashion Vs. Milestone Clothing LCC reported in 71 DLR(2019)106. He continues that the learned District Judge therefore committed no illegality in issuing the order to examine the signature in the document by handwriting expert following the provisions of Section 45 of the Evidence Act, 1872. He contends that the learned District Judge passed its order within its jurisdiction and committed no illegality and therefore the Rule bears no merits ought to be discharged for ends of justice.

25. I have heard the learned counsels from both sides and I have perused the application and all the materials on record including the order of the court of the learned District Judge. Evidently the arbitration miscellaneous case was filed by the petitioner Anamika corporation Ltd. under Section 7(ka) of the Arbitration Act, 2001. It is an admitted fact that originally four sets of agreement were executed including four power of attorneys and which were admittedly later cancelled upon consent by both parties. The petitioners claim that pursuant to the cancellation of the agreement and the power of attorney however on the date of cancellation of the 4 deeds of agreement on the same date, that is on 24.01.2019 another fresh agreement was executed between the parties, that is between the developer company and the land owner (opposite parties). However the opposite parties land owner totally deny the

execution of any fresh agreement on 24.01.2019 and they refused to register the deed of agreement dated 24.01.2019.

26. The gist of the opposite parties land owners case is that there is no agreement in existence between the parties and so the opposite parties are not under any legal obligation to the petitioner against their property at all. When the opposite party refused to acknowledge the agreement inter alia any legal obligations the petitioner thereafter filed the Arbitration Miscellaneous case No. 7 of 2019 under section 7(ka)(1) of the Arbitration Act, 2001.

27. The primary prayer in the Arbitration Miscellaneous case No. 7 of 2019 is that upon admitting the Arbitration Miscellaneous Case inter alia to pass an order restraining the opposite parties from transferring, encumbering, entering into deed of agreement or otherwise disposing of the scheduled property to any third party or otherwise create any interest therein and also with prayer to direct the parties to maintain status-quo with respect to the ownership and possession of the scheduled property until disposal of the arbitration proceedings under Section 7A (1)(b) and Section 7A (1)(c) of the Arbitration Act, 2001 and /or pass such order and further orders as the court may deem fit and proper.

28. I have perused the provision of section 7ক (১) (ক-ছ) of the Arbitration Act, 2001. Which is reproduced below:

৭ক। আদালত এবং হাইকোর্ট বিভাগের অন্তবর্তীকালীন আদেশ প্রদানের ক্ষমতা।- (১) ধারা ৭এ যাহা কিছুই থাকুক না কেন, পক্ষগণ ভিন্নভাবে সম্মত না হইলে, কোন পক্ষের আবেদনের প্রেক্ষিতে সালিসী কার্যধারা চলাকালীন কিংবা তৎপূর্বে অথবা ৪৪ বা ৪৫ এর অধীন সালিসী রোয়েদাদ কার্যকর না হওয়া পর্যন্ত আন্তর্জাতিক বানিজ্যিক সালিসের ক্ষেত্রে হাইকোর্ট বিভাগ এবং অন্যান্য সালিসের ক্ষেত্রে আদালত নিম্নবর্ণিত বিষয়ে আদেশ প্রদান করিতে পারিবে, যথা:-

(ক) নাবালক বা অপ্রকৃতিস্থ ব্যক্তির পক্ষে সালিসী কার্যধারা পরিচালনার জন্য অভিভাবক নিয়োগ;

(খ) সালিসী চুক্তির অন্তর্ভুক্ত কোন বিষয়বস্তু হিসাবে অন্তর্ভুক্ত কোন মালামাল বা সম্পত্তির অন্তবর্তীকালীন হেফাজত বা বিক্রয় বা অন্য কোন সংরক্ষণমূলক ব্যবস্থা গ্রহণ;

(গ) কোন পক্ষ কর্তৃক সালিসী রোয়েদাদ কার্যকর করিবার ক্ষেত্রে প্রতিবন্ধকতা সৃষ্টির লক্ষ্যে কোন সম্পত্তি হস্তান্তর কিংবা স্থানান্তরের উপর নিষেধাজ্ঞা;

(ঘ) সালিসী কার্যধারার অন্তর্ভুক্ত কোন বিষয়বস্তু হিসাবে অন্তর্ভুক্ত কোন মালামাল বা সম্পত্তি আটক, সংরক্ষণ, পরিদর্শণ, চিত্রায়ন, ফটোসংগ্রহ, হেফাজতকরণ, তথ্য ও নমুনা সংগ্রহ, পর্যবেক্ষণ, পরীক্ষণ বা সাক্ষ্য গ্রহণ করিবার জন্য এবং তদুদ্দেশ্যে কোন পক্ষের দখলকৃত ভূমি বা ইমারতে প্রবেশের জন্য যে কোন ব্যক্তিতে ক্ষমতা অর্পণ;

(ঙ) অন্তর্বর্তীকালীন নিষেধাজ্ঞা;

(চ) রিসিভার নিয়োগ;

(ছ) আদালত অথবা হাইকোর্ট বিভাগের নিকট যুক্তিসঙ্গত বা যথাযথ প্রতীয়মান হয় এইরূপ অন্য যে কোন অন্তর্বর্তীকালীন সংরক্ষণমূলক গ্রহণ।

29. Upon perusal of the relevant provisions I am of the considered view that section 7ক (১) contemplate the power of the learned District Judge and High Court Division to issue ad-interim order (অন্তবর্তীকালীন আদেশ) under certain sets of circumstances. I have examined the provisions of section 7ক (১) read with the sub-rules from section 7ক (১) (ক-ছ). It appears that section 7ক (১) (ক-ছ has specified particular circumstances under which and laid down a criteria when an ad-interim order (অন্তবর্তীকালীন আদেশ) under section 7ক (১) may be passed by the civil court. I am also of the considered view that it is clear from the nature of the prayer in the petitioner's application that it falls within the purview of Section 7ক (১) sub-section Uma. Section 7ক (১) ঙ provides an express provision of ad-interim injunction (অন্তবর্তীকালীন নিষেধাজ্ঞা). I am of the considered view that the Arbitration Act, 2001 being a special enactment of law therefore in an application filed under section7(ka) of the Arbitration Act, 2001 it is not

possible to travel beyond the particular criteria categorically set out and stated expressly in the provisions of section 7ka (1) and Sub-section (ka-Chha) of the Act.

30. Section 7ka also states that the parties (পক্ষগণ) if it is not otherwise agreed upon may pray for issuing ad-interim order from the court of learned District Judge and the High Court Division during the arbitration proceeding or before initiation of the proceeding. Section 7ka (1) of the Arbitration Act, 2001 has to that effect used the word তৎপূর্বে (before). In this case since the Arbitration proceeding has not yet been initiated therefore it is to be assumed that ad-interim order was prayed for by the developer company petitioner previous (তদপূর্বে) to the arbitration procedure. As mentioned above the criterias and the circumstances /situation when an ad-interim order may be passed has been categorically stated in section 7ক (১) (ক-ছ) of the Act. As also mentioned above, my considered view it that the present application under section 7ক (১) relates to ad-interim injunction (অন্তবর্তীকালীন নিষেধাজ্ঞা) envisaged in section 7ক (১) sub section ঙ of the Act.

31. Both the learned Senior Advocate for the opposite parties Mr. M.I. Farooqui and learned senior Advocate Mr. Mehedi Hasan Chowdhury contended that issuing an order to examine the signature whatsoever under the provisions of section 45 of Evidence Act, 1872 is within the contemplation of section 7ক (১) of the Arbitration Act, 2001 and consequently it is within the jurisdiction of the learned District Judge to pass such an order.

32. I would like to remind both the learned senior Advocates for the opposite parties that the substantive prayer in the Arbitration Miscellaneous case No. 7 of 2019 under section 7ক (১) of the Arbitration Act, 2001 is basically a prayer for an order of restraint till arbitration proceedings are initiated and nothing else. Further I am also of the considered view that section 7ক (১) sub-section Uma including other sections only contemplate the passing of an ad-interim order in case of urgency to address certain circumstances or situations either during an arbitration proceeding or before an arbitration case is initiated.

33. In the instant case, the prayer for ad-interim injunction was made before the arbitration proceeding was initiated. Although the learned Senior Advocate Mr. M.I Farooqui for the opposite parties contended that the learned District Judge's power is not excluded by the provisions of section 17(ka) of the Arbitration Act, 2001 but my considered view is that even before deciding over the provisions of section 17(ka), for the purpose of adjudicate of this matter, it is most necessary to examine section 7ক of the Arbitration Act, 2001. Upon a plan reading of section 7ক (১) of the Arbitration Act of 2001, I do not find anything in these provisions which may indicate anything beyond the powers already expressly conferred upon the civil court by the said section. It is pertinent to repeat that the Arbitration Act, 2001 is a special enactment of law and the provisions of any special statutory enactment must be construed strictly unless a different intention is otherwise implied anywhere in any other law. I am of the considered opinion that if the legislature intended to confer the power upon the learned District Judge besides what is expressly stated in section 7ka (1) of the Arbitration Act, 2001 in that event it would not have expressly laid the specified conditions and situations under which an order may be passed under section 7ক (১) sub Rule(ক-ছ) including an order of ad-interim injunction (অন্তবর্তীকালীন নিষেধাজ্ঞা) under sub Rule 'ঙ'.

34. My considered opinion is that the powers conferred upon the learned District Judge in an application under section 7ক of the Arbitration Act, 2001 being categorically stated and

the act being a special statutory enactment of law, there is any scope to travel beyond the special provisions laid down in the law.

35. Learned Advocates from both sides made several submissions regarding the previous orders of the learned District Judge. I am inclined to opine that for the purpose of disposal of the instant civil revision it is necessary to confine myself to the jurisdictional issue of the matter. The duty of this court here is to primarily decide as to whether the learned District Judge while entertaining an application under section 7ক of the Act of 2001 has been conferred the jurisdiction to pass an order under section 45 under the Evidence Act, 1872.

36. The learned Advocate for the petitioners upon drawing attention to Section 17(ka) of the Arbitration Act, 2001 read along with Section 19(1), 19(2) of Act vehemently argued that the special enactment of law upon reading all these provisions it is clear that the power to examine the validity and existence of a valid arbitration agreement is conferred expressly only upon the arbitral tribunal under the provisions of section 17(ka) of the Arbitration Act, 2001.

37. The learned Advocate for the petitioners further contended that Section 17(ka) read with section 19(1) and (4) and section 32(1) and section 32(2)(ka) and (ga) of the Arbitration Act, 2001 empower the Tribunal only to adjudicate upon the existence and validity or otherwise of any Arbitration Agreement, and further argued that therefore the learned District Judge acted illegally and without jurisdiction in passing the impugned order dated 26.01.2020 upon arrogating to himself the specific jurisdiction conferred on the Arbitral tribunal under the said provisions of the Arbitration Act, 2001. He also contended that upon examination of these provisions read together it is clear that the power to issue an order under section 45 of the Evidence Act, 1872 has been conferred upon the Tribunal only. He continued that since it is a special enactment of law hence the language of the provisions ought to be strictly interpreted and according to the language of the relevant provisions it is clear that the intention of the legislators is that it is only the tribunal which can decide on the existence of a valid Arbitration agreement and not a civil court. The learned Advocate for the petitioners contended that in this particular case, the learned District Judge upon issuing the impugned order dated 26.01.2020 under section 45 of the Evidence Act, 1872 arrogated upon itself the powers conferred upon the arbitrator tribunal under section 17(ka) and hence travelled beyond his jurisdiction.

38. Upon hearing the counsels of both sides and going through all materials on records, it appears that the learned Advocate for both sides contended several other legal points and factual issues. But however I am of the considered opinion that my duty for the purpose of adjudication of the instant matter is to mainly confine myself to the jurisdictional issue. Therefore I am primarily inclined to examine the power conferred upon the arbitrator tribunal under section 17(ka) read with the other provisions and I am further inclined to examine as to whether the learned District Judge travelled beyond its jurisdiction by issuing an order directing to have the signatures examined by hand writing expert under the provisions of Section 45 of the Evidence Act, 1872.

39. Upon a plain ready of the provisions of section 17 of the Arbitration Act, 2001 it is clear that the section contemplates the extent of the jurisdiction that may be exercised by an Arbitrator Tribunal. Section 17 (a) (b) (c) (d) and (e) prescribes primarily 5 issues on which the arbitral tribunal is empowered to exercise and rule on its own jurisdiction. The intention of section 17(ক) of the Arbitration Act, 2001 is to categorize and lay down the circumstances

and situation when the arbitrator tribunal may exercise to rule on its own jurisdiction and is competent there to. I have carefully scrutinised both the heading of the language of section 17 which is under chapter 5 of the Arbitration Act 2001. It may be pertinent to note that chapter 5 essentially deals with the jurisdiction of an arbitral tribunal. The heading of chapter 5 reads "Jurisdiction of Arbitral Tribunals" (নালিশী ট্রাইবুনালের এখতিয়ার). Therefore it is needless to state that chapter 5 of the Arbitration Act, 2001 specifically deals with the jurisdictional power of any arbitral tribunal. Section 17 (ক) (খ) (গ) (ঘ) এবং (ঙ) specifies the criteria and circumstances when an arbitral tribunal may rule on it is own jurisdiction. The heading of section 17 of the Arbitration Act, 2001 categorically states " সালিশী ট্রাইব্যুনালের স্বীয় এখতিয়ার বিষয়ে সিদ্ধান্ত প্রদানের ক্ষমতা" (Competence of arbitral tribunal to rule on its own jurisdiction). Therefore it is clear that section 17 expressly and unambiguously lay down the circumstances under which the arbitral tribunal may Rule on its own jurisdiction. Section 17 further states " পক্ষগণ ভিন্নভাবে সম্মত না হওয়ার ক্ষেত্রে প্রশ্নে সালিশী ট্রাইব্যুনাল স্বীয় ক্ষেত্রে সিদ্ধান্ত প্রদান করিতে পারে।" The word "যে কোন" (on any question) confers a wide power upon the arbitral tribunal to Rule on its own jurisdiction arising out of any issue or any question involving an arbitration agreement. Besides Section 17 (ka) confers wide power and expressly states 5 specific criterias clearly embodied expressing situation and/or circumstances as to when the arbitral tribunal may exercise on its jurisdiction.

40. For purposes of adjudication on the jurisdictional issue of the Tribunal, I am inclined to sddress Section 17(ka) of the Arbitration Act, 2001. Section 17(ka) of the Arbitration Act, 2001 is the first criteria under which an Arbitral tribunal may Rule on its jurisdiction. Section 17 (ক) expressly contemplate " বৈধ সালিশ চুক্তির অস্তিত্ব থাকা " which entails that an arbitral tribunal has been conferred with the jurisdiction which empowers it to Rule as to whether there is existence of a valid arbitration agreement.

41. I am of the considered opinion that section 17(ka) gives a wide power to the arbitrator tribunal but yet again 17 (ক) further specifies the criteria of issues on which an arbitral tribunal may decide upon. I am also of the further considered opinion that the intention of the legislature while enacting the provisions of the Arbitration Act, 2001 including Section 17(ka) of the Arbitration Act, 2001 clearly contemplate that the power to decide as to whether a valid arbitration agreement is in existence or not is specifically conferred upon the tribunal.

42. It is a principle of law that a statute in particular where a statute is a special piece enactment of law and addressing certain situations and circumstances, in that event unless a different intention is expressed elsewhere in the law the statute must be construed and interpreted in accordance with the strict meaning of the language as it expressly appears. The language of section 17(ka) is quite clear and there is no ambiguity as such in the provision. It is also a settled principle of law that where a specific provision of law is expressly stated such specific provision shall prevail over the general law.

43. I have also perused the other provisions of chapter 5 (পরিচ্ছেদ-৫) of the Arbitration Act, 2001 which deal with the scope and extent of the jurisdiction of any arbitral tribunal. I have particularly perused section 19(1)(2) of the Act. Section 19(1) provides that any objection challenging the jurisdiction of the tribunal shall not be raised later than the submissions of the statement of defence. Section 19(2) of the Act contemplate a situation where any objection may be raised that the tribunal is exceeding the scope of its authority in that event such objection shall be raised as soon as the allegation is raised. Therefore it clearly appears that section 19(1) and 19(2) read along with other provisions of chapter 5 including section 17(ka) also contemplate that an objection against the jurisdiction of the tribunal shall also be heard by the tribunal itself and not by any other forum.

44. It is a principle of rules of interpretation that a statute cannot be read or construed in part but must be read as a whole. Therefore in this particular case also the Arbitration Act, 2001 over all including chapter 5 of the Act must be read as a whole and not in part along with the other chapters of the Act. After perusal of section 17(ka) read along with the other provisions of chapter 5 particularly section 19(1), 19(2) of the Arbitration Act, 2001, I am of the considered view that the power to decide on the existence of a valid arbitration agreement has been conferred upon the arbitral tribunal under a specific enactment of law by way of the Arbitration Act, 2001 and has not been conferred upon the learned District Judge. If the intention of the law was to confer simultaneous or parallel jurisdiction to the learned District Judge in that case the statutory provision of Section 17would not have expressly contemplated and stated the power so unambiguously as it has been expressly and unambiguously stated in section 17 of the Arbitration Act, 2001 including section 17(ka-Uma) and for our purpose particularly section 17(ka) of the Arbitration Act, 2001.

45. The learned Advocate for the opposite parties land owner cited a decision of this division in the case of Corona Fashion Vs. Milestone Clothing LLC reported in 71 DLR(2019)106. The learned Advocate for the opposite parties land owner argued that in this decision the High Court Division in the 71 DLR decision decided that the "court" being the "District court" is competent to carry out any necessary scrutiny as to the existence of an arbitration agreement. The learned Advocate for the opposite parties further contended that the High Court Division correctly found that a civil court being the court of learned District Judge may decide and is competent to carry out any necessary scrutiny and examination as to the existence of an arbitration agreement. He further contended that necessary scrutiny evidently entails an order or orders to carry out an investigation under section 45 of the Evidence Act, 1872.

46. I have carefully perused the 71 DLR decision of this division. I have particularly perused paragraph No. 31, 32 and 33 of this decision. Upon perusal it appears that the learned Advocate for the opposite parties did not concentrate on the overall observation and finding of the High Court Division in this case. In paragraph No. 31 of this decision this division state as hereunder :

> " In other words, while the court is competent to carry out the necessary scrutiny as to existence of an arbitration agreement (সালিস চুক্তির অস্তিত্ব) in an appropriate application under section 17(a) of the Arbitration Act, the arbitral tribunal will determine the "existence of a valid arbitration agreement" (বৈধ সালিস চুক্তির অস্তিত্ব).

47. Therefore this decision of this division found that the power to decide on the existence of a valid agreement " বৈধ সালিশ চুক্তির অস্তিত্ব থাকা " upon the Tribunal under section 17(ka) of the Arbitration Act, 2001. In paragraph No. 33 of this decision this division also distinguished between the existence of an arbitration agreement and the existence of a valid arbitration agreement. I am of the considered opinion that the two situations are different. Whereas the existence of an arbitration agreement may be decided by the civil court being the learned District Judge, but where the existence of an arbitration agreement so far as its validity is challenged or under question that question must be decided by the arbitral tribunal following the provisions of section 17(ka) of the Arbitration Act, 2001.

48. It is evident that in this particular case which is presently before me the existence of the validity of the arbitration agreement is in dispute. The petitioner claims that the arbitration agreement is a valid arbitration agreement signed by the developer company and

land owner while the land owner opposite parties vehemently denies having executed the agreement. Therefore in this particular case rather the existence of a 'valid' arbitration agreement is in question. I am of the considered view and also upon drawing support from the decision in the case of Corona Fashion Vs. Milestone Clothing LLC reported in 71 DLR(2019)106 read along with the provision of Section 17 and 17(ka-uma) and also section 19(1) and 19(2) and other provisions of the Act, that the jurisdiction to decide the existence of a valid arbitration agreement " বৈধ সালিশ চুক্তির অস্তিত্ব থাকা " is specially conferred upon the arbitral tribunal and not upon any other court. I have also perused paragraph No. 43 of the 71 DLR(2019)106 decision wherein this division laid down some criterias for determining the existence of an arbitration agreement as to the conditions that are to be satisfied to constitute the existence of an arbitration agreement.

49. Section 19(2)(c) of the Act of 2001also contemplates a situation on the existence of an arbitration agreement when the arbitration agreement alleged by one party is not denied by the other. Therefore it is clear that to constitute a valid arbitration agreement within the meaning of the Act of 2001 the existence of the agreement must be agreed upon by both parties. In this case it is clear that the opposite parties denies the existence of the agreement itself. Therefore under the provisions of Section 17(ka) of the Arbitration Act, 2001 read with other provisions of the Act it is my considered view that the legislature has conferred the power to decide as to whether a valid arbitration agreement is in existence upon the tribunal only.

50. As mentioned elsewhere in this judgment section 7(ka) of the Arbitration Act, 2001 under which the instant application has been filed and which subsequently led to the issuance of the impugned order passed by the District Judge and against which the instant civil revision has been filed, the said section 7ka contemplates a situation where an ad-interim order or orders may be passed in matter in situations, which situations which have been expressly stated envisaged under the provisions of section 7ক (১) (ক-ছ) of the Act.

51. As mentioned elsewhere in this judgment for our purpose we may concentrate on section 7ক (১)(Uma) "অন্তবর্তীকালীন নিষেধাজ্ঞা" (ad-interim injunction) Even for sake of discussion drawing upon the principles of pari materia, if we compare section 7ক (১) (uma) "অন্তবর্তীকালীন নিষেধাজ্ঞা" (ad-interim injunction) with Order 39 Rule 1 and 2 of the Code of Civil Procedure and draw a comparison and analogy thereupon, it is clear that "অন্তবর্তীকালীন নিষেধাজ্ঞা" (ad-interim injunction) may be passed only to address situation/ circumstances wherein there is some urgency to restrain a particular party or person from doing certain acts pending the case. I am also of the considered view that while issuing an order of ad-interim restraint or injunction whatsoever, the learned District Judge is not empowered to pass an order under section 45 of the Evidence Act, 1872 for purpose of having any signature examined by a hand writing expert.

52. It is also necessary to be reminded that a report under section 45 of the Evidence Act, 1872 submitted by a hand writing expert is not a conclusive evidences of finding of facts but which must be corroborated by supporting evidences. It is needless to state that such assessment and adducing of such evidences is a longer process under the relevant procedural law. By no stretch of imagination can it be contemplated that section 7ক of the Arbitration

Act, 2001 including section 7ক (১) ঙ contemplate the power of a District Judge for passing of the ad-interim order beyond a situation of urgency. Section 7ক (১) particularly sub section (ঙ) of the Act of 2001, does not contemplate a lengthy trial pursuant to adducing evidences whatsoever. Therefore the provision of Section 7ক is limited to passing certain orders under certain situations and circumstances. The intention of the legislators in enacting of those provision also upon comparison and analogy with Order 39 Rule (1) and (2) of the Code of Civil Procedure, 1908 is to address circumstances of urgency and nothing beyond.

53. I have also perused some other provisions of the Arbitration Act, 2001 including the provisions of section 32 of the Act, which section contemplates the power of the tribunal to appoint experts, legal adviser etc. to determine a specific issue before the tribunal. For purposes of interpretation the term 'expert' in my considered opinion also entails a hand writing expert within the meaning of the provisions of The Evidence Act, 1872.

54. Therefore under the facts and circumstances and upon comparison with several other sections of the Arbitration Act, 2001 and in particular upon perusal and comparison of the provisions of section 7ক of the Act of 2001 along with section 17(ka), Section 19(1) and 19(2) and section 32 inter alia other provisions, my considered finding is that in the power to issue an order for examination of any signature by hand writing expert is conferred upon the arbitral tribunal only under the provisions of section 17(ka) of the Arbitration Act,2001. Section 7ক has limited powers and the civil court cannot travel beyond the limited powers while exercising the power conferred upon it under Section 7ক of the Act of 2001.

55. Therefore I am also of the considered finding that the impugned order dated 26.01.2020 passed by the learned District Judge and Arbitration Court, Cumilla in Arbitration Miscellaneous Case No. 07 of 2019 in allowing the application filed by the opposite parties under section 45 of the Evidence Act, 1872 is unlawfully passed and therefore the said order ought to be set aside.

56. Under the facts and circumstances and upon hearing the leaned senior Advocate for both sides and upon perusal of the decisions including careful examination of the Arbitration Act, 2001 read with other laws I find merits in this Rule.

57. In the result, the Rule is made absolute and the impugned order dated 26.01.2020 passed by the learned District Judge and Arbitration Court, Cumilla in Arbitration Miscellaneous Case No. 07 of 2019 in allowing the application filed by the opposite parties under section 45 of the Evidence Act, 1872 is hereby set aside.

58. The order of stay granted earlier by this court is hereby vacated.

59. Communicate the judgment and order at once.

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HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICITON)

WRIT PETITION NO. 8301 of 2010

Unilever Bangladesh Limited, represented by its Chairman and Managing Director Mr. Rakesh Mohan
...Petitioner
Vs.
The Chairman, National Board of Revenue, Rajaswa Bhaban, Segun Bagicha, Dhaka and others
...Respondents

Mr. Fida M Kamal, Senior Advocate with
Mr. Md. Monzur Rabbi, Advocate
...For the Petitioner

Mr. Kazi Mynul Hassan, D.A.G with
Mr. Md. Nazrul Islam Khandaker, A.A.G
with Mr. Md. Faruk Hossain, A.A.G with
Mr. Md. Delwar Hossain, A.A.G with
Ms. Nazma Afreen, A.A.G
...For the Respondent No. 1

Heard on 08.08.2022, 10.08.2022, 17.08.2022, 21.08.2022, 22.08.2022, 28.08.2022, 29.08.2022 and 30.08.2022.

Judgment delivered on 25.10.2022

Present:
Mr. Justice Md. Ashfaqul Islam
And
Mr. Justice Md. Ashraful Kamal
And
Mr. Justice Md. Shohrowardi

Editors' Note:

The writ petitioner being a registered trademark holder of the goods in question namely Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe and/or empty branded packing materials such as bottles, tubes, containers, wrappers, packets, labels etc. of Unilevers PLC (which are locally produced, packaged and marketed by the petitioner) prayed for a direction in the form of writ of mandamus upon the respondents Nos. 1 to 6 so that they cannot import or release the goods in Bangladesh and sought further direction upon the respondents Nos. 7 to 57 for not allowing opening of letter of credit by any importer to import the above goods. For disposal of the rule a larger Bench of the High Court Division was constituted. The High Court Division examined whether the importation of parallel goods in question into Bangladesh is barred under section 15 of the Customs Act, 1969 without prior permission of the petitioner and whether the instant writ petition is maintainable in law. The court analysing various provisions of different laws held that there is no bar in the law in importing parallel goods and any person can import parallel goods in compliance with the procedure mentioned in section 15 of the Customs Act. So, there is no obligation on the part of the respondents to restrain any person from importing parallel goods or to restrain any person from opening letter of credit for importation of parallel goods of Unilever Bangladesh Ltd. Moreover, there is alternative and equally efficacious remedy to the petitioner for violation of any condition laid down in section 15 of the Customs Act, 1969 regarding importation of parallel goods and the petitioner at any time can file an application to the customs authority for redress. Consequently the Rule was discharged.

Key Words:
Section 15, 17 of the Customs Act, 1969; Section 96 of the Trademarks Act, 2009; Article 102 of the Constitution of Bangladesh; বাংলাদেশ আমদানি নীতি আদেশ, ২০২১-২০২৪; Importation of parallel goods; equally efficacious remedy

Section 15 and 17 of the Customs Act, 1969:

On a bare reading of Section 15 of the Customs Act, 1969 it reveals that there is neither absolute bar in importing parallel goods nor said section gives any unfettered right to the importers to import parallel goods. Section 15 of the said Act is balanced legislation. Section 15(d)(e)(g) and (h) of the said Act authorized the importers to import parallel goods subject to compliance with the procedure/conditions as mentioned in the said provision. Nothing has been stated in said section regarding prior permission of the petitioner in importing parallel goods. Therefore the submission of the learned Advocate for the petitioner that without prior permission of the petitioner no one is legally entitled to import the parallel goods of Unilever Bangladesh is misconceived and fallacious. If any importer fails to satisfy the conditions laid down in Section 15(d)(e)(g) and (h) of said Act the customs authority is empowered under section 17 of the Customs Act, 1969 to detain and confiscate the imported goods. Therefore we are of the view that there is no wholesale restriction in section 15 of the said Act in importing parallel goods. (Para-19)

Section 96 of the Trademarks Act, 2009:

The petitioner is the registered trademark holder of the goods in question. Section 96 of the said Act has given protection to the petitioner. Under Section 96 of the said Act, the petitioner company is legally entitled to file suit before civil court for violation of any provision of the Trademarks Act, 2009. (Para-24)

Article 102 of the Constitution is not meant to circumvent or bypass statutory procedures:

The legislature made specific provisions in Section 17 of the Customs Act, 1969, Order 4 of the বাংলাদেশ আমদানি নীতি আদেশ, ২০২১-২০২৪, and Section 96 of the Trademarks Act for alternative, effective and equally efficacious remedy to the petitioner for violation of any condition laid down in Section 15 of the Customs Act, 1969 regarding importation of parallel goods. Article 102 of the Constitution is not meant to circumvent or bypass statutory procedures as stated above. When a right is created by a statute, which prescribes a remedy or procedure for enforcing the right, resort must be had to that particular statutory remedy before seeking extraordinary and discretionary remedy under Article 102(2) of the Constitution. Judicial prudence demands that this Court should refrain from exercising its jurisdiction under the said constitutional provision. This is a self-restrained restriction of the High Court Division. (Para-25)

When a person is entitled to seek remedy in the form of mandamus:

Mandamus is a Latin word which means “We command”. Mandamus is issued to keep public authorities within the limit of their jurisdiction while exercising public functions. It is called a ‘wakening call’ and it awakes the sleeping authorities to perform their duty. It is a judicial remedy in the form of an order of the Court to the government or public authority or Court below to do specific act which they are duty bound to do under the statutory provision of law. Any person who has an interest in the

performance of the duty by the authority and they have refused to do the duty following law despite demand in writing are entitled to seek remedy in the form of mandamus. (Para-30)

Exercising jurisdiction under Article 102 of the Constitution this Court is not legally empowered to adjudicate any disputed or contentious matter:

At the time of opening the Letter of credit, it is not practically possible for respondent Nos. 7 to 57 to identify the products which are parallel goods or counterfeit products of Unilever PLC. It is the customs authority that can examine the consignment and take the decision as to whether the particular imported consignment is parallel goods or counterfeit products of Unilever, PLC, London. Therefore if the petitioner has definite information that any respondent or anyone is importing parallel goods or counterfeit products of Unilever PLC, London in violation of the conditions imposed in Section 15 of the Customs Act, 1969 he is at liberty to file an application to customs authority regarding specific consignment. In the above backdrop of the matter, we are of the view that this writ petition has been filed relying on the highly contentious issue. A contentious issue is one that different people interpret the issue differently. Therefore, it is a controversial or disputed matter. Under Article 102 (2)(a)(i) of the Constitution on the application of any aggrieved person this court is empowered to pass an order directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do. This power of the High Court Division is discretionary. Exercising jurisdiction under Article 102 of the Constitution this Court is not legally empowered to adjudicate any disputed or contentious matter and this Court is loath to embark upon an enquiry into the disputed question of fact. (Para-46, 47)

Section 15 of the Customs Act, 1969:

No direction can be passed considering the anticipation of any person. It has already been held that in section 15 of the Customs Act, 1969 there is no wholesale restriction on importation of parallel goods. Therefore, there is no obligation on the part of the respondents to restrain any person from importing parallel goods or to restrain any person from opening letter of credit regarding importation of parallel goods of Unilever Bangladesh Ltd. Any person (s) is entitle to import parallel goods subject to compliance of the conditions imposed in Section 15(d)(e)(g) and (h) of the Customs Act, 1969. But on that score question of taking prior permission of the petitioner is irrelevant being bereft of any legal approval. (Para-48)

JUDGMENT

Md. Shohrowardi, J.

1. This writ petition has a checkered career. After issuance of the Rule, this Court by order dated 02.03.2011 sent the writ petition before the Honorable Chief Justice for constituting a larger bench for disposal of the Rule. Thereafter, the Honorable Chief Justice by his order dated 28.02.2012 constituted a larger bench for hearing and disposal of the matter but it was not heard and disposed of by that bench. Again the Honorable Chief Justice by his order dated 31.08.2021 constituted another larger bench for hearing and disposal of the Rule and that bench also did not hear the same. Lastly the Honorable Chief Justice by order

dated 21.07.2022 constituted this larger bench and accordingly this bench heard the matter and disposed of the Rule by this judgment.

2. On an application filed by the petitioner this Court by order dated 24.10.2010 issued the Rule Nisi in the following terms:

> "Let a Rule Nisi be issued calling upon the respondents to show cause as to why respondents No. 1 to 6 should not be directed not to allow import and/or release finished products with brand name Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe and/or empty branded packing materials such as bottles, tubes, containers, wrappers, packets, labels etc. of the aforesaid branded products, of Unilever PLc. (which are locally produced, packaged and marketed by the petitioner) into Bangladesh, in violation of Section 15 of the Customs Act, 1969, by anyone, other than the petitioner, ie. Unilever Bangladesh Limited, and further to show cause as to why the respondent Nos. 7 to 57 should not be directed not to allow opening of Letter(s) of Credit by any importer, including the proforma-respondent Nos. 58 to 62, or anyone else, to import the aforesaid branded finished products of Unilever Bangladesh Limited, and empty packing materials of the aforesaid branded products, into Bangladesh and/or such other or further order or orders passed as to this Court may seem fit and proper."

3. Relevant facts for the disposal of the Rule are that the petitioner is a Private Ltd Company registered under the Company Act, 1994 and a subsidiary company of "Unilever PLC" incorporated in the United Kingdom under the Companies Act, 1948 bearing Registration No. 41424 having its registered office at Port Sunlight, Wirral, Merseyside, CH62 4ZD. 39.25% of the shares of the petitioner company is held by the Government of Bangladesh and the rest of the share is owned by Unilever PLC. The petitioner is the only manufacturer, marketer, distributor, owner and importer of the products in question namely, Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe in Bangladesh and/or empty branded packing materials such as bottles, tubes, containers wrappers, packets, labels etc. within the territory of Bangladesh. Unilever PLC obtained necessary registration of trade, brands, patents and designs in accordance with the law in respect of the products as foresaid and the petitioner company is the licensee under Unilever PLC. Therefore, no one other than the petitioner is authorized to import using the same name of those products in Bangladesh in violation of Section 15 of the Customs Act, 1969. But some unscrupulous importers including the proforma-respondent Nos. 58-62 have been illegally importing counterfeit of the said branded products with a sinister design to make unlawful pecuniary gain using the advantage of marketing campaigns conducted by the petitioner which has caused a substantial financial loss to the petitioner and the unaware and bonafide consumers. They are also defrauded and mislead in purchasing substandard counterfeit products seriously harmful to their health and safety for which the heard earn reputation and goodwill of the petitioner company is being plundered by a section of unscrupulous importers who are prejudicing the interest of the petitioner company by manufacturing, importing and marketing fake product below the required standard i.e. date of manufacture and expiry and other mandatory declaration and in the event pursuant to any complaint by any customer the entire blame stood shifted on the shoulder of the petitioner company for importation and marketing inferior quality products. Illegal and unauthorized importation of substandard and counterfeit products seriously affected the business of the petitioner company.

4. The petitioner filed a supplementary affidavit on 13.10.2010 stating that the unscrupulous importer imported the product in question namely, Dove under L/C No.089808010122 dated 29.05.2008 giving false trade description and consequently the customs authority restrained the said consignment asking to produce 'No Objection Certificate' from the petitioner company by letter dated 11.08.2008 and the petitioner company did not allow such illegal import and in reply to the said letter dated 11.08.2008 the petitioner company by letter dated 21.09.2010 requested the customs authority not to allow any importers other than the petitioner company to import any of the branded finished product of Unilever Bangladesh Limited. Subsequently, on several occasions, the petitioner made numerous representations in writing to the respondents requesting them not to allow anyone other than the petitioner company to import the products in question in Bangladesh but unfortunately the authorities concerned have turned a blind eye and deaf ear to the grievance of the petitioner.

5. The petitioner filed a second supplementary affidavit on 14.8.2022 stating that in the financial year 2020-2021 the petitioner company paid around BDT. Tk. 2153 crore in the form of duties, taxes and dividends to the government. The petitioner company has adopted not only consistent high standards but also a highly effective and intensive marketing strategy which brings widespread customer loyalty and brand recognition for Unilever Bangladesh products and has thoroughly developed a credible and wide distribution network. The unauthorized and unscrupulous third parties are being engaged in illegal parallel or unauthorized import of the UBL products which are brought into Bangladesh illegally throughout the country depriving the government of its rightful revenue and dividend to make unlawful pecuniary gain using the advantage of marketing campaigns conducted by the petitioner which is not only causing damage to the business of the petitioner company but also violating the law of the land for which the bona fide consumers are also being defrauded and mislead into purchasing substandard low-quality products. The unauthorized imported products are harmful to the health and safety of the consumers and against the interest of the petitioner company. The petitioner company is the authorized entity to use trademark of the UBL products in Bangladesh and the unauthorized users of the trademarks are importing the aforesaid goods in violation of Section 25 of the Trademarks Act but the unauthorized importers are not under the control of the concerned authority. Hence, expired products are being imported and sold within the territory of Bangladesh. Respondent No. 1 has filed an affidavit-in-opposition stating that Unilever PLC, London has business offices and agents to export their goods in many countries and they have the legal authority and right to export Unilever goods in any other country in the world in their business transaction including Bangladesh and any importer of the Unilever goods have a legal right to import the Unilever brand goods or to import same types of goods under Section 25(4) of the Trademarks Act, 2009 without any objection from the customs authority and the Unilever Bangladesh. It has been asserted that the statement made by the petitioner to the effect that Unilever Bangladesh Limited is the only authorized agent of Unilever PLC, London, is completely false. In the open market economy Unilever PLC, London has not/cannot legally authorize the petitioner company as the only manufacturer, sole market distributor and importer of all their products and the petitioner company could not show any documents to prove that other importers in Bangladesh have no right to import the branded goods of Unilever of the countries of origin

like UK., USA, Germany, India, Malaysia, China etc. and the customs authorities are legally empowered to release the goods imported following the law.

6. The learned Senior Advocate Mr Fida M Kamal appearing along with learned Advocate Mr Md. Monzur Rabbi on behalf of the petitioner submits that the petitioner is the only manufacturer, marketer, distributor and importer of all Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe in Bangladesh and no other person is legally entitled to manufacture, import, distribute and market those goods within the territory of Bangladesh without prior permission of the petitioner. Section 15 of the Customs Act, 1969, আদেশ 5(6)(c) of the আমদানী নীতি আদেশ, ২০২১-২০২৪ and Section 25(2) of the Trademarks Act, 2009 imposed a restriction on unauthorized parallel importation of those goods. Therefore the customs authorities are bound to discharge their duty in accordance with law and respondent Nos. 7 to 57 have a legal obligation not to allow open Letter(s) of Credit by any importer, including respondent Nos. 58 to 62, or anyone else, to import the branded finished products of Unilever Bangladesh Limited without prior permission of the petitioner. He further submits that since there is a bar in importation of the parallel brands of Unilever Bangladesh, the customs authorities are legally bound to discharge their duty following the provisions of law and they have a legal obligation to restrain the unauthorized importers from importing parallel goods into Bangladesh but the customs authorities are illegally releasing the goods which have been imported and in the process of importing in violation of the provisions of Section 15 of the Customs Act, 1969, আমদানী নীতি আদেশ, ২০২১-২০২৪ and the Trademarks Act, 2009. Therefore the respondent Nos. 1 to 6 should be directed not to allow, import or release aforesaid products of Unilever PLC. In support of his submission learned Advocate for the petitioner has drawn our notice to the decisions made in the case of A. Bourjois & Co., Inca, V. Katzel, 260 US. 689 (1923), Lever Brothers Co. V. United States, 981 f. 2d 1330 (D.C. Cir. 1993), The Singer Manufacturing Co. V. Loog, [House of Lords] 1882, Colgate Palmolive Ltd vs Markwell Finance. Ltd [1989] 4 WLUK 199, Guangzhou Light Industry & Trade Group Limited and others vs Lintas Superstore SDN BHD, Federal Court, Putrajaya (2022) 5 MLRA 245, European Court of Justice [ECJ] Case C-143/00, Judgment dated 13.04.2002, Albert Bonnan v. Imperial Tobacco Company of India, (1929) 31 BOMLR 1388, Xerox Corporation v. Shailesh Patel, Judgment dated 20 February 2007, Messrs Ghulam Muhammad Dossul and Co. v. Messrs Vulcan Co. Ltd. and another, 1984 SC MR 1024, Abdul Wasim v. M/s. HAICO & Others, 2002 CLD 1623, British Broadcasting Corporation (BBC) v. Registrar, Department of Patents, Designs and Trade Marks Registry Wing, Ministry of Industries and others, 2018(2) LNJ 114, Abu Talha v. Bangladesh, represented by the Secretary, Ministry of Law and others, 20 BLC (2015) 508. The learned Advocate for the petitioner has also drawn our attention to the decision made in Writ Petition Nos. 8679 and 8885 of 2006.

7. On the other hand the learned Deputy Attorney General Mr Kazi Mynul Hassan appearing on behalf of respondent No. 1 submits that the writ petition is not maintainable in law since an alternative and equally effective efficacious remedy are available in the Customs Act, 1969, আমদানি নীতি আদেশ, ২০২১-২০২৪ and The Trade Marks Act, 2009. He further submits that the petitioner did not get any permission from the Bangladesh Bank under Section 18 (A) of the Foreign Exchange Regulation (Amendment Ordinance), 1976 to act as an agent of Unilever PLC, London. Therefore the petitioner is not an agent of Unilever PLC in the eye of the law and Unilever PLC, London or any subsidiary company of Unilever PLC registered all over the world are legally empowered to export their goods throughout the world including Bangladesh. He also submits that facts stated in the writ petition are disputed and contentious inasmuch as the products which would be counterfeit or parallel goods of Unilever

Bangladesh can only be examined by the customs authority at the time of assessment following the procedure laid down in the Customs Act, 1969 and if the petitioner is at all aggrieved he is at liberty to draw the attention of the customs authority as regards particular consignment. Therefore the instant writ petition is not maintainable in law.

8. We have considered the submission of the learned Senior Advocate Mr Fida M. Kamal who appeared on behalf of the petitioner and the learned Deputy Attorney General Mr Kazi Mynul Hasan who appeared on behalf of respondent No.1, perused the writ petition and the affidavit in opposition filed by the respondent No.1.

9. On perusal of the records, it is found that earlier this Division by judgment and order dated 29.08.2006 passed in Writ Petition Nos. 8679 of 2006 and 8885 of 2006 made the Rule absolute on the observation and findings which are quoted below:

> "Admittedly the petitioner is a company engaged in the manufacturing of different branded commodities mentioned above duly registered in the country and also one of the largest tax payer of the country to the tune of Tk.80 crore per annum. It appears that some persons and companies imported and in the process of further import of low quality products of the same brand products of the petitioner company from different countries which not only causes damages to the local industry but also threatened the revenue collection of the country.
>
> Section 50 of the Customs Act 1969 deals with the provisions relates to prohibition of import of goods which are prohibited under the different laws enforce in the country for the time being. Admittedly the petitioner can invoke such other jurisdictions and can intimate the same to the customs authority, but it appears that in the meantime different goods of the same brands shall be imported and in our view the other remedies in such circumstances are alternative but not efficacious one rather causing regular damage to the local industry as well as causing loss to the revenue which in our view irreparable in nature.
>
> The other provisions namely the application under the Trade Mark Act etc. though are alternative remedies available for the petitioner but the same is not efficacious one in our view. Obviously the petitioner is at liberty to invoke the other jurisdiction but at the same time, we are of the view that the local market and enterprises are required to be protected as well as the collection to revenue should be ensured. In such circumstances, the respondents should be directed to restrain any other persons or companies to import the goods as mentioned hereinabove which are branded goods of the petitioner duly registered and produced in our country.
>
> Considering the facts and circumstances, we find merit in these two Rules. Accordingly, both these Rules are made absolute without any order as to cost. The respondents Nos. 1-5 are restrained from allowing any person(s), companies to import the goods manufactured by the petitioner company as mentioned in both the writ petitions."

10. The issue involves in the instant Rule is whether the importation of parallel goods namely Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe and/or empty branded packing materials such as bottles, tubes, containers, wrappers, packets, labels etc. of the branded products of Unilever Plc. (which are locally produced, packaged and marketed by the petitioner) into Bangladesh is barred under section 15 of the

Customs Act, 1969 without prior permission of the petitioner and as to whether the instant writ petition is maintainable in law.

11. At the very outset, it is noted that the branded goods of Uninlive PLC namely Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe and/or empty branded packing materials such as bottles, tubes, containers, wrappers, packets, labels etc. of the branded products of Unilever Plc. are neither contraband nor prohibited goods under any law.

12. Parallel importation is a non-counterfeit and branded product imported from another country to sale in the local market without permission of the trade mark owner. It also refers to grey market imports. The doctrine of parallel importation developed on resold theory or the doctrine of international exhaustion of branded products. It occurs when other importers obtained products directly from an authorized source outside the country by passing any native manufacturer or suppliers. Parallel importing is regulated differently in different jurisdictions. These goods are genuine products which are brought by individuals from overseas sellers. These goods are first purchased in an overseas market with the brand owner's permission, to be imported into the domestic market without the brand owner's permission to resell.

13. "Parallel imports" in the context of trademark laws means the procurement of goods from the trademark owners or their authorized personnel through legitimate trade channels in a different market (mostly in a different country) and thereafter importation of such goods without the knowledge of the trademark owners of such products for sale to the general public in a different market.

14. It is also called as 'Grey Market' sales owing to the reason that such imported goods are offered for sale in the country of its import through trade channels not specifically permitted by the trademarks rights holder or the trademark owner in such markets. While such products are not counterfeit, pirated or duplicate products but they are offered for sale in a marketplace through trade channels that are not authorized by the trade mark right holder" [www.witipedia.org]

15. "Parallel import means that patented or market goods are purchased in a foreign market and resold in the domestic market. These are known as passive parallel imports. Instead, active parallel imports occur when foreign licensees enter the market in competition with the holder of the patent or the trade mark." [https://www.wipo.int.]

16. The term "parallel importation" has been explained in an article "Parallel Imports and International Trade" by Christopher Heath. (Max Planck Institute for Foreign and International Patent Copyright and Competition Law, Munich) in the following language;

> "The term "parallel importation" refers to goods produced and sold legally, and subsequently exported . In that sense, there is nothing "grey" about them, as the English Patents Court in the Deltamethrin decision (Roussel Uclaf v. Hockley International, decision of 9 October 1995, [1996] R.P.C. 441) correctly pointed out. Grey and mysterious may only be the distribution channels by which these CS (OS) 1682/2006 Page 46 goods find their way to the importing country. In the importing country, such goods may create havoc particularly for entrepreneurs who sell the same goods, obtained via different distribution channels and perhaps more expensively. In order to exclude such unwelcome competition, intellectual

> property rights have sometimes been of help. If products sold or imported by third parties fall within the scope of patents, trademarks or copyrights valid in this particular country, such sale or importation by third parties is generally deemed infringing. Owners of products covered by intellectual property rights have the exclusive right to put such products on the market. On the other hand, there is little doubt that once the owner of an intellectual property right has put such goods on the market either himself or with his consent, there is little he can do about further acts of commercial exploitation such as re-sale, etc., on the domestic market. Even if a car is covered by a number of patents, once the car maker has put that car on the market, there is a consensus that he cannot prevent that car from being re-sold, leased out, etc."

17. In the case of Kirtsaeng v. John Wiley & sons, Inc in 2013 following the doctrine of international exhaustion, U.S Supreme Court reversed the Second Circuit and held that

> "Kirtsaeng's sale of lawfully-made copies purchased overseas was protected by the first-sale doctrine. The Court held that the first sale doctrine applies to goods manufactured outside of the United States, and the protections and exceptions offered by the Copyright Act to work "lawfully made under this title" is not limited by geography. Rather, it applies to all copies legally made anywhere, not just in the United States, in accordance with U.S. copyright law. So, wherever a copy of a book is first made and sold, it can be resold in the U.S. without permission from the publisher."

18. At this stage it is relevant here to quote Section 15 of the Customs Act, 1969 to adjudicate the dispute between the parties which runs as follows:

> "Section 15 of the Customs Act, 1969
>
> 15. Prohibitions.—No goods specified in the following clauses shall be brought, whether by air or land or sea, into Bangladesh:-
>
> (a) counterfeit coin;
>
> (b) forged or counterfeit currency notes [1][and any other counterfeit product];
>
> (c) any obscene book, pamphlet, paper, drawing, painting, representation, figure, photograph, film or article [2][, video or audio recording, CDs or recording on any other media];
>
> (d) [3][goods having applied thereto a counterfeit trade mark within the meaning of the Penal Code (Act XLV of 1860), or a false trade description within the meaning of the **ট্রেডমার্ক আইন, ২০০৯ (২০০৯ সনের ১৯ নং আইন)** (Trademarks Act, 2009 (Act No. 19 of 2009));]
>
> (e) goods made or produced outside Bangladesh and having applied thereto any name or trade mark, being or purporting to be the name or trade mark of any manufacturer, dealer or trader in Bangladesh unless-
>
> > (i) the name or trade mark is, as to every application thereof, accompanied by a definite indication of the goods having been made or produced in a place outside Bangladesh; and
> >
> > (ii) the country in which that place is situated is in that indication shown in letters as large and conspicuous as any letter in the name or trade mark, and in the same language and character as the name or trade mark;
>
> (f) piece-goods manufactured outside Bangladesh (such as are ordinarily sold by length or by the piece), unless the real length thereof in standard [1][metres]

or other measurements for the time being applying in Bangladesh has been conspicuously stamped on each piece in Arabic numerals; [2][***]

[3][(g) goods made or produced outside Bangladesh and intended for sale, and having applied thereto, a design in which copyright exists under the Patents And Designs Act, 1911 (Act No. II of 1911) and in respect of the class to which the goods belong and any fraudulent or obvious imitation of such design except when the application of such design has been made with the license or written consent of the registered proprietor of the design;[1][***]

(h) goods or items produced outside Bangladesh involving infringement of **কপিরাইট আইন, ২০০০ (২০০০ সনের ২৮ নং আইন)** (Copyright Act, 2000 (Act No. 28 of 2000)] or infringement of layout design of integrated circuit that are intended for sale or use for commercial purposes within the territory of Bangladesh]; and

[2][(i) Goods made or produced outside Bangladesh in violation of the provisions of **ভৌগোলিক নির্দেশক পণ্য (নিবন্ধন ও সুরক্ষা) আইন, ২০১৩ (২০১৩ সনের ৫৪ নং আইন)** intended for sale or use for commercial purpose within the territory of Bangladesh.]

19. On a bare reading of Section 15 of the Customs Act, 1969 it reveals that there is neither absolute bar in importing parallel goods nor said section gives any unfettered right to the importers to import parallel goods. Section 15 of the said Act is balanced legislation. Section 15(d)(e)(g) and (h) of the said Act authorized the importers to import parallel goods subject to compliance with the procedure/conditions as mentioned in the said provision. Nothing has been stated in said section regarding prior permission of the petitioner in importing parallel goods. Therefore the submission of the learned Advocate for the petitioner that without prior permission of the petitioner no one is legally entitled to import the parallel goods of Unilever Bangladesh is misconceived and fallacious. If any importer fails to satisfy the conditions laid down in Section 15(d)(e)(g) and (h) of said Act the customs authority is empowered under section 17 of the Customs Act, 1969 to detain and confiscate the imported goods. Therefore we are of the view that there is no wholesale restriction in section 15 of the said Act in importing parallel goods.

20. At this stage, it is required to examine other provisions of law relating to the importation of parallel goods.

21. In আমদানি নীতি আদেশ, ২০২১-২০২৪ the government made provision in Order 4 of the said আদেশ as regards the importation of parallel goods which runs as follows:

৪। আমদানি নিয়ন্ত্রণের শর্তাবলি।— এই আদেশ কার্যকর হইবার পূর্বে বা এই আদেশে নিয়ন্ত্রিত তালিকাভুক্ত হইবার পরে বা অন্য কোনো বিধান আরোপের কারণে যদি কোনো পণ্যের আমদানি নিয়ন্ত্রিত হইয়া থাকে তাহা হইলে উক্তরূপ নিয়ন্ত্রণ নিম্নবর্ণিত শর্তসাপেক্ষে হইবে, যথাঃ—

(ক) স্থানীয় কোনো শিল্প প্রতিষ্ঠানের স্বার্থ সংরক্ষণের উদ্দেশ্যে বিশেষ কোনো পণ্যের আমদানি নিয়ন্ত্রণ করা হইলে সংশ্লিষ্ট পোষক বা বাংলাদেশ ট্রেড এন্ড ট্যারিফ কমিশন উক্ত প্রতিষ্ঠান কর্তৃক পণ্য উৎপাদনের বিষয়টি কঠোরভাবে নিয়মিত মনিটর করিবে;

(খ) সংরক্ষিত শিল্প (protected industry) বিশেষ করিয়া যাহারা সংযোজন কাজে নিয়োজিত তাহাদিগকে সক্রিয়ভাবে এবং সত্ত্বর প্রগতিশীল উৎপাদন শুরু করিতে হইবে,

(গ) কাঁচামালের মূল্য বৃদ্ধি অথবা বিনিময় হার হ্রাস পাওয়ার কারণ ব্যতীত যদি কোনো পণ্যের মূল্য বৃদ্ধি পায় অথবা আন্তর্জাতিক বাজারে কাঁচামালের মূল্য যতটুকু বৃদ্ধি পাইয়াছে তাহা অপেক্ষা তুলনামূলকভাবে যদি স্থানীয়ভাবে উৎপাদিত পণ্যের মূল্য অসমানুপাতিক হারে বৃদ্ধি পায় তাহা হইলে সংশ্লিষ্ট পোষক বা বাংলাদেশ ট্রেড এন্ড ট্যারিফ কমিশনের সুপারিশের ভিত্তিতে আমদানির উপর আরোপিত নিয়ন্ত্রণ প্রত্যাহার করিবে,

(ঘ) ইসরাইল হইতে অথবা উক্ত দেশে উৎপাদিত কোনো পণ্য আমদানিযোগ্য হইবে না এবং উক্ত দেশের পতাকাবাহী জাহাজেও কোনো পণ্য আদানি করা যাইবে না;
(ঙ) কোনো পণ্যের আমদানি নিষিদ্ধকরণ অথবা বাধানিষেধ আরোপের সিদ্ধান্ত সম্পর্কে যদি কাহারও কোনো আপত্তি থাকে তাহা হইলে উক্ত ব্যক্তি বা প্রতিষ্ঠান বিষয়টি বাংলাদেশ ট্রেড এন্ড ট্যারিফ কমিশনের নিকট উস্থাপন করিবে এবং উক্ত কমিশন বিষয়টি পরীক্ষার পর সুপারিশ আকারে বাণিজ্য মন্ত্রণালয়ে বিবেচনার জন্য পেশ করিবে।

22. A bare reading of the আমদানি নীতি আদেশ, ২০২১-২০২৪ and Section 15 of the Customs Act, 1969 reveals that in pursuance of section 15 of the said Act, a supplementary provision has been made in the said Order for the interest of the local industry. As per provision of order 4 (Uma) of the said Order, any aggrieved person is entitled to draw the attention of the Trade and Tariff Commission as regards violations of any condition on importation of parallel goods. After receiving any objection regarding the importation of parallel goods, the Trade and Tariff Commission under Order 4(Uma) of the আমদানি নীতি আদেশ, ২০২১-২০২৪ shall examine the objection and made a recommendation to the Ministry of Commerce. Order 5(6) of the said order stipulates that in case of import of registered branded product, an attested copy of intellectual property certificate from the country of origin issued by the concerned government or authorised authority or department is to be produced before the customs authority at the time of the release of the imported goods.

23. As regards the submission of the learned Advocate Mr Fida M Kamal regarding the patent right of the petitioner it is relevant here to quote the provision of Section 96 of the Trademarks Act, 2009 which is stated below:-

"96. Suit for infringement, etc., to be instituted before District Court.─No suit─
(a) for the infringement of a registered trademark;
(b) relating to any right in a registered trademark;
(c) relating to any corrected right in the registered trademark;
and
(d) for passing off arising out of the use by the defendant of any trademark which is identical with, or, deceptively similar to, the plaintiffs trademark, whether registered or unregistered;
shall be instituted in any court inferior to a District Court having jurisdiction to try the suit."

24. The petitioner is the registered trademark holder of the goods in question. Section 96 of the said Act has given protection to the petitioner. Under Section 96 of the said Act, the petitioner company is legally entitled to file suit before civil court for violation of any provision of the Trademarks Act, 2009.

25. On examination of the aforesaid provisions of law, it reveals that the legislature made specific provisions in Section 17 of the Customs Act, 1969, Order 4 of the বাংলাদেশ আমদানি নীতি আদেশ, ২০২১-২০২৪, and Section 96 of the Trademarks Act for alternative, effective and equally efficacious remedy to the petitioner for violation of any condition laid down in Section 15 of the Customs Act, 1969 regarding importation of parallel goods. Article 102 of the Constitution is not meant to circumvent or bypass statutory procedures as stated above. When a right is created by a statute, which prescribes a remedy or procedure for enforcing the right, resort must be had to that particular statutory remedy before seeking extraordinary and discretionary remedy under Article 102(2) of the Constitution. Judicial prudence demands

that this Court should refrain from exercising its jurisdiction under the said constitutional provision. This is a self-restrained restriction of the High Court Division.

26. In the case of Chairman, Anti Corruption Commission and another vs. Enayetur Rahman and others reported in 64 DLR (AD) 14 as regards the consequence of alternative remedy our Apex Court observed in the following terms:

> "This Court on repeated occasions argued that Article 102 (2) of the Constitution is not meant to circumvent the statutory procedures. The High Court Division will not allow a litigant to invoke the extraordinary jurisdiction to be converted into Courts of appeal or revision. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations that is to say where vires of a statute are in question or where the determination is malafide or where any action is taken by the executives in contravention of the principles of natural justice or where the fundamental right of a citizen has been affected by an act or where the statute is intra vires but the action taken is without jurisdiction and the vindication of public justice require that recourse may be had to Article 102 (2) of the Constitution."

27. As regards the maintainability of writ of mandamus Supreme Court of India in the case of A.V. Venkateswaran Vs. Ramchand Sobhraj Wadhwani and others, reported in AIR 1961 SC 1506=1962 SCR(1) 753 it has been held that:

> "normally a writ of mandamus is not issued if other remedies are available. There would be a stronger reason for following this rule where the obligation sought to be enforced by the writ is created by a statute and that statute itself provides the remedy for its breach. It should be the duty of the courts to see that the statutory provisions are observed and, therefore, that the statutory authorities are given the opportunity to decide the question which the statute requires them to decide."

28. On a laborious scrutiny of the decisions referred hereinabove by the learned Advocate for the petitioner, it reveals that those decisions have been made under the trade marks law of the concerned jurisdiction in properly instituted suits filed by the plaintiff before the trial Court which cannot be relied on by this Court in exercising the jurisdiction under Article 102 of the Constitution. In the case of Abu Talha vs Bangladesh, reported in 20 BLC (HC) 508 the customs authority directed the petitioner (importer) to submit the intellectual certificate from the country of origin and on the failure of the petitioner to submit the certificate, the customs authority did not release the imported goods. From the given facts of the referred case, it appears that the customs authorities are well aware of the conditions imposed in Section 15 of the Customs Act, 1969. Therefore, it cannot be held that the customs authorities are sleeping over the matter. Rather they are taking action on the failure of the importer on non-compliance with the conditions as mentioned in Section 15(d)(e)(g) and (h) of the Customs Act, 1969.

29. This writ petition has been filed in the form of mandamus praying for a direction upon respondents Nos. 1 to 6 not to allow import or release the goods in question and further

direction upon respondents Nos. 7 to 57 not to allow opening letter of credit by any importer to import the goods in question.

30. Mandamus is a Latin word which means "We command". Mandamus is issued to keep public authorities within the limit of their jurisdiction while exercising public functions. It is called a 'wakening call' and it awakes the sleeping authorities to perform their duty. It is a judicial remedy in the form of an order of the Court to the government or public authority or Court below to do specific act which they are duty bound to do under the statutory provision of law. Any person who has an interest in the performance of the duty by the authority and they have refused to do the duty following law despite demand in writing are entitled to seek remedy in the form of mandamus.

31. In John Shortt's book 'Information, Mandamus and Prohibition' page 256 the author has expressed his view regarding mandamus in the following terms;

> "If the duty be of a judicial character a mandamus will be granted only where there is a refusal to perform it in any way; not where it is done in one way rather than another, erroneously instead of properly. In other words, the Court will only insist that the person who is the judge shall act as such; but it will not dictate in any way what his judgment should be. If, however, the public act to be performed is of a purely ministerial kind, the Court will by mandamus compel the specific act to be done in the manner which to it seems lawful."

32. In Halsbury's law of England, Fourth Edition, Volume 1, Paragraph 89 as regards the nature of mandamus it has been opined as under;

> "is to remedy defects of justice and accordingly it will issue, to the end, that justice may be done, in all cases where there is a specific legal right and no specific legal remedy to enforcing that right and it may issue in cases where although there is an alternative legal remedy yet that made of redress is less convenient beneficial and effectual."

33. In Black's law dictionary, Ninth Edition the term Mandamus has been explained in the following term ;

> "A writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act."

34. In Wharton's Law Lexicon, 15th Edition, 2009, 'Mandamus, has been interpreted as under;

> "A high prerogative writ of a most extensive remedial nature. In form it is a command issuing in the King's name from the King's Bench Division of the High Court only, and addressed to any person, corporation, or inferior court of judicature requiring them to do something therein specified, which appertains to their office, and which the court holds to be consonant to right and justice. It is used principally for public purposes, and to enforce performance of public duties. It enforces, however, some private rights when they are withheld by public officers."

35. In the Administrative Law (Ninth Edition) by Sir William Wade and Christopher Forsyth, (Oxford University Press) at page 621, the following opinion has been expressed:

> "A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies. This difference is brought out by the relief granted in cases of ultra vires. If for example a minister or a licensing authority acts contrary to the principles of natural justice, certiorari and mandamus are standard remedies. But if a trade union disciplinary committee acts in the same way, these remedies are inapplicable: the rights of its members depend upon their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases."

36. In de Smith, Woolf and Jowell's Judicial Review of Administrative Action, 5th Edn., after detailed discussion, the learned author has summarized the term 'mandamus' with the following propositions:

> "(1) The test of whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a "public" or a "private" body.
> (2) The principles of judicial review prima facie govern the activities of bodies performing public functions.
> (3) However, not all decisions taken by bodies in the course of their public functions are the subject matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function.
> (a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and
> (b) Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed upon by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute."

37. In the case of Talekhal Progressive Fisherman Co-operative Society Ltd. vs. Bangladesh, reported in 1981 BLD (AD) 103 it has been held that;

> "In order to entitle a person to ask for performance of any public duty by mandamus it is necessary to show that he has a legal right for claiming such performance apart from the fact that he is interested in the performance of the duty."

38. In the case of National Engineers vs. Ministry of Defense reported in 44 DLR (AD) 179 our Apex Court held as under:

> "In order to enforce the performance by public bodies of any public duty by mandamus, the applicant must have a specific legal right to insist upon such performance".

39. As regards the scope of issuance of the writ of mandamus our Apex Court in the case of Government of Bangladesh vs. Md. Abdul Hye and others passed in CPLA No. 2310 of 2018 opined in the following terms;

> "The High Court Division exercising its jurisdiction under Article 102 has power to issue a writ of mandamus or in the nature of mandamus where the Government or a public authority has failed to exercise or has wrongly exercised discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion malafide or on irrelevant consideration. In all such cases, the High Court Division can issue writ of mandamus and give directions to compel performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority. In appropriate cases, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the Government or the public authority should have passed, had it properly and lawfully exercised its jurisdiction"

40. In the case of Queen vs. Guardians of the Lewisham Union, reported in (1897) 1 QB 498 it has been observed that;

> "This court would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its reference had a legal right to insist upon such performance."

41. In R.V. Metropolitan Police Commissioner(1968) 1 All ER 763/(1968) QB 118 indicating the duty of the Commissioner of Police and the mandamus, Lord Denning stated thus: (All ER P. 769).

> "I have no hesitation, however in holding that, like every constable in the land, he should be, and is, independent of the executive, He is not subject to the orders of the Secretary of State,.... I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone,

> save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."…….. "A question may be raised as to the machinery by which he could be compelled to do his duty. On principle, it seems to me that once a duty exists, there should be a means of enforcing it. This duty can be enforced. I think, either by action at the suit of the Attorney General; or by the prerogative order of mandamus."

42. In the case of Alvi Spinning Mills Ltd. vs. Government of Bangladesh, reported in 66 DLR(2014) 558 para 55 and 56 his Lordship Md. Ashfaqul Islam, J. opined in the following terms;

> "It is a well-settled principle of law that in order to get a Rule of mandamus the petitioner must show that his claim is rooted in the statute or statutory Rule. So it is always required that the applicant for a mandamus should have a legal right to enforce the performance of those duties……. a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the public bodies and there is a failure on the part of those public bodies to discharge their statutory obligations. The paramount function of a writ is to compel performance of public duties prescribed by statute and to keep public bodies exercising public functions within the limits of their jurisdiction. Therefore, mandamus may issue to compel the public bodies to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance."

43. In the case of Rai Shibendra Bahadur vs. The governing Body of the Nalanda College reported in AIR 1962 SC 1210, the Supreme Court of India has held that;

> "Mandamus may be issued to compel the authorities to do something provided the statute imposes a legal duty and the aggrieved party had the legal right under the statute to enforce its performance"

44. In the case of Binny Ltd. and others vs Sadasivan and others reported in AIR 2005 SC 3202 para 10 regarding the issuance of the writ of mandamus, the Supreme Court of India opined in the following terms;

> "The Writ of Mandamus lies to secure the performance of a public or a statutory duty. The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the sovereign to subordinates. In England, in early times, it was made generally available through the Court of King's Bench, when the Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporation which did not duly hold

> elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of public authorities."

45. Now next question has arisen as to how this Court will decide whether a particular imported consignment is a parallel brand of Unilever Bangladesh or not. Having produced a few products of Unilever Bangladesh, Unilever PLC, London and allegedly counterfeit of those products before this Court learned Advocate Mr Fida M Kamal has tried to impress upon us that due to inaction of the customs authority dishonest importers are illegally importing the counterfeit products of Unilever PLC, London for which the interest of the petitioner, as well as the interest of the consumers at large, are adversely affected. Therefore, an appropriate order is required to be passed by this Court directing the customs authority not to allow import or release the counterfeit goods or branded goods of the petitioner company.

46. At the time of opening the Letter of credit, it is not practically possible for respondent Nos. 7 to 57 to identify the products which are parallel goods or counterfeit products of Unilever PLC. It is the customs authority that can examine the consignment and take the decision as to whether the particular imported consignment is parallel goods or counterfeit products of Unilever, PLC, London. Therefore if the petitioner has definite information that any respondent or anyone is importing parallel goods or counterfeit products of Unilever PLC, London in violation of the conditions imposed in Section 15 of the Customs Act, 1969 he is at liberty to file an application to customs authority regarding specific consignment.

47. In the above backdrop of the matter, we are of the view that this writ petition has been filed relying on the highly contentious issue. A contentious issue is one that different people interpret the issue differently. Therefore, it is a controversial or disputed matter. Under Article 102 (2)(a)(i) of the Constitution on the application of any aggrieved person this court is empowered to pass an order directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do. This power of the High Court Division is discretionary. Exercising jurisdiction under Article 102 of the Constitution this Court is not legally empowered to adjudicate any disputed or contentious matter and this Court is loath to embark upon an enquiry into the disputed question of fact.

48. No direction can be passed considering the anticipation of any person. It has already been held that in section 15 of the Customs Act, 1969 there is no wholesale restriction on importation of parallel goods. Therefore, there is no obligation on the part of the respondents to restrain any person from importing parallel goods or to restrain any person from opening letter of credit regarding importation of parallel goods of Unilever Bangladesh Ltd. Any person (s) is entitle to import parallel goods subject to compliance of the conditions imposed in Section 15(d)(e)(g) and (h) of the Customs Act, 1969. But on that score question of taking prior permission of the petitioner is irrelevant being bereft of any legal approval.

49. In view of the findings, observation and proposition as discussed herein above, we are of the view that the writ petition is not maintainable in law.

50. We do not find any merit in the Rule.

51. In the result, the Rule is discharged.

52. However, there will be no order as to costs.

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HIGH COURT DIVISION
First Appeal No. 442 of 2012

Probir Kumar Dey at present Saiful Islam and another
....Defendant No.1 & 2-Appellants
-Versus-
Shipra Rani Dey and others
.....Plaintiffs -Respondents.

Mr. N.K. Shaha, Senior Advocate
......for the defendant-appellant
Mr. Tushar Kanti Roy, with Mrs. Runa Iqbal, Advocates
......for the plaintiffs-respondents

Heard on 26.06.2019, 30.06.2019, 10.07.2019, 14.07.2019, 17.07.2019, 22.07.2019, and 23.07.2019

Judgment on 28.08.2019.

Present:
Mr. Justice A.K.M. Abdul Hakim
And
Ms. Justice Fatema Najib

Editors' Note:
One Rabindra Kumar Dey was the owner and possessor of 4.81 decimals of land. He died in 1978 leaving behind his wife, two sons and four daughters. One of his sons, namely, Prodip died and the other son Probir converted to Islam before Rabindra's wife Arati Bala Dey filed the instant suit for partition claiming saham. During the pendency of the suit plaintiff died and Rabindra's unmarried daughter Shipra Rani was substituted as plaintiff. Question arose as per Daya Bhaga school of law whether the plaintiff Arati Bala Dey inherited from her deceased husband; whether the substituted plaintiff Sipra Rani Dey is entitled to inherit from her deceased father and mother; and whether the plaintiffs are entitled to a decree for partition as prayed for? The High Court Division analyzing the relevant laws, particularly, the Hindu Women's Rights to Property Act 1937, Caste Disability Removal Act, 1850 and the Bangladesh Laws (Revision and Declaration) Act, 1973 held that when a Hindu governed by the Daya Bagha School of Hindu Law dies intestate leaving any property, his widow becomes complete owner and co-sharer of the property during her life time and she is entitled to be in the same position as a son in the matter of claiming partition. The Court further held that after conversion to the faith of Islam son Probir has lost his right to his father's property and, as such, the substituted plaintiff Sipra Rani Dey, the unmarried daughter of Rabindra Kumar Dey, is entitled to get the property on partition.

Key Words:
The Hindu Succession Act, 1956; The Hindu Women's Rights to Property Act,1937; Conversion to Muslim; Partition; Caste Disability Removal Act, 1850; The Bangladesh Laws (Revision and Declaration Act, 1973 (Act No. VIII of 1973); share on partition

<u>Section 3 of the Hindu Women's Rights to Property Act, 1937:</u>
Let us now consider whether a Hindu widow is entitled to get the same share as a son. In this connection reference may be made to section 3 of the Hindu Women's Rights to Property Act, 1937 (XVIII of 1937). Sub section (1) of section 3 of the said Act says that when a Hindu governed by the Daya Bagha School of Hindu Law dies intestate leaving any property dies, his widow, shall, subject to the provisions of sub-section(3), be entitled to the same share as a sons. Sub-section (3) of section 3 of the said Act further says that any interest devolving on a Hindu widow shall be the limited interest known as a Hindu Woman's estate, but she shall have the same right of claiming partition as a male owner. Further sub-section (2) of section 1 of the said Act stipulates that it extends to the whole of Bangladesh. Thus from reading of the aforesaid provisions of sub-sections (1) and (3) of the Hindu Women's Rights to Property Act, 1937 it is clear that the widow during the period of her life time she became complete owner and co-sharer of the property and this sub-section 3(3) has the effect of putting the widow in the same position as a son in the matter of claiming partition. (Para 18 and 19)

Hindu law does not apply where a person enters into a religious order renouncing all worldly affairs, his action is tantamount to Civil death, and it excludes him altogether from inheritance and from a share on partition. (Para 22)

It is pertinent to note that Hindu law is religious law, the right to property is made by that law dependent upon the observance of the tenants of that faith. Consequently, a lapse from orthodox practices of Hinduism would under that law entail forfeiture of the caste and all rights to property and inheritance. Renouncement of religion has a disability, but after the passing of the Caste Disability Removal Act, 1850 (Act XXI of 1950), change of religion is no ground of exclusion of inheritance. But after the repealing of the Act XXI of 1850 by the Bangladesh Laws (Revision and Declaration Act, 1973 (Act No. VIII of 1973) the persons converts into another religion are now forfeited from the inheritance and from the joint family property and fathers property. (Para 22)

JUDGMENT

Fatema Najib J:

1. This appeal is directed against the judgment and decree dated 23.09.2012 passed by learned Joint District Judge, First Court, Noakhali in Title Suit No.72 of 2007 decreed the suit in part.

2. One Arati Bala Dey as sole plaintiff instituted Title Suit No.72 of 2007 on 04.11.2007 in the First Court of Joint District Judge, Noakhali impleading the appellants as defendant nos. 1 and 2 and the respondent nos. 3-21 as defendant nos.3-14 praying for partition of 2.33 $\frac{2}{3}$ decimals of land more fully described in the schedule to the plaint. During pendency of the suit, sole plaintiff, Arati Bala Dey died and her daughter who was originally impleaded as defendant no.14, her name has been struck off from defendant by Order no.7 dated 28.04.2008 and substituted her as plaintiff no. 1(ka) in place of Arati Bala Dey. Subsequently, defendant no.6 died and his heirs has been duly substituted as defendant nos.16-19 vide order no. 20 dated 17.02.2009. Sheema Rani Dey, Jarna daughter of Robindra Kumar Dey, who converted to Muslim was added as defendant no. 15 in the name of Jannatul Ferdous vide order no.20 dated 17.02.2009. Polash Chandra Pal, son of Mira Rani Dey and

Sujun Chandra Pal son of Ira Rani Dey have been substituted as plaintiffs vide order No.73 dated 11.09.2012. On the prayer of the plaintiff the defendant nos. 20-21 was added as defendants. In the appeal the respondent nos. 5-8 died and since they did not contest the suit, their heirs were not substituted and their names have been struck off from the memo of appeal by order dated 06.05.2014.

3. The case of the plaintiff, in brief, is that, the suit land measuring 5.10 decimals of land was originally belonged to Rabindra Kumar Dey, who got the same through gift and inheritance from his mother and father respectively. After transferring, while possessing 4.81 decimals of land, Rabindra Kumar Dey died leaving behind wife Arati Bala Dey, two sons namely, Prodip Kumar Dey and Probir Kumar Dey and four daughters Mira Bali Dey, Ira Rani Dey, Sheema Rani Dey and Shipra Rani Dey. Mira Rani Dey and Ira Rani Dey got married during life time of their father and the rest two daughters and two sons were minors at the time of death of their father Rabindra Kumar Dey. According to Daya Bagha School unmarried daughters can enjoy the land of their father till marriage. Arati Bala Dey while owning and possessing the suit land with her two sons, Prodip Kumar Dey, died leaving behind mother and brother Probir, who converted to Muslim. Sheema Rani Dey, daughter of Rabindra Kumar Dey, also converted to Muslim and married a Muslim boy. The plaintiff Arati Bala Dey got $\frac{1}{3}$ i.e. $1.60\frac{1}{3}$ decimals out of total land 4.81 decimals of land by inheritance from her husband. Prodip Kumar Dey out of his share $1.60\frac{1}{3}$ decimals of land sold way 0.27 decimal during his life time. So, the plaintiff Arati Bala Dey got $1.60\frac{1}{3}$ decimals by inheritance from her husband and son Prodip had $1.33\frac{1}{3}$ decimals after selling 0.27decimals of land. In this way Arati Bala Dey and Prodip Kumer Dey got together $2.93\frac{1}{3}$ decimals of land. The plaintiff Arati Bala Dey along with her unmarried daughter Sipra Rani Dey, who later on was substituted as plaintiff no. 1 (ka) in place of Arati Bala Dey had been living in a house situated at S. A. plot no.921 of S. A. Khatian No.253. The plaintiff Arati Bala Dey claimed partition which the defendant no.1 Probir Kumar Dey denied the same on 25.09.2007. So, the plaintiff, Arati Bala Dey was constrained to file the present suit.

4. The defendant no.1, Probir Kumar Dey alias Saiful Islam contested the suit by filing a written statement contending, interalia, that the suit land was belonged to his father, Rabindra Kumar Dey, who died on 05.10.1978 leaving behind two sons namely, Probir Kumar Dey and Prodip Kumar Dey, wife, the plaintiff Arati Bala Dey and four daughters. But according to Daya Bagha School the wife and daughters of Rabindra Kumar Dey are not entitled to get saham in the suit land. Prodip sold out his entire shares to different persons and extinguished title in the suit land; that the plaintiff earlier filed Title Suit No. 11 of 1990 in the Court of Assistant Judge, Chatkhil for the same land and in the plaint she admitted that Prodip sold his entire share and Prodip and Probir inherited the land of their late father Rabindra Kumar Dey in equal shares measuring $2.40\frac{1}{2}$ acres; that the aforesaid suit was filed by mother of Probir, Arati Bala Dey as legal guardian of her minor son, Probir and suit was decreed on 20.06.1992; that against the said decree Abdul Khaleque filed Title Appeal No.34 of 1990 in the Court of District Judge, Noakhali, which was dismissed on 23.07.1991 and the decree passed by the trial court was affirmed; that this defendant Probir as youngest son of Rabindra

Kumar Dey inherited his $2.40\frac{1}{2}$ acres in the suit khatian and has been possessing the same. The further case of the defendant is that Sheema Rani Dey, daughter of Rabindra Kumar Dey also converted to Muslim and married a Muslim man. The plaintiff Arati Bala Dey died and her unmarried daughter Shipra Rani Dey was substituted as plaintiff in the suit in her place but substituted plaintiff is not legally entitled to get any saham in the present suit. Further case of the defendant is that he embraced Islam religion voluntarily on 05.07.1999 and changed his name Md. Saiful Islam, married Rojina Akhter on 30.09.1999 and living in his Paternal house with family situated in khatian No.253, Plot no.121; that although present B. S. D. P. Khatian No.350 was recorded in his name for 01.64 acres of land but he has been in possession of $2.40\ \frac{1}{2}$ acres; that on the other hand, since he is not the owner of the suit khatian, his name was not recorded in the present khatian; that as per Hindu law, when a son acquired property by inheritance from his father and latter changed religion, he will not be deprived from his father's property. Thus there is no legal bar for defendant no.1 for getting saham in the property left by his deceased father, Rabindra Kumar Dey. With these averments, the defendant no. 1 prayed for dismissal of the suit and claimed saham of $2.40\frac{1}{2}$ acres in the suit khatians.

5. The defendant nos. 2 and 21 contested the suit by filing separate written statement. The defendant no.2 Rustom Ali claimed saham in 0.36 acres by way of registered Ewaz Deed No.6119 dated 23.11.2010 with the defendant no.1. The Added-defendant no. 21, Abdul Malek claimed 0.41 decimals of land in suit plot no.121 by purchases from Prodip Kumar Dey and defendant no.1.

6. The trial court framed the following issues:

1. Whether the plaintiff Arati Bala Dey inherited from her deceased husband Rabindra Kumar Dey?
2. Whether the substituted plaintiff Sipra Rani Dey is entitled to inherit of her deceased father and mother?
3. Whether the plaintiffs are entitled to a decree for partition as prayed for?

7. In the suit the plaintiff examined only one witness as P.W-1 and the documents produced which were marked as Exhibits 1 and 2. On the other hand, the defendant no.1 examined only one witness as D.W.1 and produced the documents which were marked as Exhibits Ka-Jha. The defendant nos. 2 and 21 did not produce any oral or documentary evidence.

8. The trial court after considering the oral and documentary evidences produced by the parties decreed the suit in part for $1.60\ \frac{1}{3}$ acres land on contest in preliminary form against the defendant no.1 and ex-parte against other defendants without cost by judgment and decree dated 23.04.2012.

9. Being aggrieved by and dissatisfied with the impugned judgment and decree dated 23.04.2012 the defendant no.1, Probir Kumar Dey preferred this appeal.

10. Mr. N. K. Shaha, the learned Advocate on behalf of the defendant nos.1 and 2 appellants submits that Hindu widow can not inherit the property of her husband since the

widow gets only life time interest. He further submits that intestate succession the property of male and female Hindus is governed by the Hindu Succession Act, 1956 and same is applicable in the present suit. He next submits that the defendant no.1 converted to Muslim from Hindu after death of his father and such conversion is no ground for exclusion of inheritance under Section 23 and 26 of the said Act. In this respect reference was made to the decision reported in (1911) ILR 33, Allahabad 356. He also submits that Arati Bala Dey earlier filed a suit wherein in the plaint it was stated that Probir and Prodip got 8(eight) annas each of the property of Rabindra Kumar Dey. So, Arati Bala Dey can not claim share of Rabindra Kumer Dey. He finally submits that Arati Bala Dey and after her death Sipra Rani Dey can not inherit the property of Rabindra Kumar Dey.

11. Mr. Tusher Kanti Roy, the learned Advocate appearing for the plaintiff-respondent submits that the Hindu Succession Act, 1956 was enacted on 17.06.1956 in India and as such the provisions of the said Act have no manner of application in Bangladesh. He further submits the inheritance of Hindu women is governed by Hindu Women's Rights to Property Act, (XVIII of 1937) which is still in force in Bangladesh and not repealed by the Bangladesh Laws (Revision and Declaration) Act, 1973 as specified in the First Schedule under Article 2 of the Act, 1973 and will be applicable in the present suit. He by referring section 3(1) of the said Act submits that Rabindra Kumar Dey died on 5.10.1978 and his wife Arati Bala Dey entitled in respect of the property to the same share as of son. He next submits that Arati Bala Dey as widow can file a partition suit. After death of Arati Bala Dey on 24.08.2008 the property which she inherited from her husband Rabindra Kumar Dey the same will be inherited by the next heir of the person from whom she inherited. The only son Probir Kumer Dey, defendant no. 1 was alive at the time of death of Arati Bala Dey but since the defendant no.1 converted to Muslim in the year 1999 and same is a ground of forfeiture of property and exclusion from inheritance as the son had changed his religion. He finally submits the substituted plaintiff, Sipra Rani Dey, the unmarried daughter of deceased Rabindra Kumar Dey as next heir is entitled to inherit the property and as such Shipra Rani Dey rightly got $1.60\frac{1}{3}$ decimals of land and there is no illegality in passing the impugned judgment and decree passed by the learned Joint District Judge.

12. Heard the learned lawyers of respective parties. Perused the oral and documentary evidences and materials on record and the relevant provisions of the Hindu law.

13. Admittedly, the suit property measuring an area of 4.81 decimals belonged to Rabindra Kumar Dey and he died on 05.10.1978 leaving behind wife Arati Bala Dey, two sons namely, Probir Kumar Dey, defendant no.1 and Prodip Kumar Dey and four daughters namely, Mira Bala Dey, Ira Rani Dey, Sheema Rani Dey and Sipra Rani Dey. Prodip died leaving behind mother, Arati Bala Dey, brother Probir and four sisters. Probir converted to Muslim from Hindu in the year 1999. Among four daughters three daughters namely, Mira Bala Dey, Ira Rani Dey, Sheema Rani Dey were married and also converted to Muslim.

14. The positive case of the plaintiff is that after death of Rabindra Kumar Dey, Arati Bala Dey inherited the same share as a son in respect of property of Rabindra Kumer Dey. In this way she inherited $\frac{1}{3}$ share i.e. $1.60\frac{1}{3}$ decimal out of total 4.81 decimals of land. After death of Arati Bala Dey on 24.08.2008, the property was passed to the next heir Shipra Rani Dey, unmarried daughter of Rabindra Kumar Dey. The further assertion of the plaintiff is that at the time of death of Arati Bala Day, one son Probir, the defendant no.1, one unmarried

daughter Shipra Rani Dey and other married daughters were alive. But son Probir converted to Muslim in the year 1999 and thereby excluded to inherit the property of Rabindra Kumar Dey after conversion. Further according to Hindu law unmarried daughter, Shipra Rani Dey will inherit the same as next heir of Rabindra Kumar Dey from whom Arati Bala Dey got it for her life time interest.

15.The defendant no-1 mainly contended that Arati Bala or after her death the unmarried daughter Shipra Rani Dey did not inherit the property of Rabindra Kumer Dey as per Hindu Succession Act, 1956. Though Probir became a Muslim, he did not forfeit his interest and exclusion from inheritance from the property of his deceased father, Rabindra Kumer Dey by reason of his conversion to Muslim.

16.The learned Advocate for the defendant no.1 by referring the Hindu Succession Act, 1956 submits that Arati Bala Dey as widow or after her death unmarried daughter Shipra Rani Dey is not entitled to inherit the property left by Rabindra Kumer Dey. We have carefully examined the Hindu Succession Act, 1956. The aforesaid Act was enacted on 17.06.1956 by parliament in the seventh year of the Republic of India. No where in this Act it was stated that it extends to the whole of Pakistan and after libration the word 'Bangladesh' was substituted and as such the provisions of the said Act has no manner of application in the present case. In support of this he relied on the decision of the *Privy Council in the case of Gobind Krishna Narain and another versus Khunni Lal reported in (1911) ILR 33 Allahabad 35.* The cited case decided on a different state of facts, law and were distinguishable from the present case. In our opinion, this decision does not support the contention of Mr. N.K. Shaha.

17. In paragraph no. 6 (ka) of the written statement filed by the defendant no.1 it was stated that Arati Bala Dey on behalf of her minor son Probir Kumar Dey, the defendant no.1 herein filed Title Suit No. 11 of 1990 for permanent injunction and in the plaint it was stated that Probir Kumar Dey and Prodip Kumer Dey got 2.40 $\frac{1}{2}$ decimals of land each left by their deceased father. That suit was decreed and also upheld in appeal. But now the learned Advocate of the defendant no.1 submits Arati Bala Dey can not claim that she will get a saham by inheritance on the property left by Rabindra Kumer Dey. On perusal Exhibit Um-Um (2) series it appears that the said suit was filed for permanent injunction filed by Arathi Bala Dey on behalf of his minor son Probir Kumer Dey and same was decreed ex-parte. There is no evidence on record to show that any appeal was filed against the said ex-parte decree or the said ex-parte decree was set aside. Since the issues, subject matter and the parties of the said suit are not same, we find there is no legal bar for Arati Bala Dey to claim a saham in the property left by her husband and legally entitled to file the present suit for partition.

18. Let us now consider whether a Hindu widow is entitled to get the same share as a son. In this connection reference may be made to section 3 of the Hindu Women's Rights to Property Act, 1937 (XVIII of 1937). Sub section (1) of section 3 of the said Act says that when a Hindu governed by the Daya Bagha School of Hindu Law dies intestate leaving any property dies, his widow, shall, subject to the provisions of sub-section(3), be entitled to the same share as a sons. Sub-section (3) of section 3 of the said Act further says that any interest devolving on a Hindu widow shall be the limited interest known as a Hindu Woman's estate,

but she shall have the same right of claiming partition as a male owner. Further sub-section (2) of section 1 of the said Act stipulates that it extends to the whole of Bangladesh.

19. Thus from reading of the aforesaid provisions of sub-sections (1) and (3) of the Hindu Women's Rights to Property Act, 1937 it is clear that the widow during the period of her life time she became complete owner and co-sharer of the property and this sub-section 3(3) has the effect of putting the widow in the same position as a son in the matter of claiming partition and consequently having the right to claim partition filed the present suit. Thus Arati Bala Dey as heirs of Rabindra Kumar Dey shall get $\frac{1}{3}$ rd share = $1.60\frac{1}{3}$ decimals out of total 4.81 decimals.

20. The plaintiff alleged that Prodip Kumar Dey died unmarried leaving behind Arati Bala Dey as heir and since Probir by this time change religion converted to Muslim and exclusion of inheritance from the property of his deceased father. The contesting defendant no.1 alleged that Prodip sold out his shares during his life time. The learned trial court in its judgment found that Prodip sold out his shares to different people and nothing was remained. The defendants did not file appeal or cross objection against those findings. So, the defendants can not raise this issue in the present appeal.

21. Now, the question may arise whether the substituted-plaintiff Shipra Rani, unmarried daughter of Rabindra Kumar Dey is entitled to inherit the property of Arati Bala Dey which Arati Bala got for life time interest from her husband, Rabindra Kumar Dey.

22. In Commentaries 168(4) of Mulla's Principles of Hindu law speaks every female whether she is a widow, who succeeds as heirs to the property of male, takes only a limited estate in the property inherited by her, and at her death the property passes not to her heir, but to the next heir of the male from whom she inherited it. So, after the death of Arati Bala, her inherited property will pass to the next heirs of original owner Rabindra Kumar Dey. At the time of death of Arati Bala Rabindra Kumar Dey had one son, defendant no.1, one unmarried daughter i.e. the plaintiff Sipra Rani Dey and other three married daughters. Admittedly, son Probir Kumar Dey, defendant no.1 converted to Muslim in the year 1999. Hindu law does not apply where a person enters into a religious order renouncing all worldly affairs, his action is tantamount to Civil death, and it excludes him altogether from inheritance and from a share on partition. So, conversion from the Hindu to the Mahomedan faith by the defendant no.1 Probir debarred him from inheriting the property of his father at the time of opening the inheritance on 24.08.2008 when Arati Bala Dey died. It is pertinent to note that Hindu law is religious law, the right to property is made by that law dependent upon the observance of the tenants of that faith. Consequently, a lapse from orthodox practices of Hinduism would under that law entail forfeiture of the caste and all rights to property and inheritance. Renouncement of religion has a disability, but after the passing of the Caste Disability Removal Act, 1850 (Act XXI of 1950), change of religion is no ground of exclusion of inheritance. But after the repealing of the Act XXI of 1850 by the Bangladesh Laws (Revision and Declaration Act, 1973 (Act No. VIII of 1973) the persons converts into another religion are now forfeited from the inheritance and from the joint family property and fathers property. It will not be out of place to mention that when a Hindu adopting by the Mahomedan faith, from the moment of

this conversion, by that acts affects all the property he acquires subsequently to it, so to render it subject to be Muslim law of inheritance. Commentaries 43(5) of the aforesaid Book states As between daughters the inheritance goes, first, to the unmarried daughters. As already observed above, Shipra Rani Dey was only unmarried daughter of Rabindra Kumar Dey, who was alive at the time of death of Arati Bala Dey on 24.08.2008. So, Sipra Rani Dey as the only unmarried daughter of Rabindra Kumar Dey will get $1.60\frac{1}{3}$ decimals of land which was passed to Rabindra Kumar Dey due to demise of his wife, Arati Bala Dey.

23. It is pertinent to mentioned that Probir, son of Rabindra Kumar Dey got $\frac{1}{3}$ of 4.81 i.e. $1.60\frac{1}{3}$ decimals of land at the death of Rabindra Kumar Dey on 05.10.1978 when he was Hindu. The defendant no.1 also filed an application for saham and paid court fee on 27.08.2012 which was kept with the record. So, the defendant no.1 will get a saham for $1.60\frac{1}{3}$ decimals of land and not $2.40\frac{1}{2}$ acres as claimed by him in the present suit.

24. It appears from the record that as per judgment and decree the plaintiff prayed for commission to make partition in respect of her shares allotted by court on 04.11.2012. Accordingly, Advocate Commissioner was appointed and after Commission learned Advocate Commissioner submitted his report. Subsequently, all proceedings of the suit was stayed since the present appeal was filed against the impugned judgment and decree dated 23.09.2012.

25. Having regard to facts and circumstances, we are of the view that trial court on proper consideration and appreciation of the evidence and materials on record rightly decreed the suit in part on finding that the original plaintiff, Arati Rani Bala Dey wife of Rabindra Kumar Dey became owner and co-sharer of the property and had right to file the suit for partition during her life time. After her death, her share was passed to Rabindra Kumar Dey from whom she inherited and Shipra Rani Dey as only unmarried daughter of Rabindra Kumar Dey will get the same from Rabindra Kumar Dey as next heir since the only son Probir Kumar Dey, who was alive but converted to Muslim earlier before opening the inheritance of Rabindra Kumar Dey on the property which was passed from Arati Bala Dey at her death on 24.04.2008.

26. Thus we find no merit in this appeal.

27. In the result, the appeal is dismissed and the impugned judgment and decree dated 23.09.2012 is affirmed.

28. Send down the lower court records along with a copy of this judgment at once.

17 SCOB [2023] HCD 162

HIGH COURT DIVISION
Criminal Miscellaneous Case No.49766 of 2021

Professor Muhammad Yunus @ Professor Dr. Muhammad Yunus
.... Accused-Petitioner
Vs.

The State
.... Opposite Party

Mr. Abdullah-Al-Mamun, with
Mr. Khaja Tanvir Ahmed,
Mr. Md. Ibrahim, Advocates
.... For the petitioner
Mr. Md. Khurshid Alam Khan, Advocate
… For the opposite party No.2.
Mr. K. M. Masud Rumy, DAG
… For the State

Heard on 11.08.2022 and Judgment on 17.08.2022.

Present:
Mr. Justice S M Kuddus Zaman
And
Mr. Justice Fahmida Quader

Editors' Note:
Opposite Party No.2, an Inspector of Labor, in course of inspection of the GTC detected some violations of the labor law and submitted a complaint under Bangladesh Labor Act, 2006 in the Court of learned third Labor Court, Dhaka. The alleged violations of Labor Law by the GTC are- (i) on completion of probationary period job of the labors and employees are not made permanent, (ii) the labors and employees are not granted annual leave with pay or encashment of leave or money in lieu of annual leave and (iii) the company did not constitute Labor Participation Fund and Labor Welfare Fund nor deposited 5% of net profit in above fund under the Sramik Kollan Foundation Ain, 2006. On behalf of the petitioner it was submitted that there is no date of occurrence of this case and this case is barred by the law of limitation for not having filed within 6 months as provided in Section 314 of Bangladesh Labor Ain, 2006; even if all the averments made in the complaint are taken as true in its entirety even then no complicity of the petitioner can be established; the petitioner is a Nobel laureate and an internationally acclaimed personality who had no role in the management of financial or administrative affairs of the GTC; the GTC is a nonprofit organization registered under Section 28 of the Companies Act, 1991 therefore does not require to constitute a Labor Participation Fund; and the GTC works in the telecommunication sector on the basis of its contract with other companies and as such its labors and employees are also appointed on contractual basis for which the proceeding in Labor Court is an abuse of the process of the Court. The High Court Division analyzing relevant laws and rules and considering admitted facts found the above contentions of the petitioner are not tenable in law as because the question of limitation is a mixed question of law and facts which cannot be determined without taking evidence; section 28 of the Companies Act does not exempt any Company from making contribution to the Labor Welfare Fund and article 33 and 34 of the Memorandum and Articles and Association of the GTC

mentions that the Board of Directors exercises full managerial and financial control over the GTC and is responsible for the management and administration of the affairs of GTC and as such it cannot be said at this stage of the proceedings that the petitioner has no role in the financial management and administration of the GTC. Consequently, the Rule was discharged.

Key Words:
Sections 303(Uma), 307, 117, 314 of Bangladesh Labor Act, 2006; Labor Welfare Foundation Law, 2006; Section 28 of the Companies Act; Bangladesh Labor Rules, 2015

<u>Section 28 of Companies Act:</u>
<u>There is nothing in Section 28 of the Companies Act which exempts any Company registered under above provision from making contribution to the Labor Welfare Fund:</u>
The learned Advocate for the petitioner repeatedly submits that the GTC is a nonprofit company and registered under Section 28 of Companies Act. As such GTC is not liable to contribute 5% of the net profit to the Labor Welfare Fund. In support of above submission the learned Advocate produced the Memorandum and Articles and Association of the GTC. But there is no mention in above Memorandum that the GTC is a nonprofit company. On the contrary Article 71 of above Memorandum shows that GTC may earn profit but the profit shall be utilized for the advancement of the objectives as stated in the above Memorandum. Since the GTC is a profit earning company it is not understandable as to why the company will not contribute a very insignificant part of its net profit for the welfare of its labors. There is nothing in Section 28 of the Companies Act which exempts any Company registered under above provision from making above contribution to the Labor Welfare Fund. (Para 28, 29)

<u>Section 314 of Bangladesh Labor Ain, 2006:</u>
The alleged violations were first detected by the complainant on 09.02.2020. He issued a letter to the GTC for taking remedial measures. No satisfactory reply having received a second inspection was held on 16.08.2021 and again the same violations were discovered. This Complaint was filed in the concerned labor court on 28.08.2021. As such, it prima facie appears that this case has a date of occurrence and the same has been filed within six months from the date of occurrence as provided in Section 314 of Bangladesh Labor Ain, 2006. Moreover it is well settled that a question of limitation is a mixed question of law and facts which can be determined on consideration of evidence to be adduced at trial. (Para 34)

JUDGMENT

S M Kuddus Zaman, J:

1. On an application under section 561A of the Code of Criminal Procedure this Rule was issued calling upon the opposite parties to show cause as to why the proceedings of B.L.A. (Criminal) Case No.228 of 2021 under Sections 303(Uma) and 307 of Bangladesh Labor Act, 2006, now pending in the Court of learned third Labor Court, Dhaka, so far it relates to the petitioner shall not be quashed and after hearing the parties, and perusing the record, and the cause shown, if any, make the Rule absolute and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts in short are that Mr. S.M. Arifuzzaman, Labour Inspector (General), Department of Inspection Factories and Establishments, Dhaka, lodged a petition of complaint with the Third Labour Court, Dhaka on 20.08.2021 alleging that in course of inspection of GTC (hereinafter referred to as GTC) he detected infringements of the following provisions of Bangladesh Labor Ain, 2006 and Bangladesh Labor Rules, 2015:

(1) On completion of probationary period jobs of the labors and employees are not made permanent in violation of section 4(7) of বাংলাদেশ শ্রম আইন, ২০০৬;
(2) Labors and Employee are not granted annual leave with pay or money against earned leave in violation of Section 117 of Bangladesh Labor Ain, 2006, and
(3) Labor Participatory Fund and labor welfare Fund were not constituted and 5% of the net profit was not deposited in above fund under the Labor Welfare Foundation Law, 2006.

3. The complaint sent by registered post a letter to the defendants vide Memo No.3982/উঃমঃপঃ/ঢাকা on 01.03.2020 for stopping above violations and taking remedial measures. The defendants sent a letter of compliance on 09.03.2020, but the same was found to be not satisfactory. On the direction of the higher authority he again inspected GTC on 16.08.2021 and sent another letter on 19.08.2021 to the defendants who again sent a letter of reply but the same was again found to be not satisfactory. The defendants have committed an offence punishable under Section 303(UMO) and 307 of Bangladesh Labor Law, 2006 and Bangaldesh Labor (Amendment) Law, 2013.

4. The learned Judge of the Labor Court took cognizance of above complaint and initiated the instant proceedings.

5. Being aggrieved by and dissatisfied with above order of the learned Judge of the Labor Court the petitioner moved to this Court and obtained this Rule.

6. Mr. Abdulla-Al-Mamun, learned counsel appearing for the petitioner submits that there is no date of occurrence of this case and this case is barred by the law of limitation for not having filed within 6 months as provided in Section 314 of Bangladesh Labor Ain, 2006. A clear and plain reading of the petition of complaint does not disclose any offence under the Bangladesh Labor Ain, 2006. Even if all the averments made in the complaint are taken as true in its entirety even then no complicity of the petitioner can be established with alleged infringement of any above provisions of the Bangladesh Labor Ain, 2006.

7. The learned Advocate further submits that the complainant has stated in the complaint that the GTC gave replies to the letters issued by the complainant, but the complainant did not make a decision on the basis of above replies nor communicated the same to the petitioner enabling the GTC to prefer an appeal to the Government under Section 3(4) of Bangladesh Labor Ain, 2006. As such, filing of this case is both premature and violative of the provision of Section 3(4) of above Ain.

8. The learned Advocate further submits that the defendant is a Nobel laureate and an internationally acclaimed personality who had no role in the management of financial or administrative affairs of the GTC. The petitioner has been implicated in this case due to personal rivalry and grudge and in violation of Section 312 of the Bangladesh Labor Law, 2006.

9. The GTC is a nonprofit organization registered under Section 28 of the Companies Act, 1991 for advancement of telecom facilities in the rural Bangladesh and thereby empowering the poor people. The Directors of the company do not get any profit from the Company. As such, the labor and employees of the company are not legally entitled to get 5% of the net profit in their welfare fund.

10. The learned Advocate again submits that the GTC works in the telecommunication sector on the basis of its contract with other companies, namely, Polly Phone Services and Nokia sales Services. Since the GTC works on contractual basis its labors and employees are also appointed on contractual basis and although their jobs are not made permanent they are given all facilities and benefits of permanent labors and employees, stated the learned Advocate.

11. In view of above facts and circumstances and leagl position the taking of cognizance of the above false and unfounded complaint by the learned Judge of the Labor Court is an abuse of the process of the Court. All the allegations made in the complaints preposterous and not tenable in law and above still born proceedings shall only cause harassment to the innocent petitioner without bringing any fruitful result. As such, this still born, preposterous and illegal proceeding may be quashed, concluded the learned Advocate.

12. In support of above submission the learned Advocate refers to the case laws reported in 28 DLR (AD) Page-38, AIR 1989 (SC) Page-2222 and 17 BLD (AD) 1997 Page-44.

13. On the other hand Mr. Md. Khurshid Alam Khan, learned Counsel appearing for the opposite party No.2 submits that the complainant an inspector of labor in course of inspection detected some violations of the labor law by the GTC which have been stated in the petition of complaint. The complainant issued two letters on 01.03.2020 and 16.08.2021 respectively to the defendants to refrain from continuous violations of the labor laws and implement remedial measures.

14. The defendants have admitted the facts of above violations and tried to justify those in their replies to the complainant. Accordingly, the complainant has filed this case under Section 319(5) of the Bangladesh Labor Ain, 2006.

15. The learned advocate further submits that the complaint discloses several infringements of the Labor Ain by the GTC. The questions whether the GTC is exempted from implementation of above labor laws or whether the petitioner as the Chairman of the Board of Directors is responsible for above violations of the labor laws or not are contentious questions of facts which will be determined at trial on consideration of evidence. The learned Advocate lastly submits that the Appellate Division of the Supreme Court of Bangladesh has clearly defined the areas and competence of a court while dealing with a petition under Section 561A of the Code of Criminal Procedure in the case reported in 70 DLR (AD) 2018 and in above yard stick this petition has no substance and all the claims made by the petitioner are defense case which must go through the trial process for determination. In support of above submissions the learned Advocate refers to the case law reported in 70 DLR(AD) 2018 page-1990.

16. We have considered the submissions of the learned Advocates for respective party and carefully examined the petition of complaint and other materials on record.

17. As mentioned above Opposite No.2 an Inspector of Labor in course of inspection of the GTC on 09.02.2020 and 16.08.2021 under Section 319 of the Bangladesh Labor Ain, 2006 detected some violations of the labor law and submitted a complaint under Section 219(5) of the above Ain.

18. In above complaint mention has been made about following violations of the Labor Law by the GTC;

19. Firstly on completion of probationary period job of the labors and employees are not made permanent.

20. Secondly, the labors and employees are not granted annual leave with pay or encashment of leave or money in lieu of annual leave and;

21. Lastly, the company did not constitute Labor Participation Fund and Labor Welfare Fund nor deposited 5% of net profit in above fund under the Sramik Kollan Foundation Ain, 2006.

22. In view of above specific allegations of violations we are unable to find any substance in the submissions of the learned Advocate for the petitioner that if above complaint is taken in its face value and accepted as true in its entirety even then no prima facie case of violations of above provisions of Bangladesh Labor Ain, 2006 against the GTC is made out.

23. The learned Advocate for the petitioner mentions about not making of a decision by the complainant on the basis of two replies of the GTC and communicate the same to the GTC under Section 3(2) of above Ain which could enable the GTC to prefer an appeal to the government under Section 3(4) of the above Ain. As such the learned Advocate submits, above proceeding is premature and violative of section 3(4) of above Ain.

24. As mentioned above the complaint of this case was lodged under section 319(5) of the Bangaldesh Labor Ain, 2006 not under section 3 of above Ain. Secondly, it turns out from above replies of the GTC as reproduced at paragraph No.8 of this application under Section 561A of the Code of Criminal Procedure that the GTC has in fact admitted all the allegations made in the complaint. The GTC has tried to justify its position in above replies stating that the GTC was registered under Section 28 of the Companies Act as a non-profit company so the provisions of constitution of a Labor Welfare Fund and deposit of 5% of the net profit to that account are not applicable for the GTC.

25. As far as the allegation that after completion of probationary period the jobs of the labors are not made permanent is concerned it has been stated that all the employees and labors of the GTC are appointed on contractual basis. So, their jobs cannot be made permanent.

26. As to not granting of the annual leave with pay or encashment of annual leave it has been stated that after completion of six years contractual service the employees and labors get leave with pay or one month full salary in lieu of leave.

27. In view of above replies of the GTC it is not understandable as to what a different decision could be made by the complainant excepting a decision to present a complaint to the concerned labor court and exactly that has been done by the complainant.

28. The learned Advocate for the petitioner repeatedly submits that the GTC is a nonprofit company and registered under Section 28 of Companies Act. As such GTC is not liable to contribute 5% of the net profit to the Labor Welfare Fund. In support of above submission the learned Advocate produced the Memorandum and Articles and Association of the GTC.

29. But there is no mention in above Memorandum that the GTC is a nonprofit company. On the contrary Article 71 of above Memorandum shows that GTC may earn profit but the

profit shall be utilized for the advancement of the objectives as stated in the above Memorandum. Since the GTC is a profit earning company it is not understandable as to why the company will not contribute a very insignificant part of its net profit for the welfare of its labors. There is nothing in Section 28 of the Companies Act which exempts any Company registered under above provision from making above contribution to the Labor Welfare Fund.

30. The petitioner is the Chairman of the Board of Directors of the GTC. The learned Advocate for the petitioner submits that the petitioner holds a ceremonial position. He merely presides over the meeting of the Board and he has no role or contribution in the management of the affairs of the company.

31. Article 33 and 34 of the Memorandum and Articles and Association of the GTC mentions about the constitute of Board of Directors, its powers and functions in following terms:

> ''33. The affairs of the GTC shall be supervised by a Board of Directors, which shall have the responsibility to determine the direction and scope of the activities of the GTC. The Board of Director shall exercise full management and financial control of the GTC. For the purpose of the Act, the Board of Directors shall be deemed to be the Directors of the GTC.
>
> 34. The Board of Directors, subject to the general control and supervision of the General Body, Shall generally pursue and carry out the objects of the GTC as set forth in the Memorandum of Association and the Board Shall be responsible for the management and administration of the affairs of the GTC in accordance with the Articles of Association and the Rules, Regulations and Bye-laws made hereunder.''

32. It is crystal clear form above Articles that the Board of Directors exercises full managerial and financial control over the GTC and is responsible for the management and administration of the affairs of GTC. As such it cannot be said at this stage of the proceedings that the petitioner has no role in the financial management and administration of the GTC.

33. The learned Advocate for the petitioner mentions that this case does not have a date of occurrence and the case is barred by limitation as the same has not been filed within six months as provided in Section 314 of the Bangladesh Labor Ain, 2006.

34. The alleged violations were first detected by the complainant on 09.02.2020. He issued a letter to the GTC for taking remedial measures. No satisfactory reply having received a second inspection was held on 16.08.2021 and again the same violations were discovered. This Complaint was filed in the concerned labor court on 28.08.2021. As such, it prima facie appears that this case has a date of occurrence and the same has been filed within six months from the date of occurrence as provided in Section 314 of Bangladesh Labor Ain, 2006. Moreover it is well settled that a question of limitation is a mixed question of law and facts which can be determined on consideration of evidence to be adduced at trial.

35. The facts and circumstances of the cases referred to above by the learned Advocate for the Petitioner are distinguishable from those of the case in hand, as such; above cited case laws have no application in the instant case.

36. On consideration of above facts and circumstances of the case and materials on record and relevant laws we are unable to find any substance in this petition under section 561A of the Code of Criminal Procedure and the rule issued in this connection is liable to be discharged.

37. In the result, the Rule is discharged.

38. Communicate this judgment and order to the Court concerned at once.

17 SCOB [2023] HCD 168

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICITON)

Writ Petition No. 2869 of 2020

Md. Shahin Ikbal
.....Petitioner
Vs.
General Certificate Officer, Office of the Deputy Commissioner, Rajshahi District, Rajshahi and others
.....Respondents

Mr. Dewan Md. Abu Obyed Hossain, Advocate
...for the Petitioner
Mr. Shamim Khaled Ahmed with
Mr. M. Mohiuddin Yousuf, Advocates
...for the Respondent No. 3
Heard on: 15.09.2021 and 03.11.2021
Judgment on: 05.01.2022

Present:
Mr. Justice Abu Taher Md. Saifur Rahman
And
Mr. Justice Md. Zakir Hossain

Editors' Note:
For a defaulted loan of 250,000/- taka a certificate case was instituted against the petitioner-certificate-debtor and he was ordered to pay Tk. 5000/- per month as repayment of loan on 05.02.2008. Thereafter, as per order of the Certificate Officer, the certificate debtor deposited entire amount of the certificate in deferent installments. The Certificate Officer on 01.02.2016 wanted to know from the certificate holder about the outstanding dues of the certificate debtor. The certificate holder informed in reply that till then Tk. 5,07,766.00 was outstanding. In the above backdrop, challenging the legality and propriety of the certificate proceeding, the petitioner rushed to the High Court Division and obtained the Rule and stay. High Court Division found that as per section 5(5) of the Artha Rin Adalat Ain 2003 the certificate proceeding does not suffer from jurisdictional defect raised by the petitioner but the Certificate Officer without any objective satisfaction and only on the basis of improperly filed requisition letter and without considering as to whether the entire outstanding dues as claimed by the respondent-Bank is actually due at the relevant time, started certificate proceeding which is illegal. Consequently, the Court quashed the certificate proceeding.

Key Words:
Section 4, 6, 16 of the Public Demands Recovery Act, 1913; Section 5(5) of the Artha Rin Adalat Ain, 2003; Certificate proceeding; Certificate Officer; Writ of certiorari; Calculation of interest;

<u>**Section 5(5) of the Artha Rin Adalat Ain, 2003:**</u>
On meticulous and meaningful reading of the aforesaid provision of the Ain, 2003, it is as clear as day light that the legislature has consciously given option for shopping the forum either to file Artha Rin Suit or Certificate Case for speedy realization of the outstanding amount which does not exceed Tk. 5 lacs. The jurisdiction of the Certificate Officer is in addition but not in derogation to the jurisdiction of the Artha Rin Adalat;

therefore, the certificate proceeding does not suffer from jurisdictional defect raised by the petitioner. Consequently, the issue stands decided in the negative. (Para 16)

<u>Section 4, 6 and 16 of the Public Demands Recovery Act, 1913:</u>
Section 16 of the PDR Act refers to interest, costs and charge which are recoverable in respect of every certificate which has been filed under section 4 or section 6. In other words, these include the amounts which are leviable from time to time in respect of the certificate after it has been filed. It should be noted that upto the stage of filing of a certificate under section 4 or 6 whatever sums become due are entered in the certificate, and they are-
(i) actual amount due,
(ii) interest, if any, from the date when the amount becomes due to the date of filing of the certificate (the inclusion of the interest shall be done by the Requiring Officer or the Department concerned), and amount of ad-valorem court-fees paid (this is in respect of certificate filed under section 6).
Clause (a) of section 16 refers to interest leviable on the demands in the certificate calculated at the rate of $6\frac{1}{4}$% from the date of signing of the certificate to the date of realization i.e., the actual recovery of the demands. (Para 19)

<u>Section 16 of the Public Demands Recovery Act, 1913:</u>
By and large after filing the Certificate Case, the calculation of interest has to be made in accordance with section 16 of the PDR Act. If the contention of the respondent-Bank is accepted that the interest and charges are recoverable on the certificate amount upto the date of realization as per the mandate of section 16 of the PDR Act, then it would be safely concluded that the interest imposed during the pendency of the Certificate Case was also unlawful and unjustified. (Para 25)

<u>Sections 5 and 6 of the Public Demands Recovery Act, 1913:</u>
<u>Duty of the Certificate Officer:</u>
Before starting Certificate Case, it is the duty of the Certificate Officer to see as to whether the requisition is filed in a prescribed form under section 5 of the PDR Act and whether the provision of section 6 of the PDR Act has been complied with. In this case, the Certificate Officer without any objective satisfaction and only on the basis of improperly filed requisition letter and without considering as to whether the entire outstanding dues as claimed by the respondent-Bank is actually due at the relevant time, the Certificate Officer started certificate proceeding. Prescribed Form means the forms appended in the PDR Act. The Schedule-II, Rule 84 prescribes the various forms. Form No. 1 clearly spells out that the Certificate Officer has to give certificate that the amount stated in the requisition letter is recoverable and is recovered by suit is not barred by law. (Para 28, 29)

It is true that a certificate tantamounts to decree. It cannot be denied that the Certificate Officer's position is like an Executing Court for enforcing the decree of the Civil Court. (Para 30)

<u>When Executing Court can go behind the decree:</u>
The *ratio* that Executing Court cannot go behind the decree is not absolute. It has got four exceptions; the Executing Court may refuse to execute the decree, if it is found that

the decree was passed by the Court having no jurisdiction or it is made against dead man or the decree is tainted with apparent fraud. (Para 32)

Interest should be imposed as per law:

It cannot be denied that during the pendency of the execution case, the lender Bank or FIs may impose interest, but that interest should be as per law. But the interest, costs and other incidental expenses incurred during the execution proceeding is the discretion of the presiding officer, who presides over certificate proceedings and such discretion has also to be exercised judiciously, carefully, cautiously and not whimsically. (Para 34)

A writ of certiorari is available in case of violation of the principles of natural justice or where there is an error of law apparent on the face of record:

A writ of certiorari controls all courts, tribunals, and other authorities when they purport to act without jurisdiction, or in excess of it. It is also available in case of violation of the principles of natural justice or where there is an error of law apparent on the face of record. If the Court or executing authority does not perform its obligation in accordance with law, the writ of certiorari may be invoked. In the meantime 12 years have already been elapsed, if this small borrower goes for appeal or revision as embodied in PDR Act itself, it may take another 12 years and it will not yield him any positive, effective and speedy result. Moreover, without being any final decision by the Certificate Officer, it would not possible to take resort of Appeal. Therefore, we hold our view that the writ of certiorari is an appropriate and efficacious remedy in this case in hand. Since the starting of certificate proceeding is not in accordance with law; therefore, the entire proceeding is liable to be quashed to secure the ends of justice. (Para 35)

Section 45 and 49 of the Bank Company Ain, 1991:

Experience shows that the calculation of interest is a very challenging job and at times, we find that the Bank officials are not so vigilant and not so diligent in calculating interest; therefore, Bangladesh Bank should exercise its power as embodied under section 45 and 49 of the Bank Company Ain, 1991 to inspect the case as to the calculation of interest by FIs at least on random basis. Bangladesh Bank should examine as to whether the interest calculated is in accordance with law or not. Mere denial or no objection as to calculation of interest by the borrower does not *ipso facto* give validity of the statement as to interest. (Para 36)

JUDGMENT

Md. Zakir Hossain, J:

1. At the instance of the petitioner, the Rule Nisi was issued calling upon the respondents to show cause as to why the proceedings of the Certificate Case No. 80 of 2006-2007 (Agrani) now pending before the General Certificate Officer, Rajshahi (Respondent No. 1) after adjustment of certificate claim by the petitioner should not be declared to have been made without lawful authority and is of no legal effect and as to why the respondent No. 3 should not be directed to determine how much actual amount is payable by the petitioner to respondent No. 3 in Certificate Case No. 80 of 2006-2007 and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. At the time of issuance of the Rule, this Court was further pleased to stay the operation of the proceedings of the Certificate Case No. 80 of 2006-2007 for a period of 3(three) months, later on it has been extended for a further period of 3(three) months.

3. Facts leading to the issuance of the Rule are, in brief, as follows:
The respondent No. 3, Agrani Bank Ltd., in short 'the Bank', filed a requisition to the General Certificate Officer, Rajshahi on 14.08.2007 for realizing of Tk. 4,16,756.00 including the Court fees of Tk. 9,572.00. On the basis of the requisition submitted by Manager of the Bank, Wapda Branch, Boalia, Rajshahi, the Certificate Officer filled up the prescribed form as appended to the rules by her order dated 09.01.2020 and on the basis of the filled up requisition, the concerned General Certificate Officer started Certificate Case No. 80 of 2006-2007 by its order being No. 1, dated 12.09.2007 against the petitioner.

4. The certificate debtor, the instant petitioner received Tk. 2,50,000.00 as Cash Credit (Hypo) loan for running furniture business from the Bank on 28.08.2005 and the period of repayment of loan money has been expired on 27.08.2006 and the certificate debtor i.e. the borrower failed to repay the loan. Thereafter, the certificate holder i.e. the Bank issued a notice to through its appointed lawyer and having received the same, the certificate debtor did not pay heed to this. After that, the certificate holder i.e. the Bank filed requisition for realizing Tk. 4,16,756.00. Being satisfied with the requisition, the General Certificate Officer started the aforesaid proceeding and issued notice upon the certificate debtor. Having received the notice issued under section 7 of the Public Demands Recovery Act, 1913 (the PDR Act), the certificate debtor entered appearance in the certificate proceeding and prayed for depositing the certificated amount by way of installment Tk. 10,000.00 per month and having considered the petition of the certificate debtor, the General Certificate Officer was pleased to allow the certificate debtor for depositing Tk. 5,000.00 *per mensem* by her order being No. 04 dated 05.02.2008 and thereafter, as per order of the Certificate Officer, the certificate debtor deposited entire amount of the certificate in deferent installments. Thereafter, the Certificate Officer by his/her order 69, dated 01.02.2016 wanted to know the certificate holder that what amount of the certificate debtor is still outstanding. Having received the order of the Certificate Officer, the certificate holder informed the Certificate Officer that till then Tk. 5,07,766.00 was outstanding. In the above backdrop, challenging the legality and propriety of the certificate proceeding, the petitioner rushed to this Court and moved the aforesaid petition and obtained the Rule and stay therewith.

5. Mr. Dewan Md. Abu Obyed Hossain, the learned Advocate appearing on behalf of the petitioner, took us through the writ petition, affidavit-in-opposition and the relevant laws involved in this case and submits that the Artha Rin Adalat has got an exclusive jurisdiction to try the claim of the Financial Institutions, in short 'the FIs', including the Bank; therefore, the Certificate Officer has got no jurisdiction to entertain any certificate proceeding against the petitioner. He further contends that the Artha Rin Adalat Ain, 2003 in short the Ain, 2003 is a special law and obviously it will get primacy over the PDR Act. He also contends that if there is a conflict arises between the two special laws, obviously the latter shall get primacy.

6. He next submits that the calculation of the interest is absolutely illegal and beyond the purview of the loan sanction letter and the existing law of the land. He further contends that without thorough examination of the requisition letter of the Bank Manager, the Certificate Officer started certificate proceeding flouting the provision of the PDR Act; therefore, the same is liable to be turned down to secure the ends of justice, otherwise it will entail serious

loss to the poor petitioner, who by mortgaging his only homestead took Tk. 2,50,000.00 in different times for running his small furniture business.

7. He further submits that the calculation of the interest made by the Bank palpably repugnant to the sanctioned letter. He nest submits that the respondent-Bank admitted that in the meantime, the petitioner paid Tk. 6,83,756.00 and therefore, the continuation of the certificate proceeding is nothing but abuse of law. He further submits that certificate tantamounts to decree of the Civil Court, but on perusal of the entire order sheets, it would be as clear as day light that almost half of the dozens of the Certificate Officers dealt with the aforesaid Certificate Case, but none exercised his/her judicial discretion and conscience to dispose of the Certificate Case and thereby the very purpose of more than century old PDR Act has been frustrated. He further submits that the very initiation of certificate proceeding is absolutely contrary to the provision of the PDR Act. He further submits that the certificate holder-Bank in order to grasp the homestead of the petitioner put undue pressure upon the petitioner and took various devices by lapse of one year from the date of disbursement of loan money of Tk. 2,50,000.00. He further submits that in no circumstances, the Bank cannot claim more than 200% of the principal amount in view of section 47 of the Ain, 2003. Finally, he submits that the small entrepreneur cannot continue its business due to holding like the leech by Bank and other FIs and thereby, the borrower by lapse of time became destitute.

8. Per contra, Mr. Shamim Khaled Ahmed, the learned Senior Advocate along with Mr. M. Mohiuddin Yousuf, appearing on behalf of the respondent-Bank, submits that since the petitioner has got alternative remedy within the bounds of the PDR Act; therefore, the Writ Petition is not maintainable and as such, the Rule is liable to be discharged.

9. He further submits that any order passed by the Certificate Officer is appealable; therefore, this Court has got no jurisdiction to entertain the instant writ petition in order to settle down the disputed question of facts. He next submits that the respondent-Bank filed the said Certificate Case for realization of the principal amount of Tk. 2,50,000.00 along with interest and charges in view of section 16 of the PDR Act. He further submits that the calculation of the interest and charge made by the Bank shall presume to be correct, who will say it is incorrect heavy burden lies upon him and since the petitioner did not raise any objection as to calculation made by the Bank, cannot be agitated in the writ Court.

10. Mr. Ahmed next submits that in view of the *proviso* of sub-section 5 of section 5 of the Ain, 2003, the Certificate Officer can start certificate proceeding to recover the outstanding dues of the Bank or FIs as mentioned therein; therefore, the contention of the petitioner that the Certificate Officer has got no jurisdiction to entertain the certificate proceeding.

11. Taking thread from paragraph No. 12 of affidavit-in-opposition dated 12.09.2021, he further submits that as per section 16 of the PDR Act, interest and charge are recoverable on the certificate amount upto the date of realization; therefore, the certificate debtor is in no way escape from the liability to pay the accrued interest during the pendency of the certificate proceeding and in support of his contention, he relies on the decision of the case of *M/s. R. B. H. M. Jute Mills, Katihar and others v. Certificate Officer, Katihar and others*, reported in AIR 1967 SC 400 para 2 and *M/s. Khardah Co. Ltd. v. State of West Bengal and others* reported in AIR 1969 Cal. 184 para 2.

12. He further submits that section 47 of the Ain, 2003 has no manner of application in an execution proceedings filed under the PDR Act. In support of his contention he relies on the case of *Bangladesh House Building Finance Corporation and another v. Amena Khatun and another* reported in 12 ADC 336 para 6.

13. In order to fortify his submission, Mr. Ahmed banked on the decisions of the case of *Rupali Bank Ltd. v. Md. Shamser Ali and others* reported in 69 DLR (AD) 366 and *Rajib Traders v. Artha Rin Adalat as well as Joint District Judge, Additional Court, Jessore and another* reported in 68 DLR (AD)10.

Now the moot issues are-

(i) whether the writ petition is maintainable challenging the legality of the certificate proceeding;

(ii) whether the Certificate Officer is entitled to entertain Certificate Case for realizing the outstanding dues of the respondent Bank;

(iii) whether the impugned Certificate Case was duly filed following the procedures as laid down under section 5 and 6 of the PDR Act;

(iv) whether the interest calculated by the respondent-Bank was made in accordance with law and if so whether the calculation of interest is correct;

(v) whether the certificate proceeding is liable to be quashed.

14. We have perused the entire materials on record and the submission advanced by the learned Advocates of the parties and the legal position intricately involved in this case with great care and attention and seriousness as it deserves in order to give answer to the aforesaid issues.

15. All of the issues are intricately related to each other; therefore, they are taken up together for final and complete adjudication of the dispute arisen in the case.

Section 5(5) of the Ain, 2003 may be read as follows:

(৫) The Public Demands Recovery Act, 1913 (Act No. III of 1913) এর বিধানে যাহা কিছুই থাকুক না কেন, এই আইনের অধীন অর্থ ঋণ আদালত কর্তৃক আদায়যোগ্য ঋণ "সরকারী পাওনা" হইলেও উহা আদায়ার্থ মামলা এই আইনের অধীন আদালতেই দায়ের করিতে হইবে:

তবে শর্ত থাকে যে, বাংলাদেশ কৃষি ব্যাংক, রাজশাহী কৃষি উন্নয়ন ব্যাংক ও রাষ্ট্রীয় মালিকানাধীন অন্যান্য আর্থিক প্রতিষ্ঠান কর্তৃক অনূর্ধ্ব ৫,০০,০০০ টাকার (পাঁচ লক্ষ টাকা) দাবী সম্বলিত মামলাসমূহ অর্থ ঋণ আদালতে দায়ের না করিয়া The Public Demands Recovery Act, 1913 এর বিধান অনুযায়ী সার্টিফিকেট মামলা হিসাবেও দায়ের করা যাইবে।

16. On meticulous and meaningful reading of the aforesaid provision of the Ain, 2003, it is as clear as day light that the legislature has consciously given option for shopping the forum either to file Artha Rin Suit or Certificate Case for speedy realization of the outstanding amount which does not exceed Tk. 5 lacs. The jurisdiction of the Certificate Officer is in addition but not in derogation to the jurisdiction of the Artha Rin Adalat; therefore, the certificate proceeding does not suffer from jurisdictional defect raised by the petitioner. Consequently, the issue stands decided in the negative.

17. The Manager of the Bank in his requisition letter dated 14.08.2007 addressing to the General Certificate Officer may be read thus in *verbatim*:

বরাবর
জেনারেল সার্টিফিকেট অফিসার
রাজশাহী।
বিষয়ঃ সার্টিফিকেট মামলা দায়েরের প্রসঙ্গে।

প্রিয় মহোদয়,

শিরোনামে বর্ণিত বিষয়ে অত্র শাখার খেলাপী ঋণ গ্রহীতা প্রতিষ্ঠান মেসার্স শাহীন ফার্নিচার মার্ট/মালিক শাহীন ইকবাল, পিতা- মৃত মোঃ শুকুর উদ্দীন শেখ অত্র শাখা হতে ২৮/০৫/২০০৫ ইং তারিখে ২,৫০,০০০/- (দুই লক্ষ পঞ্চাশ হাজার) টাকা সিসি (হাইপোঃ) ঋণ গ্রহণ করেন। ঋণের মেয়াদ ২৭-০৮-২০০৬ ইং তারিখে উত্তীর্ণ হলেও তিনি ঋণটি পরিশোধ করেন নাই। ইতিমধ্যে তার সংগে ব্যক্তিগতভাবে এবং পত্রের মাধ্যমে তাগাদা দেওয়া হয়েছে। সর্বশেষ ২১-৫-২০০৭ ইং তারিখে উকিল নোটিশ দেওয়া হয়েছে। বর্তমানে ব্যাংকের পাওনা ৪,০৭,১৮৪+৯,৫৭২= ৪,১৬,৭৫৬/- (চার লক্ষ ষোল হাজার সাতশত ছাপ্পান্ন) টাকা।

অতএব, মোঃ শাহীন ইকবাল, পিতা- মৃত মোঃ শুকুর উদ্দীন শেখ-এর নামে সার্টিফিকেট মামলা দায়ের করার জন্য বিশেষভাবে অনুরোধ করা হ'ল।

আপনার বিশ্বস্ত,
মোঃ আজিজুর রহমান
ব্যবস্থাপক
এসপিও এন্ড ম্যানেজার
অগ্রনী ব্যাংক লি.
ওয়াপদা ব্রাঞ্চ, রাজশাহী

(Underlined for emphasis)

18. Having received the requisition, the Certificate Officer filled the prescribed form. In the prescribed form, he stated that the total outstanding is Tk. 4,16,756.00 including *ad valorem* Court fees of Tk. 9,572.00 and thereafter on 12.09.2007, the Certificate Officer took cognizance and started Certificate proceedings so far it relates to the said Certificate Case. Section 5 of the PDR Act may read as follows:

5. (1) When any public demand payable to any person other than the Collector is due, such person may send to the Certificate-officer a written requisition in the prescribed form:
Provided that no action shall be taken under this Act, on a requisition made by a land mortgage bank registered or deemed to be registered under the Co-operative Societies Act, 1940, or an assignee of such bank, unless the requisition be countersigned by the Registrar of Co-operative Societies, Bangladesh.

(2) Every such requisition shall be signed and verified in the prescribed manner, and, except in such cases as may be prescribed, shall be chargeable with the fee of the amount which would be payable under the Court-fees Act, 1870, in respect of a plaint for the recovery of a sum of money equal to that stated in the requisition as being due.

Section 6 of the PDR Act runs as follows:
6. On receipt of any such requisition, the Certificate-officer, if he is satisfied that the demand is recoverable and that recovery by suit is not barred by law, may sign a certificate, in the prescribed form, stating that the demand is due; and shall include in the certificate the fee (if any) paid under section 5, sub-section (2); and shall cause the certificate to be filed in his office.

Schedule II, Rule 1 of the PDR Act may be read thus:

1. Signature and verification of requisition for certificate: Signature and verification of requisition for certificate-(1) Every requisition made under section 5 shall be signed and verified at the foot by the person making it.
(2) The verification shall state that the person signing the requisition has been satisfied by inquiry that the amount stated in the requisition is actually due.

(3) The verification shall be signed by the person making it and shall state the date on which it is signed.

(Underlined for emphasis)

19. Section 16 of the PDR Act refers to interest, costs and charge which are recoverable in respect of every certificate which has been filed under section 4 or section 6. In other words, these include the amounts which are leviable from time to time in respect of the certificate after it has been filed. It should be noted that upto the stage of filing of a certificate under section 4 or 6 whatever sums become due are entered in the certificate, and they are-
(iii)actual amount due,
(iv)interest, if any, from the date when the amount becomes due to the date of filing of the certificate (the inclusion of the interest shall be done by the Requiring Officer or the Department concerned), and amount of ad-valorem court-fees paid (this is in respect of certificate filed under section 6).
Clause (a) of section 16 refers to interest leviable on the demands in the certificate calculated at the rate of $6\frac{1}{4}$ % from the date of signing of the certificate to the date of realization i.e., the actual recovery of the demands.

20. In this respect, we may read the provision of section 16 in verbatim:

16. There shall be recoverable, in the proceedings in execution of every certificate filed under this Act-
(a) interest on the public demand to which the certificate relates, at the rate at which interest may, by law, be chargeable on the public demand on the date of the signing of the certificate *or at the rate of six and a quarter per centum per annum,* *whichever is higher, from the date of the signing of the certificate up to the date of realization,*
(b) such costs as are directed to be paid under section 45, and
(c) all charges incurred in respect of-
(i) the service of notice under section 7, and of warrants and other processes, and
(ii) all other proceedings taken for realizing the demand.

Section 45 and 46 of the PDR Act may be read thus:

45. Subject to such limitation as may be prescribed, *the award of and cost of and incidental to any proceeding under this Act shall be in the discretion of the officer presiding,* *and he shall have full power to direct by whom and to what extent such costs shall be paid.*

(Underlined for emphasis)

46. If the Certificate-officer is satisfied that any requisition under section 5 was made without reasonable cause, he may award to the certificate-debtor such compensation as the Certificate-officer thinks fit;
and the amount so awarded shall be recoverable from the certificate-holder under the procedure provided by this Act for recovery of costs.

Section 47 and 50 of the Ain, 2003 run as follows:

৪৭। (১) বর্তমানে প্রচলিত অন্য কোন আইন বা পক্ষগণের মধ্যে সম্পাদিত সংশ্লিষ্ট চুক্তিতে যাহাই থাকুক না কেন, এই আইনের অধীন মামলা দায়েরের ক্ষেত্রে, কোন আর্থিক প্রতিষ্ঠান কোন ঋণ গ্রহীতাকে প্রদত্ত আসল ঋণের উপর দায় এমনভাবে আরোপ করিয়া আদালতে মামলা দায়ের করিবে না, যাহাতে আদালতে উত্থাপিত উক্ত সমুদয় দাবী আসল ঋণ অপেক্ষা ২০০% (১০০+২০০ = ৩০০ টাকা) এর অধিক হয়।

(২) উপ-ধারা (১) এ বর্ণিত মতে আসল ঋণ অপেক্ষা ২০০% এর অধিক অনুরূপ দাবী আদালত কর্তৃক গ্রহণযোগ্য হইবে না।

(৩) এই ধারার বিধানটি এই আইন বলবৎ হইবার এক বৎসর পর কার্যকর হইবে:
তবে শর্ত থাকে যে, কোন আর্থিক প্রতিষ্ঠান, ইচ্ছা করিলে, এই ধারা কার্যকর হইবার পূর্বেই, এই ধারার বিধান অনুসরণ করিতে পারিবে।

৫০। (১) ধারা ৪৭ এর বিধান সাপেক্ষে, এই আইনের অধীন কোন আদালত, ঋণ প্রদানের দিবস হইতে মামলা দায়েরের দিবস পর্যন্ত সময়কালে কোন ঋণের উপর আর্থিক প্রতিষ্ঠান কর্তৃক আইনানুগভাবে ধার্যকৃত সুদ, বা, ক্ষেত্রমত, মুনাফা বা ভাড়া হ্রাস, মাফ বা নামঞ্জুর করিতে পারিবে না।

(২) অর্থ ঋণ আদালত কর্তৃক প্রদত্ত ডিক্রীর বিরুদ্ধে বিবাদী-দায়িক পক্ষ কোন আপীল, রিভিশন, আপীল বিভাগে আপীল বা অন্য কোনরূপ দরখাস্ত কোন উচ্চতর আদালতে দায়ের না করিলে, মামলা দায়েরের দিবস হইতে ডিক্রীর টাকা আদায় হইবার দিবস পর্যন্ত সময়ের জন্য ডিক্রীকৃত টাকার উপর ১২% (বার শতাংশ) বার্ষিক সরল হারে, কোন আপীল, রিভিশন বা অন্য কোন দরখাস্ত কোন উচ্চতর আদালতে দায়ের করিলে পূর্বোক্ত সময়কালের জন্য ১৬% (ষোল শতাংশ) বার্ষিক সরল হারে, এবং আপীল বা উচ্চতর আদালতের ডিক্রী বা আদেশের বিরুদ্ধে আপীল বিভাগে আপীল করিলে, পূর্বোক্ত সময়কালের জন্য ১৮% (আঠার শতাংশ) বার্ষিক সরল হারে, উপ-ধারা (৩) এর বিধান সাপেক্ষে, সুদ, বা, ক্ষেত্রমত, মুনাফা আরোপিত হইবে।

(৩) উপ-ধারা (২) এর বিধান সত্ত্বেও উচ্চতর আদালত আপীল, রিভিশন, আপীল বিভাগে আপীল বা অন্য কোন দরখাস্তে আপীলকৃত বা বিতর্কিত ডিক্রী বা আদেশের গুণগত পরিবর্তন করিয়া কোন আদেশ বা ডিক্রী প্রদান করিলে, উক্ত আদালত, উপরি-উল্লিখিত সংশ্লিষ্ট বর্ধিত সুদ বা মুনাফার হার আপীল বা দরখাস্তকারীর ক্ষেত্রে প্রযোজ্য হইবে না মর্মে আদেশ প্রদান করিতে পারিবে।

(৪) এই ধারার পূববর্তী উপ-ধারাসমূহে ভিন্নতর যাহা কিছুই থাকুক না কেন, ধারা ৪১ ও ৪২ এর বিধান অনুযায়ী বিবাদী-দায়িক কর্তৃক নির্ধারিত পরিমাণ টাকা বা, ক্ষেত্রমত, জামানত জমা করিয়া উচ্চতর আদালতে আপীল বা রিভিশন দায়ের করিবার সুযোগ থাকা সত্ত্বেও যদি কোন বিবাদী-দায়িক অনুরূপ নির্ধারিত পরিমাণ টাকা বা, ক্ষেত্রমত, জামানত জমা না করিয়া নিম্ন আদালতের আদেশ বা ডিক্রীকে প্রত্যক্ষ বা পরোক্ষভাবে তর্কিত করিয়া হাইকোর্ট বিভাগে রীট আবেদন দায়ের করেন এবং উক্ত রীট আবেদন হাইকোর্ট বিভাগ বা আপীল বিভাগ কর্তৃক খারিজ হয়, তাহা হইলে উপ-ধারা (২) এ উল্লিখিত সময়ের জন্য ২৫% বার্ষিক সরল হারে সুদ বা, ক্ষেত্রমত, মুনাফা আরোপিত হইবে।

21. Apparently, the interest calculated by the Bank is found to be illegal and unreasonable for a prudent man; therefore, we have tried with all our might and main to find out the actual interest before starting the Certificate Case. It appears from the record that the certificate proceeding has been started before 14 days of conclusion of two years from the date of disbursement of loan. Admittedly, on perusal of the sanctioned letter (Annexure-2 to the supplementary Affidavit), it appears that the total loan limit is Tk. 2,50,000.00 cash credit hypo with 12% interest, but it can be increased time to time. It appears from Bank Statement that during 28.08.2005 to 30.09.2007, the Bank admittedly imposed 12% interest (Annexure-4).

22. It cannot be denied that CC (Hypo) loan has not been disbursed at a time. But in several dates, Tk. 2,50,000.00 was disbursed. For the sake of argument, if it is taken as granted that the entire amount was disbursed on 28.08.2005; nevertheless, the calculation of interest as shown in the requisition letter is absolutely illegal. The principal amount is admittedly Tk. 2,50,000.00. From 28.08.2005 to 31.12.2005 total 126 days and within 126 days the interest stands at Tk. 10,500.00. From 01.01.2006 to 31.12.2006 total 365 days i.e. within 365 days the interest stands at Tk. 30,000.00 and from 01.01.2007 to 14.08.2007, total

126 days and accordingly, within 126 days the interest stands at Tk. 10,500.00. The total interest is Tk. 51,000.00. If the interest is added with the principal amount that will be Tk. (2,50,000+51,000)= 3,01,000.00; but unfortunately, the Manager of the Bank by his requisition letter (Annexure-A) dated 14.08.2007 claimed Tk. 4,07,184.00 and with Tk. 9,572.00 as Court fees. The Manager of the Bank claimed more money almost Tk. (4,07,184-3,01,000) = 1,06,184.00 which was not due at the relevant time and accordingly, more Court fee was paid which the Bank was not supposed to pay as if to make free with another's money. Since the borrower has to pay the Court fees; therefore, he did not care about this. The requisition letter itself is vague, indefinite and unspecified; rather it is a lumpsum calculation resulting in gross illegality.

23. Now, it is crystal clear that the amount claimed by the Bank was not due at the relevant time but the Certificate Officer without exercising its conscience started the Certificate Case which is unfortunate.

24. After filing the Certificate Case, the Bank imposes highest interest as to the quantum of 14.50% and accordingly, the interest calculated (Annexure-4) may be looked into for better appreciation:

ক্রমিক নং	সময়কাল	সুদের হার	মন্তব্য
(ক)	(খ)	(গ)	(ঘ)
১	২৮/০৮/২০০৫ ইং হইতে ৩০/০৯/২০০৭ ইং পর্যন্ত	১২%	
২	০১/১০/২০০৭ ইং হইতে ৩১/০৩/২০১১ ইং পর্যন্ত	১৪.৫০%	
৩	০১/০৪/২০১১ ইং হইতে ১৮/১০/২০১১ ইং পর্যন্ত	১৪%	
৪	১৯/১০/২০১১ ইং হইতে ২২/১১/২০১১ ইং পর্যন্ত	১২%	
৫	২৩/১১/২০১১ ইং হইতে ৩০/০৯/২০১৪ ইং পর্যন্ত	১৬%	
৬	০১/১০/২০১৪ ইং হইতে ৩১/১২/২০১৫ ইং পর্যন্ত	১৫%	
৭	০১/০১/২০১৬ ইং হইতে ৩১/০৩/২০১৭ ইং পর্যন্ত	১৪%	
৮	০১/০৪/২০১৭ ইং হইতে ৩০/০৯/২০১৭ ইং পর্যন্ত	১২%	
৯	০১/১০/২০১৭ ইং হইতে ৩১/১২/২০১৭ ইং পর্যন্ত	১১%	
১০	০১/০১/২০১৮ ইং হইতে ৩১/০৩/২০১৮ ইং পর্যন্ত	১২%	
১১	০১/০৪/২০১৮ ইং হইতে ৩০/০৯/২০১৯ ইং পর্যন্ত	৯%	

25. By and large after filing the Certificate Case, the calculation of interest has to be made in accordance with section 16 of the PDR Act. If the contention of the respondent-Bank is accepted that the interest and charges are recoverable on the certificate amount upto the date of realization as per the mandate of section 16 of the PDR Act, then it would be safely concluded that the interest imposed during the pendency of the Certificate Case was also unlawful and unjustified.

26. In the Certificate Case, the Certificate Officers passed as many as 105 orders till 13.11.2019. On perusal of the entire order sheets, it transpires that the Certificate Officer allowed the certificate debtor to deposit the certificated amount by installment and accordingly, he deposited more money for which certificate was issued. In this Case, during the tenure of more than 12(twelve) years a considerable number of Certificate Officers took over the charge of dealing with the aforesaid Certificate Case, but they failed to conceive the very purpose of the PDR Act. They did not take positive step in order to dispose of the Certificate Case with utmost sincerity, may be due to lack of their adequate knowledge regarding more than century old PDR Act and Rules therewith.

27. Within the four walls of the order sheets, we do not find that none of the Certificate Officer attempted to dispose of the Certificate Case in accordance with section 14 of the PDR Act; rather she or he kept it pending for indefinite period.

28. Now, we see another aspect of this case that before starting Certificate Case, it is the duty of the Certificate Officer to see as to whether the requisition is filed in a prescribed form under section 5 of the PDR Act and whether the provision of section 6 of the PDR Act has been complied with. In this case, the Certificate Officer without any objective satisfaction and only on the basis of improperly filed requisition letter and without considering as to whether the entire outstanding dues as claimed by the respondent-Bank is actually due at the relevant time, the Certificate Officer started certificate proceeding.

29. Prescribed Form means the forms appended in the PDR Act. The Schedule-II, Rule 84 prescribes the various forms. Form No. 1 clearly spells out that the Certificate Officer has to give certificate that the amount stated in the requisition letter is recoverable and is recovered by suit is not barred by law.

30. It is true that a certificate tantamounts to decree. It cannot be denied that the Certificate Officer's position is like an Executing Court for enforcing the decree of the Civil Court.

31. In the case of *Kalipada Ray v. Mukunda Lal Ray,* reported in 34 CWN 131, it was observed as follows:

> *"A certificate under the Public Demands Recovery Act is considered as equivalent to a decree of a Civil Court. A decree in the form in which the certificate was issued if made by a Civil Court must undoubtedly be held not binding on the minors whose interest is sought to be affected by it. In the case of minors there is a provision in the Public Demands Recovery Act, which has been held a complete code in itself a point to which the Civil Procedure Code has been made applicable."*

32. The *ratio* that Executing Court cannot go behind the decree is not absolute. It has got four exceptions; the Executing Court may refuse to execute the decree, if it is found that the decree was passed by the Court having no jurisdiction or it is made against dead man or the decree is tainted with apparent fraud.

33. For better appreciation and understanding, we should meaningfully go through the section 14 of the PDR Act, which runs as follows:

> *14. Subject to such conditions and limitations as may be prescribed, a Certificate-officer may order execution of a certificate-*
>
> *(a) by attachment and sale, or by sale (without previous attachment), of any property, or*
>
> *(b) by attachment of any decree, or*
>
> *(c) by arresting the Certificate-debtor and detaining him in the civil prison, or*
>
> *(d) by any two or all of the methods mentioned in clauses (a), (b) and (c).*

Explanation to clause (d).-The Certificate-officer may, in his discretion, refuse execution at the same time against the person and property of the certificate-debtor.

34. It cannot be denied that during the pendency of the execution case, the lender Bank or FIs may impose interest, but that interest should be as per law. But the interest, costs and other incidental expenses incurred during the execution proceeding is the discretion of the presiding officer, who presides over certificate proceedings and such discretion has also to be exercised judiciously, carefully, cautiously and not whimsically.

35. It cannot be denied that a writ of certiorari controls all courts, tribunals, and other authorities when they purport to act without jurisdiction, or in excess of it. It is also available in case of violation of the principles of natural justice or where there is an error of law apparent on the face of record. If the Court or executing authority does not perform its obligation in accordance with law, the writ of certiorari may be invoked. In the meantime 12 years have already been elapsed, if this small borrower goes for appeal or revision as embodied in PDR Act itself, it may take another 12 years and it will not yield him any positive, effective and speedy result. Moreover, without being any final decision by the Certificate Officer, it would not possible to take resort of Appeal. Therefore, we hold our view that the writ of certiorari is an appropriate and efficacious remedy in this case in hand. Since the starting of certificate proceeding is not in accordance with law; therefore, the entire proceeding is liable to be quashed to secure the ends of justice.

36. Experience shows that the calculation of interest is a very challenging job and at times, we find that the Bank officials are not so vigilant and not so diligent in calculating interest; therefore, Bangladesh Bank should exercise its power as embodied under section 45 and 49 of the Bank Company Ain, 1991 to inspect the case as to the calculation of interest by FIs at least on random basis. Bangladesh Bank should examine as to whether the interest calculated is in accordance with law or not. Mere denial or no objection as to calculation of interest by the borrower does not *ipso facto* give validity of the statement as to interest. On the face of the record, we find that the calculation of interest is wrongly made in the case in hand.

37. The Certificate Officers who dealing with the Certificate Case are not well aware as to the latest position of law; therefore, they should impart comprehensive training on certificate proceeding so that they may handle the cases of public importance effectively.

38. The PDR Act is a self-contained, exhaustive and consolidated Act. It provides the speedier and easier procedure in matters of realization of various kinds of dues which are basically undisputed in nature such as fines, fees, rent, rates, land revenue and charges payable to the government, local authorities and Court of wards. Cases involving dispute in which the debtor reasonably can demonstrate some facts denying his liability to pay the dues, should invoke protection under the jurisdiction of Civil Court by instituting a suit therefore. The primary condition for the issuance of certificate is the satisfaction of the Certificate Officer that the demand is due from the debtor. This involves the question of application of the mind of the Certificate Officer for the purpose of summary determination of the right of certificate-debtor. The nature of dues that are realizable under the certificate procedure has been described in Schedule I of the PDR Act. The very foundation for the exercise of jurisdiction for the purpose of realization of dues under the certificate procedure by the Certificate Officer, is based on a condition precedent that if any demand does not come and fall within the purview of the nature of demands described in Schedule I of the Act, the Certificate Officer must cease to act under the PDR Act.

39. The Ain, 2003 was enacted for speedy recovery of outstanding loan of the FIs including the Bank. Being special law is directed towards special objects, special measure i.e. speedy realization of the loan money from the borrower gives rise to special cause of action and itself provides for the methods of enforcement of such rights conferred by that Act. The nature and function of the Artha Rin Adalat coupled with power and authority clearly indicate that it is special forum of limited jurisdiction and not an ordinary Civil Court.

40. Our penultimate conclusion is that-

i. Court cannot just remain as silent spectator to a glaring primacy illegality in calculation of the interest, costs and charge etc.;

ii. In a Certificate Case, the provision of section 50 of the Ain, 2003 so far it relates to interest, profit cannot be applicable rather the provision of section 16 and 45 of the PDR Act shall apply, otherwise it will frustrate the purpose of empowering the Certificate Officer in disposing Certificate Case filed by FIs for recovery of a small amount not more than Tk. 5 lacs;

iii. The Certificate Officer acted in flagrant violation of some provisions of the PDR Act, therefore, the entire proceedings before the Certificate Officer was without jurisdiction, then the High Court Division in exercise of its extraordinary jurisdiction as enshrined under Article 102 of the Constitution may quash the certificate proceeding as an appropriate case;

iv. The Certificate Officer has absolute domain to determine the interest, costs and charges therewith; this power cannot be circumvent by FIs;

v. The purpose of awarding compensation to the judgment debtor is undoubtedly laudable; because it was incorporated to protect the unfortunate judgment debtor as a safety bulb, but it is seldom found in practice;

vi. Admittedly, the certificate holder sanctioned loan of Tk. 2,50,000.00 and in the meantime, the petitioner paid Tk. 6,83,756.00; nevertheless, the Certificate Officer kept the Certificate Case alive, therefore, the same is repugnant to the provision of law and has hopelessly frustrated the very purpose of the special enactment;

vii. From the order sheets of the Certificate Case, the Certificate Officer passed as many as 105 orders between 12.09.2007 to 13.11.2019 and the Certificate Officer without awarding civil imprisonment issued warrant of arrest against the petitioner several times and thereby, negated the provisions of the PDR Act which is highly deprecated;

viii. The order sheets demonstrate that the Certificate Officers are not well aware as to the PDR Act and other allied Rules; therefore, they kept the Certificate Case pending for indefinite period without conceiving the very purpose of the PDR Act; therefore, Bangladesh Civil Service Administration Academy, Shahbagh, Dhaka may arrange two weeks long special course for the Certificate Officers in order to equip them in this particular law so that the outstanding dues of the FIs may be recovered speedily by exercising the power bestowed upon the Certificate Officers within the four walls of the PDR Act. It is our considered view that if meritorious and laborious officers belonging to BCS admin cadre are trained up and posted as Certificate Officer, it will undoubtedly yield very positive result and as such the long pending Certificate Cases be disposed of speedily;

ix. The experience shows that after taking small amount of loan, the borrowers are getting poorer and on the other hand, the big sort are getting richer having received huge amount of loan and the Bank and FIs are at times found very reluctant in pursuing the legal action against them causes are best known to the authority of the

FIs; on the other hand, in order to catch up a small fry the Bank incurs money more than the loan sanctioned by it for litigation;

x. The petitioner as a small furniture businessman of the locality upon receiving Tk. 2,50,000.00 in different times by mortgaging his homestead got involved in the long drawn legal net by the Bank authority within 2(two) years;

xi. The requisition has not verified by the Manager of the Bank as per the mandate of the Schedule II, Rule I and therefore, the very initiation of the Certificate Case is absolutely illegal and unfounded;

xii. The facts and circumstances of the cases reported in 12 ADC 336; 68 DLR (AD)10 and 69 DLR (AD) 366 referred to by the respondent-Bank are distinguishable from the case in hand. In this respect, we are tempted to discuss the observations of Lord Denning in the matter of applying judicial precedent which have become locus classicus:

> *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo, J.) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.*
>
> *...*
>
> *Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."*

xiii. The continuation of certificate proceeding shall be an abuse of the process of the Law and in the meantime, the very initiation of the certificate proceeding is baseless and unfounded; therefore, by applying our judicial conscience and activism, we hold the view that the certificate proceeding should be buried at this stage in order to save money, time and energy of the parties to the said proceeding. Accordingly, we find merit in this Rule and the same is legally bound to be made absolute. Consequently, the Certificate Case No. 80/2006-2007 pending before the General Certificate Officer, Rajshahi is liable to be quashed.

41. In the result, the Rule is made absolute, however, without passing any order as to costs. The earlier order of stay granted by this Court, thus stands vacated and recalled.

42. We do hereby quash the Certificate Case No. 80/2006-2007 pending before the General Certificate Officer, Rajshahi.

43. The respondent No. 3, the Bank, is directed to redeem the mortgage property of the petitioner by executing and registering a deed of redemption in favour of the petitioner within 2 months from the date of receiving the copy of the judgment and handed over the relevant documents to the petitioner.

44. Let a copy of the judgment be communicated to (i) the Governor of Bangladesh Bank, (ii) the Rector of Bangladesh Civil Service Administration Academy, Shahbagh, Dhaka and (iii) the Managing Director of Agrani Bank Ltd. for taking necessary step as per the observations appended to the body of the judgment.

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HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 7143 OF 2021

Samia Rahman
.........Petitioner
Vs.
The Government of the People's Republic of Bangladesh and others
.......Respondents

Mr. Hassan M.S. Azim with Mr. Ashfaqur Rahman, Advocates
…..For the Petitioner
Mr. Naim Ahmed with Mr. Shahin Alam, Advocates
.... For the Respondent Nos.2 and 6

Heard on: 07.04.2022, 21.07.2022, 27.07.2022 and 03.08.2022.
Judgment on: 04.08.2022.

Present:
Mr. Justice Zafar Ahmed
And
Mr. Justice Md. Akhtaruzzaman

Editors' Note:
This writ petition was filed by one Associate Professor of the department of Mass Communication and Journalism of Dhaka University when the University Syndicate demoted her to the post of Assistant Professor for a period of two years on the basis of report of the tribunal formed to enquire the allegations of plagiarism against her. The tribunal did not categorically find the petitioner to have adopted plagiarism, but found that the published article lacks quality. The tribunal did not recommend to award her relegation. But the syndicate arriving at the decision that the petitioner resorted to plagiarism handed her the above punishment. The petitioner claimed that without following the due process of law and violating natural justice most illegally she was punished. On the other hand, respondent claimed that the petition was not maintainable as it involved resolution of disputed questions of facts and the petitioner failed to exhaust the alternative remedy of appeal before the Hon'ble Chancellor of the University. The High Court Division held that the matter of copying being a question of fact cannot be decided in the Writ Jurisdiction but the authority concerned should have acted in accordance with law giving the petitioner adequate opportunity of being heard before awarding punishment. Moreover, considering plagiarism as intellectual crime the court has expressed frustration and held that the tendency of plagiarism among the University teacher is alarming and shocking for the nation. Finally, the High Court Division declared the decision of the Syndicate demoting the petitioner as illegal.

Key Words:
Plagiarism; Regulation 7(a) of the Enquiry Committee and Tribunal (Teachers and Officers) Regulations,1980; Article 52 of the Dhaka University Order,1973; Section 38(5), 45(5) of the First Statutes of the University of Dhaka

Mandatory requirements to initiate a departmental proceeding:

It appears that framing charge as well as specification of penalty proposed to be imposed by the Syndicate upon the petitioner are mandatory requirements to initiate a departmental proceeding. Upon receiving the reference from the Syndicate the Enquiry Committee shall communicate the charge to the concerned accused together with the statements of allegations and request him/her to submit, within 7(seven) days from the day the charge is communicated to him/her, a written statement of his/her defense and to show cause at the same time why the penalty proposed should not be imposed on him/her and also states whether he/she desires to be heard in person or not. After framing the charge by the Syndicate the Tribunal shall take into consideration of the charges framed, the evidence on record, both oral and documentary, including the additional evidence, if any, accepted by it and recommend such action against the accused as it may deem fit. In the case in hand, admittedly no formal charge was framed which is *sine quo non* to start a formal departmental proceeding. (Paras 26 and 27)

Regulation No. 7 of the Enquiry Committee and Tribunal (Teachers and Officers) Regulations, 1980; section 45(5) of the First Statute of the University of Dhaka and Article 52 of the Dhaka University Order, 1973:

In the instant case, prior to referring the allegations to the Enquiry Committee set up by the Syndicate for enquiry into the allegations brought against the petitioner, the Syndicate omitted to frame a formal charge against the petitioner with a statement of the allegations on which the charge is based and also specifying therein the penalty proposed to be imposed in terms of Regulation No. 7 of the *Enquiry Committee and Tribunal (Teachers and Officers) Regulations, 1980* and hence, the entire exercise by the respondent No. 2 University of Dhaka and its officials leading up to the purported demotion of the petitioner in service by the Syndicate is *void ab-initio* and, as such, *non est* in the eye of law, rendering the said purported demotion to be without lawful authority and is of no legal effect. Moreover, under section 45(5) of the First Statute of the University of Dhaka only those orders of the Syndicate which are passed on the recommendation of the Tribunal are appealable, whereas, in the instant case, since the impugned order of demotion of the petitioner in service was passed by the Syndicate without any recommendation of the Tribunal, there is no appealable order from the Syndicate and, hence, no question of preferring any appeal under Article 52 of the Dhaka University Order, 1973 arises and, thus, there is no applicability of the decision reported in 44 DLR (AD) 305 in the facts and circumstances of the case in hand. (Para-29)

The Tribunal categorically found that the petitioner cannot be made accused for direct plagiarism, but the Syndicate demoted the petitioner for plagiarism which is absolutely baseless and whimsical inasmuch as the Syndicate can only punish someone based on the findings of facts arrived at by the Tribunal. (Para 30)

Admittedly, the petitioner was not provided with any of the reports of either the Enquiry Committee or the Tribunal and, as such, the petitioner was not given an effective opportunity to prefer an appeal against the Syndicate's decision to demote her which is also a grave violation of the principles of natural justice and, thus, in our view,

there is no bar in filing a writ petition under Article 102 of the Constitution against such decision of the Syndicate. (Para 31)

The observance of the principles of natural justice is not an idle formality. A meaningful opportunity to defend oneself must be given under any circumstances to its truest sense and, in the instant case, the respondents sought to show ceremonial observance of the principles of the natural justice as an eye wash for an ulterior purpose without affording any real opportunity to the petitioner to defend herself by not furnishing the enquiry report as well as the report of the Tribunal. It appears that the impugned decision of the Syndicate is vitiated by bias and *malafide* inasmuch as while the petitioner was awarded with a major punishment with the stigma of plagiarism but despite repeated requests, she was not given a copy of the enquiry report. The Syndicate did not care to consider the long delay in completing the enquiry. (Para 32)

JUDGMENT

Md. Akhtaruzzaman, J.

1. In an application under Article 102 of the Constitution of the People's Republic of Bangladesh, the Rule was issued on 05.09.2021 calling upon the respondents to show cause as to why the impugned decision of the respondent No.3 Syndicate as contained in the Memo No. রেজি: প্রশা-১/৩৯২৫১ dated 15.02.2020 (Annexure-A) issued under signature of the respondent No.6 Registrar, University of Dhaka purportedly demoting the petitioner with stigma from the post of Associate Professor of the Department of Mass Communication and Journalism of the University of Dhaka to the post of Assistant Professor for a period of 2(two) years with effect from 28.01.2021 pursuant to a resolution adopted in its meeting held on 28.01.2021 shall not be declared to be without lawful authority and is of no legal effect and as to why the respondent Nos. 2-4, 6-7 shall not be directed to grant all usual service as well as financial benefits to the petitioner with effect from 28.01.2021 and /or such other or further order or orders as to this Court may seem fit and proper.

2. Facts, relevant for disposal of the Rule, in brief, are that the petitioner was an Associate Professor of the Department of Mass Communication and Journalism of the University of Dhaka (hereinafter, the 'University'). She along with one Syed Mahfujul Haque Marjan, Lecturer of the Department of Criminology of the University submitted an Article titled "*A new Dimension of Colonialism and Pop Culture: A Case Study of the Cultural Imperialism*" for publication in the Social Sciences Review of the University which was eventually published in the December 2016 issue of the Social Sciences Review of the Dhaka University Studies, Part D, Volume 33, No. 2 (Annexure 'B'). After publication of the Article, one Alex Martin, Administrative Assistant of the Chicago Journal, submitted a complaint before the Vice-Chancellor of the University by an e-mail dated 15.09.2017 stating that the Article published by the petitioner is plagiarized from an Article titled *"The Subject and Power"* written by Michel Foucault published in Volume 8, Number 4, Summer 1982, pages 777-795, of the Chicago Journal (Annexure 'E'). The Syndicate of the University formed an Enquiry Committee consisting of 5(five) members vide its decision dated 27.09.2017. The said Enquiry Committee held meetings on several days, notice was issued and the petitioner was interviewed by the Enquiry Committee. The petitioner also filed written representation dated 22.11.2017 before the Enquiry Committee. The Enquiry Committee submitted its report on 28.10.2019 with a finding that the allegation of plagiarism is true. The Syndicate of the

University considered the report and constituted a Tribunal on 29.10.2020 consisting of 3(three) members. One of the members was to be nominated by the petitioner as her representative. The petitioner nominated her representative. The Tribunal issued a show cause notice to the petitioner on 24.12.2020. The petitioner replied to the same on 02.01.2021. The Tribunal held several meetings on the issue and after due consideration, submitted its report on 25.01.2021 recommending minor punishment of withholding promotion as well as increase of salary for one year to be awarded to the petitioner. Eventually, the report of the Tribunal was placed before the Syndicate, which on 28.01.2021, considered the same and decided to demote the petitioner from the post of Associate Professor to the post of Assistant professor for a period of two years. The co-author of the disputed Article, the respondent No.9 was also punished by the Syndicate on the same date. His promotion was withheld for 2(for) two years to be counted from the date of his joining after expiration of his study leave. Thereafter, the petitioner filed an application before the Hon'ble Chancellor of the University on 08.03.2021 which is still pending.

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

4. The respondent Nos. 2 and 6 contested the Rule by filing an affidavit-in-opposition.

5. Mr. Hassan M.S. Azim, the learned Advocate appearing for the petitioner takes us through the writ petition as well as the annexures thereto, the materials on record and submits that the impugned decision of the Syndicate of the University demoting the petitioner with stigma from the post of Associate Professor to the post of Assistant Professor for a period of 2(two) years is clearly violative of the principles of natural justice inasmuch as despite repeated prayers, the petitioner was never furnished with copies of the enquiry report as well as the decision of the Tribunal to enable her to set up an effective defence.

6. According to Mr. Azim the impugned decision is bad in law for the reason that the same passed on the basis of a fake e-mail without verifying its authenticity with an ulterior motive to tarnish her image and to destroy her career as a brilliant journalist and educationist.

7. The learned Advocate of the petitioner further submits that there was no signature of the petitioner to be found in the relevant records and the petitioner was also not given a copy of the comment and feedback of the reviewer ever and thus, she was specifically targated by a vested quarter for the purpose of humiliation and harassment.

8. Mr. Azim further submits that the so-called show cause notice dated 24.12.2020 issued by the Tribunal was violative of Regulation 7(a) read with Regulation 11 of the Enquiry Committee and Tribunal (Teachers and Officers) Regulations, 1980 which categorically provides that Syndicate shall frame charge and specify therein the penalty proposed to be imposed, which was not done in the case of the petitioner, and, as such, the said show cause notice cannot be termed as a statutory show cause notice.

9. Mr. Azim next submits that in the absence of any rules or regulations defining plagiarism, imposition of the penalty in question upon the petitioner was a high feat of arbitrariness in the facts and circumstances of the case.

10. Mr. Azim also contends that in any view of the matter, the long delay of about 6(six) months in disposing of the appeal filed by the petitioner before the Hon'ble Chancellor on

08.03.2021 would be deemed to have been rejected and the petitioner cannot be reasonably expected to wait for an indefinite period for disposal of the Appeal by the Hon'ble Chancellor. The impugned decision is liable to be set aside and the petitioner is entitled to have all her service as well as financial benefits restored with effect from 28.01.2021 as before inasmuch as the same is violative of the fundamental rights of the petitioner as guaranteed under Articles 27, 31 and 40 of the Constitution.

11. In support of his submissions, the leanred Advocate relied upon the decisions reported in 69 DLR (AD) 10, 22 BLD (AD) 102, 11 BLT (AD) 221 and 8 ADC 289.

12. Per contra, Mr. Naim Ahmed, appearing with Mr. Shahin Alam, learned Advocates for the Respondent Nos. 2 and 6 submits that the instant writ petition involves resolution of disputed questions of facts which cannot be decided in writ jurisdiction and accordingly the writ petition is not maintainable. He next submits that the petitioner has failed to exhaust the alternative remedy of appeal before the Hon'ble Chancellor of the University as provided in Article 52 of the Dhaka University Order, 1973. Mr. Ahmed also submits that the provision of appeal under Article 52 of the Dhaka University Order 1973 is an equally efficacious remedy and, as such, while the statutory appeal is pending, it cannot be 'deemed to have been rejected' and for that reason, the instant writ petition is not maintainable. Mr. Ahmed further submits that there is no requirement under any law/rule/regulation of the University under which the signature of the author is required at the time of submitting any Article for publication in the University Journal. Mr. Ahmed next submits that the petitioner admitted in her letter dated 05.02.2017 that she was primarily responsible as the main researcher to correct the mistakes in the Article and further that she sent the draft and she was responsible to follow up the matter and she should have stopped the publication. In view of such clear admission, the writ petitioner has no ground to challenge the impugned decision of the Syndicate. According to Mr. Ahmed, admittedly the complaint of plagiarism was first raised in February 2017 which is well before the e-mail dated 15.09.2017 of Mr. Alex Martin. The allegation of plagiarism has been found to be true after following proper procedure through the Enquiry Committee and the Tribunal and, as such, the question of authenticity of the e-mail of Mr. Alex Martin is not relevant and the same will not vitiate the proceedings - Mr. Ahmed adds. The learned Advocate also contends that any claim with respect to genuineness of Mr. Alex Martin and the e-mail leads to questions of fact which cannot be decided in writ jurisdiction. The learned Advocate further submits that the principles of natural justice were not denied since the petitioner had opportunity to present her case verbally and in writing before the Enquiry Committee and the Tribunal which she did. The learned Advocate also submits that the petitioner was issued show cause notice by the Tribunal clearly stating the allegations against her and she nominated her representative to sit as a member of the Tribunal and the said representative took part in the proceedings of the Tribunal and put his signature in the report of the Tribunal without any dissent. Mr. Ahmed further contends that the Syndicate framed charge in general terms. Thereafter, the Tribunal in its notice dated 24.12.2020 stated the allegations in details allowing her to defend her case properly. Mr. Ahmed finally submits that the Syndicate has discretion to accept or reject the recommendations of the Tribunal and the said power of the Syndicate, being a statutory power, cannot be curtailed or challenged under judicial review. In Support of his submission, the learned Advocate relied upon the decision reported in 44 DLR (AD) 305.

13. For appreciating the arguments as advanced before us, at first we would like to quote the relevant provision of Article 52 of the Dhaka University Order, 1973 which is reproduced as under:

"52(1) An appeal against the order of any officer or authority of the University affecting any person or class of persons in the University may be made by petition to the Chancellor who shall send a copy on receipt of the petition thereof to the officer or authority concerned and shall give such officer or authority an opportunity to show cause why the appeal should not be entertained.

(2) The Chancellor may reject any such appeal or may, if he thinks fit, appoint an Enquiry Commission consisting of such persons as are not officers of the University or members of any authority thereof, to enquire into the matter and to submit to him a report thereon.

(3) The Chancellor shall, on receipt of the Enquiry Commission's report, send a copy thereof to the Syndicate and the Syndicate shall take the report into consideration and shall, within three months of the receipt thereof, pass a resolution thereon which shall be communicated to the Chancellor, who shall then take such action on the report of the Enquiry Commission and resolution of the Syndicate as he may think fit.

(4) An Enquiry Commission appointed under clause (2) may require any officer or authority of the University to furnish it with such papers or information as are, in the opinion of the Enquiry Commission, relevant to the matter under enquiry, and such officer or authority shall be bound to comply with such requisition."

14. On perusal of the materials on record, it appears that being aggrieved by and dissatisfied with the impugned Memo, the petitioner preferred an appeal under section 38(5) of the First Statutes of the University under the Schedule to the Dhaka University Order, 1973 before the Hon'ble Chancellor on 08.03.2021 through registered mail but till date, the petitioner has not heard anything from the office of the Hon'ble Chancellor.

15. The main allegation brought against the petitioner by the respondents is that the she submitted the disputed Article titled *"A New Dimension of Colonialism and Pop Culture: A Case Study of the Cultural Imperialism"* for publication in the Social Sciences Review of the University where she was joint author with respondent No. 9 which was plagiarized from the Atricle titled *"The Subject and Power"* written by Michel Foucault published in Volume 8, November, 4, Summer 1982, Pages 777-795 of the Chicago Journal.

16. In order to inquire into the allegations, the Syndicate formed a 5-member Enquiry Committee. The Pro-Vice-Chancellor of the University was the convernor of the Committee. The members were full Professors of the University drawn from different departments. The relevant portions of the enquiry report read as under:

"**পর্যালোচনাঃ**

Oxford Dictionary অনুযায়ী Plagiarism is "The practice of taking someone else's work or ideas and passing them off as one's own". Merriam-Webster Online Dictionary-এর মতে Plagiarize verb অর্থ: (a) to steal and pass off (the ideas or words of another) as one's own: (b) use (another's production) without crediting the source to commit literary theft: (c) present as new and original an idea or product derived from an existing source.

. . . .

তদন্ত কমিটি উল্লেখিত প্রবন্ধটি পরীক্ষা-নিরীক্ষা করে দেখতে পায় যে,

(১) প্রবন্ধটির ৬০টি অনুচ্ছেদের মধ্যে প্রায় ৪৮টি অনুচ্ছেদ হুবহু কপি করা হয়েছে। তন্মধ্যে Colonialism to Cultural Imperialism: Edward Said (পৃষ্ঠা: ৮৭-৯১) অংশে Edward Said রচিত Culture and Imperialism বইয়ের বিভিন্ন অংশ থেকে প্রবন্ধটিতে অবিকল ২৭% প্রবন্ধে তুলে দিয়েছেন। এছাড়াও

Michel Foucault-র "The Subject and Power" প্রবন্ধ থেকেও আনুমানিক পাঁচ পৃষ্ঠা (৩০%) সরাসরি কপি করা হয়েছে। এমনকি, Foucault-কে নিয়ে Ryan Jocobs-এর লেখা থেকেও কোন রেফারেন্স ছাড়াই নিজেদের লেখায় (৫%) সরাসরি কপি করেছেন। আলোচিত অংশগুলো বাদ দিলে প্রবন্ধটির আর তেমন কিছুই অবশিষ্ট থাকে না। Turnitin এই প্রবন্ধটিতে বিভিন্ন সোর্স থেকে আনীত প্রায় ৭০% টেক্সেটের মিল পেয়েছে।

(২) লেখকদ্বয় Edward Said বা Michel Foucault লেখাকে সরাসরি নিজেদের বলে চালিয়ে দেয়ার চেষ্টা করেন নি বলে দাবী করেন। প্রবন্ধে Said ও Foucault-এর নাম যথাক্রমে ২৪ বার ও ২৮ বার উল্লেখ করা হয়েছে। তবে, সাইটেশনের নিয়মানুযায়ী সরাসরি উদ্ধৃতির ক্ষেত্রে শব্দসীমা থাকে। লেখকদ্বয় অনুমোদিত শব্দসীমা লঙ্ঘন করে অবলীলায় পাতার পর পাতা সরাসরি কপি করেছেন যা নিয়ম বহির্ভূত হয়। এছাড়াও, তারা প্রবন্ধে Ryan Jocobs-এর রেফারেন্স দেন নি। লিখিত বক্তব্য ও সাক্ষাৎকারে তারা তাদের অজ্ঞতার কথা বলেছেন। সাংবাদিকতার শিক্ষার্থী ও প্রত্যক্ষ সাংবাদিকতার অভিজ্ঞতা থাকায় তাদের এই অজ্ঞতার যুক্তিটি গ্রহণযোগ্য নয়। এছাড়াও, লিখিত বক্তব্যে তারা একজন আরেকজনকে দোষারোপ করে প্রকারান্তরে তাদের বিরুদ্ধে আনীত অভিযোগ স্বীকার করে নিয়েছেন।

(৩) এখানে বিশেষভাবে উল্লেখ্য যে, এই প্রবন্ধটির রিভিউয়ার স্পষ্টই এতে মৌলিক অসংগতি রয়েছে বলে উল্লেখ করেছিলেন। রিভিউ রিপোর্ট লেখকদের সরবরাহ করা হয়েছিল কিনা এবং সে আলোকে লেখাটিতে প্রয়োজনীয় সংশোধন করা হয়েছিল কিনা সেটি স্পষ্ট নয়। এ বিষয়ে কোন দালিলিক প্রমাণও নেই। প্রবন্ধটি জমা করা থেকে শুরু করে রিভিউ এবং তৎপরবর্তীতে চূড়ান্তভাবে গ্রহণ ও ছাপানোর কার্যক্রমে তৎকালীন এডিটরিয়াল বোর্ডের রেকর্ড সংরক্ষণে দুর্বলতা/ঘাটতি রয়েছে।

(৪) যদিও প্রবন্ধটির শিরোনাম ছিল "A New Dimension of Colonislism and Pop Culture: A Case Study of the Cultural Imperialism", প্রবন্ধটির মূল অংশে কোথাও Pop শব্দটি একবারও ব্যবহার করা হয় নি। এছাড়া, পৃ, ৮৬ তে একটি উদ্বৃতি অসম্পূর্ণ রয়েছে। এমন একটি দুর্বল ও মানহীন প্রবন্ধ কীভাবে Social Science Review-তে ছাপা হলো তা কমিটির কাছে বিস্ময়ের। কমিটি মনে করে যে, এডিটরিয়াল বোর্ড দায়িত্ব পালনে ব্যর্থ হয়েছে।

সর্বোপরি, প্রবন্ধটিতে Edward Said রচিত Culture and Imperialism ও Critical Inquiry জার্নালের Michel Foucault রচিত প্রবন্ধ "The Subject and Power" থেকে বহুলাংশে হুবহু কপি করা হয়েছে। যথাযথভাবে শব্দান্তরিত করা কিংবা নিয়মানুযায়ী সরাসরি উদ্ধৃতির ক্ষেত্রে অনুমোদিত শব্দসীমার মাত্রা লেখকদ্বয় অনুসরণ করেন নি। এছাড়াও, Foucault -কে নিয়ে Ryan Jocobs-এর লেখা থেকে রেফারেন্স ছাড়াই কপি করা হয়েছে। লিখিত বক্তব্য ও সাক্ষাৎকারে তারা উভয়েই বর্ণিত প্রবন্ধে যথাযথ সাইটেশন দেয়া হয় নি বলে স্বীকার করেছেন। তারা তাদের প্রবন্ধটি Social Science Review -থেকে প্রত্যাহার করে নিতে বলেছিলেন কিন্তু তাদের দাবীর কোন প্রমাণপত্র দেখাতে পারেন নি। মিসেস সামিয়া রহমান সাক্ষাৎকারে (২২-১১-২০১৯) বলেন, ডিন অফিস তার অভিযুক্ত প্রবন্ধটি হারিয়ে ফেলেছে। কিন্তু ডিন অফিসে প্রবন্ধটি সংরক্ষিত ছিল। এমতাবস্থায়, তদন্ত কমিটি মনে করে যে, Alex Martin -এর অভিযোগটির সত্যতা রয়েছে।

লেখকদ্বয় উল্লেখ করেন যে, তারা আরও বেশ কয়েকটি প্রবন্ধ যৌথভাবে রচনা করেছেন। তাই সেটি বিবেচনায় নিয়ে তদন্ত কমিটি এই লেখকদ্বয়ের রচিত আরও ৩টি প্রবন্ধ তদন্তের অধিকতর গ্রহণযোগ্যতার জন্য খতিয়ে দেখা সমীচীন বলে মনে করে। ফলস্বরূপ, তাদের যৌথভাবে রচিত আরও ৩টি প্রবন্ধে নিম্নিলিখিত গরমিল রয়েছে বলে কমিটির নিকট প্রতীয়মান হয়:

(১) ২০১৩ সালে Social Science Review -এর ৩০ তম ভলিউমে প্রকাশিত "Talk Shows in Bangladeshi TV Channels: Audience Perceptions and Perspectives" শীর্ষক প্রবন্ধটিতে তারা বিভিন্ন উৎস থেকে একাধিক অনুচ্ছেদ যথাযথ সাইটেশন ছাড়া সরাসরি কপি করেছেন।

(২) Social Science Review -থেকে প্রকাশিত লেখকদ্বয়ের আরেকটি প্রবন্ধে তারা মোট ২৬টি অনুচ্ছেদ হুবহু অন্যদের লেখা থেকে কপি করেছেন। "Journalism, New Media and their Consequences: Perspective Bangladesh" শীর্ষক এই লেখায় Turnitin ব্যবহার করে ৬৪% টেক্সট সিমিলারিটি পাওয়া গেছে। এখানে তারা মার্ক ডেইজ-এর "The web and its journalisms: Considering the consequences of different types of newsmedia online" প্রবন্ধ থেকে সরাসরি কপি করেছেন।

(৩) লেখকদ্বয়ের একসাথে আরেকটি লেখা Mass Communication and Journalism নামের একটি ওপেন এক্সেস জার্নাল থেকে প্রকাশিত হয়। "Role of Mass Media in Setting Agenda and manufacturing Consent: A Study on Wars to Rise of Radical Group (Hefajat-e-

Islam) in Bangladesh"-শীর্ষক লেখাটির একটি উল্লেখযোগ্য অংশ সাইটেশন ছাড়াই একাধিক উৎস থেকে সরাসির তুলে দেওয়ার প্রমাণ মিলেছে। উল্লেখ্য, বর্ণিত জার্নালটি একটি চিহ্নিত প্রিডেটরি প্রকাশক কর্তৃক প্রকাশিত হয়।

মিসেস সামিয়া রহমান ও সৈয়দ মাহফুজুল হক মারজান ঢাকা বিশ্ববিদ্যালয়ের শিক্ষক হিসেবে কর্মরত আছেন। তাদের যৌথভাবে লিখিত/প্রকাশিত অভিযুক্ত প্রবন্ধটি ছাড়াও আরও ৩টি প্রবন্ধে সাইটেশনে ঘাটতিসহ হুবহু কপি করার অভিযোগ সত্য। তাদের এই ধরনের কর্মকান্ডের ফলে ঢাকা বিশ্ববিদ্যালয়ের শিক্ষকদের ও ঢাকা বিশ্ববিদ্যালয়ের একাডেমিক ভাবমূর্তি ভীষণভাবে ক্ষুণ্ন করেছে। এছাড়াও, বিষয়টি নিয়ে গণমাধ্যমে ব্যাপক সমালোচনা হয়েছে। সর্বোপরি শিক্ষার্থীদের কাছে শিক্ষক হিসেবে কেবলমাত্র নিজেদের মর্যাদাহানি হয়নি সমগ্র শিক্ষক সমাজের ভাবমূর্তি নিয়ে সমালোচনা অব্যাহত আছে।

কমিটি আরও দেখতে পায় যে, যদি Alex Martin অভিযোগ না করতেন তাহলে হয়তো বিষয়টি ধরা পড়তো না। এভাবে হুবুহু কপি করে প্রবন্ধ প্রকাশ করে একাডেমিক সুবিধা নেয়া চাকুরী শৃঙ্খলার পরিপন্থি এবং নৈতিক স্খলন। ভবিষ্যতে এ ধরণের কাজ ঢাকা বিশ্ববিদ্যালয়ের শিক্ষকরা যেন বিরত থাকেন সেজন্য কঠোর আইনী পদক্ষেপ/সিদ্ধান্ত গ্রহণ করা উচিত বলে কমিটি মনে করে।

<u>কমিটির সুপারিশ</u>

<u>অভিযোগ সংক্রান্ত সুপারিশ:</u>

Alex Martin কর্তৃক গণযোগাযোগ ও সাংবাদিকতা বিভাগের সহযোগী অধ্যাপক মিসেস সামিয়া রহমান এবং ক্রিমিনোলজি বিভাগের প্রভাষক সৈয়দ মাহফুজুল হক মারজান লিখিত প্রবন্ধটিতে Plagiarism-এর যে অভিযোগ করা হয়েছে তা কমিটির কাছে সঠিক বলে প্রতীয়মান হয়েছে। গণযোগাযোগ ও সাংবাদিকতা বিভাগের সহযোগী অধ্যাপক মিসেস সামিয়া রহমান ও ক্রিমিনোলজি বিভাগের প্রভাষক সৈয়দ মাহফুজুল হক মারজান তাদের যৌথনামে প্রকাশিত প্রবন্ধসমূহে ধারাবাহিকভাবে ও অবলিলায় অন্য প্রবন্ধ থেকে সাইটেশনের নিয়মনীতি অনুসরণ না করে কপি/পেস্ট করে গেছেন। এমতাবস্থায়, অভিযুক্ত শিক্ষকদের বিরুদ্ধে পরবর্তী ব্যবস্থা গ্রহণের জন্য বিষয়টি সিন্ডিকেটে পেশ করা হলো।

<u>প্রবন্ধটি প্রত্যাহারের সুপারিশ:</u>

প্রবন্ধটিতে যেহেতু Plagiarism-এর অভিযোগ প্রতীয়মান হয়েছে সেহেতু অভিযুক্ত প্রবন্ধটি Social Science Review থেকে প্রত্যাহার করার বিষয়ে কমিটি সুপারিশ করছে। লেখাটি প্রত্যাহার করা হলো মর্মে Social Science Review-এর পরবর্তী কোন সংখ্যায় তা প্রকাশের প্রয়োজনীয় ব্যবস্থা গ্রহণের সুপারিশ করা হলো।

<u>এডিটরিয়াল বোর্ডের জন্য সুপারিশ :</u>

অভিযুক্ত প্রবন্ধটি জমা দেয়া থেকে শুরু করে রিভিউ, চূড়ান্তভাবে গ্রহণ ও ছাপানের প্রক্রিয়াতে অস্বচ্ছতা ও অদক্ষতা রয়েছে। এক্ষেত্রে, যথাযথ রেকর্ড সংরক্ষণে তৎকালীন এডিটরিয়াল বোর্ডের দুর্বলতা ছিল। লেখাটি কে জমা দিয়েছিল সে বিষয়ে অথারদের মধ্যে মতদ্বৈততা রয়েছে এবং তদন্ত কমিটির কাছেও বিষয়টি স্পষ্ট নয়। এতদ্সত্ত্বেও, তারা কেউ অথারশিপ প্রত্যাহার করেন নি। এডিটরিয়াল বোর্ডকে প্রবন্ধ জমা থেকে শুরু করে প্রকাশনা পর্যন্ত দালিলিক প্রমাণপত্র সংরক্ষণের বিষয়ে কমিটি সুপারিশ করছে। প্রতিটি মূল প্রবন্ধে পান্ডুলিপি জমাদান, রিভিউ সম্পাদন ও চূড়ান্তাভাবে গ্রহণের তারিখ ছাপানোর বিষয়ে সুপারিশ করা হলো।

<u>Plagiarism-নীতিমালা সংক্রান্ত সুপারিশ:</u>

ঢাকা বিশ্ববিদ্যালয়ের কিছু সংখ্যক শিক্ষকদের মধ্যে সাম্প্রতিককালে অন্যের প্রবন্ধ থেকে যথাযথ সাইটেশন ব্যতীত কপি/পেস্ট করার (Plagiarism) প্রবণতা লক্ষ্য করা যাচ্ছে যা দুঃখজনক। Plagiarism একটি গুরুত্বর অন্যায় ও নৈতিক স্খলন। ঢাকা বিশ্ববিদ্যালয়ের শিক্ষকদের কাছ থেকে দেশ এবং জাতি কখনো এই ধরনের কর্মকান্ড প্রত্যাশা করে না। Plagiarism রোধ করার নিমিত্তে দ্রুত একটি সুনির্দিষ্ট নীতিমালা প্রণয়নের বিষয়ে তদন্ত কমিটি সুপারিশ করেছে। এছাড়াও, নবীন শিক্ষকদের স্কলারলি আর্টিক্যাল রাইটিং, পাবলিশিং এথিকস ও সাইটেশন ব্যবহার বিষয়ে প্রশিক্ষণ প্রদান করা জরুরী বলে কমিটি মনে করে।"

17. It appears from the report of the Enquiry Committee that the allegation of plagiarism in publishing the alleged Article is true. It was found that out of 60 paragraphs, 47 paragraphs were copied in full. In one part of Article under the sub-title *"Colonialism to Cultural Imperialism: Edward Said"* (pages 87-91), the petitioner copied 27% from various part of the book "Culture and Imperialism" written by Edward Said. Furthermore, more or less 5(five) pages of about 30% were copied from the Article *"The Subject and Power"* written by

Michel Foucault. The Enquiry Committee also found that about 5% was copied from the writings of Ryan Jocob without any reference. The Enquiry Committee observed that the software Turnitin found 70% of the text to be copied from various sources. The Committee also recommended to frame appropriate rules by the University to prevent plagiarism in publishing Articles by the teachers and the researchers of the University.

18. The Syndicate of the University considered the above mentioned report of the Enquiry Committee and constituted a Tribunal consisting of 3(three) members. A Professor of Department of Law of the Univeristy was the Convenor of the Tribunal whereas another Professor of the University and an Advocate nominated by the petitioner as her representative under the relevant rule were members of the Tribunal. The Tribunal issued show cause notice to the petitioner and she replied to the same. The Tribunal held 4(four) meetings on different dates. After due consideration, it submitted its report on 25.01.2021, the relevant portions of which are reproduced below:

"**ট্রাইবুনাল-এর পর্যালোচনা**

ট্রাইবুনাল অভিযোগকারী Alex Martin কর্তৃক প্রেরিত ই-মেইলের কপি, তদন্ত কমিটির রিপোর্ট, অভিযুক্ত প্রবন্ধ, মিসেস সামিয়া রহমান ও সৈয়দ মাহফুজুল হক মারজান-এর কারণ দর্শানো নোটিশের জবাব, সামাজিক বিজ্ঞান অনুষদের ডিন কর্তৃক প্রেরিত তথ্যসমূহ, Plagiarism-এর সংজ্ঞা এবং সংশ্লিষ্ট প্রবন্ধটির Turnitin report পরীক্ষা-নিরীক্ষা ও পর্যালোচনা করে ট্রাইবুনাল দেখতে পায় যে:

(১) অভিযুক্ত প্রবন্ধটিতে ৬০টি অনুচ্ছেদের মধ্যে পায় ৪৮টি অনুচ্ছেদ কপি করা হয়েছে। তন্মধ্যে Colonialism to Cultural Imperialism: Edward Said (পৃষ্ঠাঃ ৮৭-৯১) অংশে Edward Said রচিত Culture and imperialism বইয়ের বিভিন্ন অংশ থেকে প্রবন্ধটিতে ২৭% কপি করা হয়েছে। এছাড়াও, Michel Foucault-র ÒThe Subject and Power" প্রবন্ধ থেকেও আনুমানিক পাঁচ পৃষ্ঠা (৩০%) কপি করা হয়েছে। এমনকি, Foucault-কে নিয়ে Ryan Jocobs-এর লেখা থেকেও কোন রেফারেন্স ছাড়াই নিজেদের লেখায় (৫%) কপি করা হয়েছে। Turnitin পদ্ধতির মাধ্যমে দেখা যায় এই প্রবন্ধটিতে বিভিন্ন সোর্স থেকে আনীত প্রায় ৭০% টেক্সটের মিল আছে।

(২) লেখকদ্বয় Edward Said বা Michel Foucault লেখাকে সরাসরি নিজেদের বলে দাবী করেননি সত্য। তবে, সাইটেশনের নিয়মানুযায়ী সরাসরি উদ্ধৃতির ক্ষেত্রে শব্দসীমা থাকে, কিন্তু লেখকদ্বয় সেটা অনুসরণ করেননি। যদিও লেখকদ্বয় তাঁদের লিখিত বক্তব্যে বলছেন, প্রবন্ধটি Michel Foucault এবং Edward Said এর তাত্ত্বিক কাজের একটি তুলনামূলক বিশ্লেষণ, প্রবন্ধটির কোথাও Edward Said বা Michel Foucault বক্তব্যকে নিজেদের বক্তব্য বলে দাবি করেননি। প্রবন্ধটির শেষের দিকে Edward Said বা Michel Foucault-এর রেফারেন্সও দেয়া হয়েছে। আর্টিকেলটিতে সাইটেশনের ভুল আছে, তবে সম্পূর্ণ অনিচ্ছাকৃত এবং সাইটেশন ত্রুটি বলে বিবেচনা করা যায়। অভিযুক্ত আর্টিকেলটি ২০১৬ সালে সাবমিট করা হয়। সেই সময়ে ঢাকা বিশ্ববিদ্যালয়ে টারনিটিন সফটওয়্যারের সুবিধা ছিলো না। যদি থাকতো তাহলে এই অনিচ্ছাকৃত ভুলগুলো ধরা পড়ত। এমন একটি দুর্বল ও মানহীন প্রবন্ধ কীভাবে Social Science Review জার্নালে ছাপা হলো তা ট্রাইবুনালের নিকট বোধগম্য নয়। রিভিউয়ার ও এডিটরিয়াল বোর্ড অবশ্যই তাঁদের দায়িত্ব সঠিকভাবে পালন করতে ব্যর্থ হয়েছেন এবং এজন্য তাঁরা দায় এড়াতে পারেন না। এধরণের ভুলের জন্য এডিটর ও এডিটোরিয়াল বোর্ডকে অভিযুক্ত করা উচিৎ ছিল বলে ট্রাইবুনাল মনে করে।

(৩) অভিযোগকারী Alex Martin এর পরিচয়টা ট্রাইবুনাল-এর নিকট পরিস্কার নয়। ২০১৬ সালের ডিসেম্বর মাসে প্রকাশিত Social Science Review জার্নালটি ঢাকা বিশ্ববিদ্যালয়ের সামাজিক বিজ্ঞান অনুষদের একটি নিজস্ব অফ লাইন জার্নাল। তাহলে কিভাবে এই অভিযুক্ত জার্নালের কপি Chicago Journal এর Alex Martin- এর নিকট হস্তগত হলো এ বিষয়ে ট্রাইবুনাল সন্দেহ পোষণ করে। এ ছাড়া তদন্ত কমিটি Alex Martin নামে কোন ব্যক্তি Chicago Journal-এর পক্ষে অভিযোগটি আদৌ করেছেন কিনা সে বিষয়ে কোন অনুসন্ধান করেনি। ট্রাইবুনালের নিকট ই-মেইলটি যথেষ্ট সন্দেহজনক বলে মনে হয়।

(৪) তদন্ত কমিটি অভিযুক্ত প্রবন্ধটির জন্য এককভাবে লেখকদ্বয়কে দায়ী করেছেন। কিন্তু অভিযুক্ত প্রবন্ধটি জমা দেয়া থেকে শুরু করে রিভিউ, চূড়ান্তভাবে গ্রহণ ও ছাপানোর প্রক্রিয়াতে অস্বচ্ছতা ও অদক্ষতা রয়েছে বলে প্রত্যক্ষভাবে প্রতীয়মান হয়েছে। এক্ষেত্রে এডিটরিয়াল বোর্ড তাঁদের দায়িত্ব যথাযথভাবে পালন করেননি। ট্রাইবুনাল মনে করে, লেখকদ্বয় যেমন প্রবন্ধটি লেখার জন্য দায়ী ঠিক সমভাবে রিভিউয়ার এবং এডিটরিয়াল বোর্ডের

সদস্যবৃন্দকে সাক্ষাৎকারে না ডেকে শুধুমাত্র লেখকদ্বয়কে অভিযুক্ত করায় ন্যায়বিচার পরাহুত হয়েছে বলে ট্রাইবুনাল বিবেচনা করছে।

(৫) তদন্ত কমিটি কেবল লেখকদ্বয়ের সাক্ষাৎকার নিয়ে তাঁদের অভিযুক্ত করেছে। এডিটোরিয়াল বোর্ড, রিভিউয়ারদের সাক্ষাৎকারে না ডেকে এবং Alex Martin এর অভিযোগের ভিত্তি অনুসন্ধান না করে প্রতিবেদন দেয়ায় প্রতিবেদনের নিরপেক্ষতা এবং ভিত্তি দুর্বল বলে ট্রাইবুনালের কাছে প্রতিয়মান হয়েছে।

(৬) ট্রাইবুনাল আরও দেখতে পায় যে, তদন্ত কমিটিতে শুধুমাত্র Social Science Review-এর ২০১৬ সংখ্যায় প্রকাশিত অভিযুক্ত প্রবন্ধটি তদন্ত করার ক্ষমতা দেয়া হয়েছিল। কিন্তু তদন্ত কমিটি লেখকদ্বয়ের যৌথভাবে লিখিত আরো কিছু প্রবন্ধের মন্তব্য করেছে যা প্রয়োজন ছিল না।

(৭) ট্রাইবুনাল আরও দেখতে পায় যে, যদিও লেখকদ্বয় অভিযুক্ত প্রবন্ধটিতে প্রতি পাতায় ফুট নোট উল্লেখ করেনি কিন্তু প্রতি প্যারায় উদ্ধতির পূর্বে Michel Foucault এবং Edward Said এর নাম উল্লেখ করেছেন। এ ছাড়া প্রবন্ধটির শেষেও Michel Foucault এবং Edward Said-এর রেফারেন্স দিয়েছেন। প্রবন্ধের কোথাও Michel Foucault এবং Edward Said-এর কোন উদ্ধৃতিকে লেখকদ্বয়ের নিজের উদ্ধৃতি বলে দাবি করেননি তাই <u>তাঁদের এ কার্যক্রমকে সরাসরি Plagiarism-এর অভিযোগে অভিযুক্ত করা যায় না।</u>

[Underlining is ours]

(৮) ট্রাইবুনাল দেখতে পায়, অভিযোগটি উত্থাপিত হয় ২০১৭ সালে, তদন্ত শেষ হয় ২০১৯ সালে এবং ট্রাইব্যুনাল গঠিত হয় অক্টোবর ২০২০ সালে। এতদীর্ঘ মেয়াদী তদন্তের ফলে এ বিষয়টি নিয়ে সামাজিক যোগাযোগ মাধ্যমে বিভিন্নভাবে বিশ্ববিদ্যালয়ের তদন্ত প্রক্রিয়া নিয়ে প্রশ্ন উত্থাপন করার সুযোগ পেয়েছে এবং একইভাবে অভিযুক্ত শিক্ষকদের সামাজিক যোগাযোগ মাধ্যমে মিডিয়া ট্রায়াল হয়েছে যা কখনো ন্যায়বিচারের জন্য কাম্য নয়। এতদীর্ঘ সূত্রিতা মূলতঃ ন্যায় বিচারকে পরাভূত করেছে এবং সংশ্লিষ্ট ব্যক্তিদের প্রতি ন্যায়বিচার পাবার ক্ষেত্রেও বাঁধার সৃষ্টি হয়েছে।

ট্রাইবুনাল উপরোল্লিখিত সার্বিক বিষয় পর্যালোচনা করে নিম্নোক্ত সুপারিশ প্রদান করছে:

<u>সুপারিশ</u>

(১) গণযোগাযোগ এবং সাংবাদিকতা বিভাগের সহযোগী অধ্যাপক মিসেস সামিয়া রহমান ও ক্রিমিনোলজি বিভাগের প্রভাষক সৈয়দ মাহফুজুল হক মারজান কর্তৃক যৌথভাবে লিখিত "A New Dimension in Colonialism And Pop Culture: A Case Study of the Cultural Imperialism" নামক প্রবন্ধটির সাথে Edward Said রচিত "Culture and Imperialism"- The University of Chicago Press কর্তৃক প্রকাশিত Critical Inquiry জার্নালের "The Subject and Power" by Michel Foucault. Vol. 8, No-4 Summer, 1982 মিল থাকায় তাঁদের <u>অভিযুক্ত প্রবন্ধটি গবেষণা প্রবন্ধ হিসেবে বিবেচনা করা যায় না</u> বিধায় তা Social Science Review জার্নাল থেকে বাতিল করার সুপারিশ করছে।

(২) গণযোগাযোগ ও সাংবাদিকতা বিভাগের সহযোগী অধ্যাপক মিসেস সামিয়া রহমান ও ক্রিমিনোলজি বিভাগের প্রভাষক সৈয়দ মাফুজুল হক মারজান কর্তৃক যৌথভাবে লিখিত "A New Dimension in Colonialism And Pop Culutre: A Case Study of the Cultural Imperislism" নামক প্রবন্ধটির সাথে Edward Said রচিত "Culture and Imperialism"- The University of Chicago Press কর্তৃক প্রকাশিত Critical Inquiry জার্নালের "The Subject and Power" by Michel Foucault. Vol. 8, No-4 Summer, 1982 মিল থাকায় এবং **<u>অনভিপ্রেত ভুলের জন্য অভিযুক্ত শিক্ষকদ্বয়ের আগামী ১ (এক) বছর পদোন্নতি থেকে বিরত রাখা এবং প্রত্যেকের ১ (এক) টি করে বাৎসরিক বেতন বৃদ্ধি স্থগিত করার সুপারিশ করছে। এ সুপারিশ উভয়ের ক্ষেত্রে একই সময় শুধু এক বছরের জন্য কার্যকর হবে। উল্লেখ্য, যেহেতু গবেষণা প্রবন্ধ প্রকাশনার জন্য জমা দেয়ার পর রিভিউয়ার এর মতামত গবেষকদের নিকট প্রেরিত হয়নি/সংশোধনের সুযোগ পায়নি (গবেষকদ্বয়ের স্বীকারোক্তি ও তদন্ত প্রতিবেদনের উদ্ধৃতি অনুযায়ী), রিভিউয়ার ও এডিটোরিয়াল বোর্ড দায়িত্ব পালনে অদক্ষতার পরিচয় দিয়েছে এবং একই সঙ্গে অভিযোগ উত্থাপন, তদন্ত থেকে ট্রাইবুনালে নিস্পত্তি হওয়া পর্যন্ত ৩ বছরের অধিক সময় অতিবাহিত হয়েছে তাই তাঁদের অপরাধ মার্জনার দৃষ্টিতে বিবেচনা করে শাস্তি লঘু করার সুপারিশ করা হলো।</u>** [Emphasis added)]

(৩) ভষ্যিতে তাঁদের কোন গবেষণায় এই ধরনের ভুল থাকলে তাঁদের বিরুদ্ধে কঠোর শাস্তিমূলক ব্যবস্থা গ্রহণ করা হবে বলে তাঁদের সতর্ক করার সুপারিশ করছে।

(৪) সামাজিক বিজ্ঞান অনুষদের জার্নাল প্রকাশের ক্ষেত্রে অনুষদের ডিন মহোদয়ের মাধ্যমে এডিটরিয়াল বোর্ড, রিভিউয়ার এবং সংশ্লিষ্ট সকলকে গবেষণা কর্ম সম্পন্ন এবং প্রকাশনার সকল বিধি মেনে চলতে ও গবেষণা সংশ্লিষ্ট সকল নথিপত্র যথাযথভাবে সংরক্ষণ করতে অনুরোধ করে পত্র দেয়ার সুপারিশ করছে। ভবিষ্যতে প্রকাশিত কোন

প্রবন্ধ নিয়ে প্রশ্ন উত্থাপিত হলে, এডিটোরিয়াল বোর্ড ও রিভিউয়ারদের জবাবদিহিতার আওতায় আনা হবে মর্মে সতর্কতা পত্রও দেয়ার সুপারিশ করছে।

(৫) ভবিষ্যতে ন্যায়বিচারের স্বার্থে যে কোনো অভিযোগ দায়েরের পর থেকে অনুসন্ধান, তদন্ত এবং বিচার প্রক্রিয়া সম্পন্ন করার ক্ষেত্রে সুনির্দিষ্ট সময় (সর্বোচ্চ ৩ মাস) অনুসরণ করতে জোর সুপারিশ করছে।"

19. From the above it is evident that admittedly Social Science Review Journal of the University is an off-line Journal and it has no on-line version. Tribunal apprehended about the identity of the complainant, *i.e.,* Alex Martin and his knowledge about the alleged Article since it was not published in any on-line journal. It is a matter of concern that before 2017 no software (Tarnitin) was procured by the University authority to detect plagiarism. The Tribunal observed that though the authors of the alleged Article had copied some texts of the Articles published by Michel Foucault and Edward Said which fell under plagiarism but they did not claim the same as their own research work and, as such, the authors (including the present petitioner) should not be prosecuted for plagiarism. The Tribunal also opined that in the process of prosecuting the authors for the alleged act of plagiarism the principles of natural justice was denied. The Tribunal finally recommended minor punishment of withholding promotion for one year and withholding increase of salary for one year and further to caution them in publishing Articles in future.

20. The report of the Tribunal was placed before the Syndicate in its meeting held on 28.01.2021. The relevant portion of the decision of the Syndicate dated 28.01.2021 is reproduced below:

" সিদ্ধান্ত ঃ (১) ট্রাইবুনালের প্রতিবেদন সর্বসম্মতিক্রমে গ্রহণ করা হলো।

(২) ট্রাইবুনাল-এর প্রতিবেদনের আলোকে গণযোগাযোগ ও সাংবাদিকতা বিভাগের সহযোগী অধ্যাপক মিসেস সামিয়া রহমান-এর বিরুদ্ধে আনীত Plagiarism-এর অভিযোগ প্রমাণিত হওয়ায় সিন্ডিকেট সিদ্ধান্তের তারিখ অর্থাৎ ২৮-০১-২০২১ তারিখ হতে তাঁকে ২(দুই) বছরের জন্য সহযোগী অধ্যাপকের পদ থেকে সহকারী অধ্যাপক পদে পদাবনতি (demotion) করা হলো।

(৩) ক্রিমিনোলজি বিভাগের লেকচারার জনাব সৈয়দ মাহফুজুল হক মারজানের বিরুদ্ধে আনীত Plagiarism-এর অভিযোগ প্রমাণিত হওয়ায় শিক্ষাছুটি শেষে তিনি বিভাগে যোগদান করার পর ২(দুই) বছর কোন ধরণের পদোন্নতি প্রাপ্য হবেন না।

(৪) গণযোগাযোগ ও সাংবাদিকতা বিভাগের সহযোগী অধ্যাপক মিসেস সামিয়া রহমান ও ক্রিমিনোলজি বিভাগের প্রভাষক জনাব সৈয়দ মাহফুজুল হক মারজান কর্তৃক যৌথভাবে প্রকাশিত "A New Dimension in Colonialism And Pop Culture: A Case Study of the Cultural Imperialism" নামক প্রবন্ধটির সাথে Edward Said রচিত "Culture and Imperialism"- The University of Chicago Press কর্তৃক প্রকাশিত Critical Inquiry জার্নালের "The Subject and Power" by Michel Foucault. Vol. 8, No-4 Summer, 1982 মিল থাকায় তাঁদের অভিযুক্ত প্রবন্ধটি গবেষণা প্রবন্ধ হিসাবে বিবেচনা করা যায় না বিধায় তা Social Science Review জার্নাল থেকে বাতিল করা হোক।

(৫) ভবিষ্যতে তাঁদের কোন গবেষণায় এই ধরণের ঘটনা ঘটলে তাঁদের বিরুদ্ধে কঠোর শাস্তিমূলক ব্যবস্থা গ্রহণ করা হবে বলে তাঁদেরকে সতর্ক করা হোক।

(৬) সামাজিক বিজ্ঞান অনুষদের জার্নাল প্রকাশের ক্ষেত্রে অনুষদের ডিন মহোদয়ের মাধ্যমে এডিটোরিয়াল বোর্ড, রিভিউয়ার এবং সংশ্লিষ্ট সকলকে গবেষণা কর্ম সম্পন্ন এবং প্রকাশনার সকল বিধি মেনে চলতে ও গবেষণা সংশ্লিষ্ট সকল নথিপত্র যথাযথভাবে সংরক্ষণ করতে অনুরোধ করে পত্র দেয়ার সুপারিশ করছে। ভবিষ্যতে প্রকাশিত কোন প্রবন্ধ নিয়ে প্রশ্ন উত্থাপিত হলে, এডিটোরিয়াল বোর্ড ও রিভিউয়ারদের জবাবদিহিতার আওতায় আনা হবে মর্মে সতর্কতা পত্রও দেয়া হোক।

(৭) ভবিষ্যতে ন্যায় বিচারের স্বার্থে যে কোনো অভিযোগ দায়েরের পর থেকে অনুসন্ধান, তদন্ত এবং বিচার প্রক্রিয়া সম্পন্ন করার ক্ষেত্রে সুনির্দিষ্ট সময় (সর্বোচ্চ ৩ মাস) অনুসরণ করা হোক।

(৮) এতদ্বিষয়ে সকল তদন্ত কমিটির পূর্ণাঙ্গ প্রতিবেদন তদন্ত শাখায় সংরক্ষিত থাকবে।"

21. On perusal of materials on record, it is evident that the Tribunal in principle decided to impose a lesser punishment to the petitioner on the grounds that although the petitioner could not be held liable for plagiarism, but the Article in question cannot be termed as a research Article and that the petitioner made unintentional mistakes in the said Article as co-author. The Syndicate of the University, on the other hand, accepted the report of the Tribunal in toto, but found the petitioner guilty of plagiarism without assigning any reason whatsoever and awarded the impugned major punishment demoting the petitioner from the post of Associate Professor to the post of Assistant Professor. The learned Advocate of the petitioner rightly points out that the decision of the Syndicate is unreasonable in Wednesbury sense.

It is extremely regrettable to mention here that the Syndicate of a century old educational institution, like Dhaka University, in its resolution dated 28.01.2021 has most callously used undesirable mixture of elegant and inelegant words. Apart from this, spelling mistakes and errors in sentence construction are also found which appear to be very unpleasant.

22. Mr. Azim, the learned Advocate of the petitioner submits that show cause notice dated 24.12.2020 issued by the Tribunal was violative of Regulation 7(a) read with Regulation 11 of the *Enquiry Committee and Tribunal (Teachers and Officers) Regulations, 1980* which categorically provides that the respondent No. 3 Syndicate shall frame a charge and specify therein the penalty proposed to be imposed, which was not done in the case of the petitioner.

23. In reply to the above submission, Mr. Naim Ahmed, the learned Advocate representing the respondent Nos. 2 and 6 submits that as per reports of the Enquiry Committee as well as the Tribunal, the petitioner was found guilty of plagiarism and the matter was duly conveyed to the petitioner and, as such, the petitioner was not at all denied to defend the case effectively. Mr. Ahmed further submits that in filing the present Writ Petition the provisions of Section 45(5) of the First Statutes was not followed. But on a query by us Mr. Ahmed admitted that actually charge against the accused was not framed by the Syndicate under Regulation 7(a) of the *Enquiry Committee and Tribunal (Teachers and Officers) Regulations, 1980* and the Syndicate also did not specify the penalty proposed to be imposed to the petitioner which is a requirement of law.

24. In this respect Regulation 7(a) of the *Enquiry Committee and Tribunal (Teachers and Officers) Regulations, 1980* is reproduced below:

> "7 (a) The Syndicate shall frame a charge and specify herein the penalty proposed to be imposed and refer it to the Committee for enquiry and report along with a statement of the allegations on which the charge is based. [Emphasis given]
>
> (b) On receipt of the reference from the Syndicate the Committee shall communicate the charge to the accused together with the statement of the allegations and require him to submit, within seven days from the day the charge is communicate to him, written statement of his defence and to show cause at the same time why the penalty proposed should not be imposed on him and also state whether he desires to be heard in person.
>
> (c) The Committee shall hear oral evidence as to such of the allegations as are not admitted and consider documentary evidence relevant or material in regard to the chare. The accused shall be entitled to cross-examine the witnesses against him, to give evidence in person and to have such witnesses called for the defence as he may

wish in writing. The person presenting the case in support of the charge shall be entitled to cross-examine the accused and the witnesses examined in his defence.

Provided that the Committee may, for reasons to be recorded in writing, refuse to call a particular witness or to summon or admit a particular evidence."

25. Regulation 12 reads as under:

"The committee shall hear oral evidence as to such of the allegations as are not admitted and considered documentary evidence relevant or materials in regard to the charge. The accused shall be entitled to cross examine the witnesses against him, to give evidence in person and to have such witnesses called for the defense as he/she may wish in writing. The person presenting the case in support of the charge shall be entitled to cross examine the accused and the witnesses examined in his defense."

26. So, from the above it appears that framing charge as well as specification of penalty proposed to be imposed by the Syndicate upon the petitioner are mandatory requirements to initiate a departmental proceeding. Upon receiving the reference from the Syndicate the Enquiry Committee shall communicate the charge to the concerned accused together with the statements of allegations and request him/her to submit, within 7(seven) days from the day the charge is communicated to him/her, a written statement of his/her defense and to show cause at the same time why the penalty proposed should not be imposed on him/her and also states whether he/she desires to be heard in person or not.

27. After framing the charge by the Syndicate the Tribunal shall take into consideration of the charges framed, the evidence on record, both oral and documentary, including the additional evidence, if any, accepted by it and recommend such action against the accused as it may deem fit. In the case in hand, admittedly no formal charge was framed which is *sine quo non* to start a formal departmental proceeding.

28. The learned Advocate of respondent Nos. 2 and 6 mainly argued on the point of maintainability of this writ petition and submits that without exhausting the statutory alternative remedy, the petitioner has invoked the writ jurisdiction which is not at all maintainable in the eye of law. In support of the argument, the learned Advocate refers to the case of ***Dhaka University*** v. ***Md. Mahinuddin*** reported in 44 DLR (AD) 305, wherein the Appellate Division of the Supreme Court of Bangladesh has observed:

> "Mr. Amirul Islam contends that the procedure of appeal to the Chancellor is lengthy and cumbersome, and the High Court Division is also of the same view. We do not find any substance in this contention, for, remedy by appeals is quite simple and speedy, particularly when a time limit has been given for the opinion of the Syndicate on the report of the Enquiry Commission. An application under Article 102 of the Constitution is maintainable if the High Court Division is satisfied that no other equally efficacious remedy is provided by law. Here, the remedy available by appeal to the Chancellor is efficacious and speedy. Mr. Amirul Islam next contends that when the High Court Division, in its discretion, has found that the alternative remedy by appeal to the Chancellor is not equally efficacious, then such discretion should not be interfered with by this Court, and in support of this contention the learned Counsel has referred to a decision of the Indian Supreme Court in the Case of Zila Parishad, Moradabad V. M/S. Kundan Sugar Mills, Amroha, : MANU/SC/0259/1967 : AIR 1968 SC 98. It is true that if the High Court Division is satisfied by exercising its discretion judicially that the alternative remedy provided in a particular case is not adequate and effective,

> then, such discretion can hardly be interfered with. But in this case the High Court Division did not apply properly their mind to law and facts of the case and it misconceived the whole matter as to provisions of Article 52 wrongly holding the opinion that Chancellor's decision on the appeal is dependent upon the opinion of the University Authority who had passed the impugned order. The respondents in their concise statement alleged that "appeal to the Chancellor is appeal from." This is palpably wrong and is found to be based on misconception of the law relating to the present case. As such, the discretion exercised by the High Court Division is not found to be discretion exercised judicially. The question as to maintainability of the writ petitions is thus found to have been wrongly decided by the High Court Division."

29. In the instant case, prior to referring the allegations to the Enquiry Committee set up by the Syndicate for enquiry into the allegations brought against the petitioner, the Syndicate omitted to frame a formal charge against the petitioner with a statement of the allegations on which the charge is based and also specifying therein the penalty proposed to be imposed in terms of Regulation No. 7 of the *Enquiry Committee and Tribunal (Teachers and Officers) Regulations, 1980* and hence, the entire exercise by the respondent No. 2 University of Dhaka and its officials leading up to the purported demotion of the petitioner in service by the Syndicate is *void ab-initio* and, as such, *non est* in the eye of law, rendering the said purported demotion to be without lawful authority and is of no legal effect. Moreover, under section 45(5) of the First Statute of the University of Dhaka only those orders of the Syndicate which are passed on the recommendation of the Tribunal are appealable, whereas, in the instant case, since the impugned order of demotion of the petitioner in service was passed by the Syndicate without any recommendation of the Tribunal, there is no appealable order from the Syndicate and, hence, no question of preferring any appeal under Article 52 of the Dhaka University Order, 1973 arises and, thus, there is no applicability of the decision reported in 44 DLR (AD) 305 in the facts and circumstances of the case in hand.

30. The Tribunal categorically found that the petitioner cannot be made accused for direct plagiarism, but the Syndicate demoted the petitioner for plagiarism which is absolutely baseless and whimsical inasmuch as the Syndicate can only punish someone based on the findings of facts arrived at by the Tribunal.

31. Admittedly, the petitioner was not provided with any of the reports of either the Enquiry Committee or the Tribunal and, as such, the petitioner was not given an effective opportunity to prefer an appeal against the Syndicate's decision to demote her which is also a grave violation of the principles of natural justice and, thus, in our view, there is no bar in filing a writ petition under Article 102 of the Constitution against such decision of the Syndicate.

32. The observance of the principles of natural justice is not an idle formality. A meaningful opportunity to defend oneself must be given under any circumstances to its truest sense and, in the instant case, the respondents sought to show ceremonial observance of the principles of the natural justice as an eye wash for an ulterior purpose without affording any real opportunity to the petitioner to defend herself by not furnishing the enquiry report as well as the report of the Tribunal. It appears that the impugned decision of the Syndicate is vitiated by bias and *malafide* inasmuch as while the petitioner was awarded with a major punishment with the stigma of plagiarism but despite repeated requests, she was not given a copy of the

enquiry report. The Syndicate did not care to consider the long delay in completing the enquiry.

33. We know that since the decision in ***Ridge*** v. ***Baldwin*** [(1964) AC 40], principles of natural justice should be applied to judicial, quasi-judicial and administrative proceedings, but even before this decision, the rules of natural justice were being applied in this Country to administrative proceedings which might affect the person, property or other rights of the parties concerned in the dispute. [Ref. *Faridsons Ltd.* v. *Pakistan,* 13 DLR (SC) 233]. It was held in the case of ***University of Dacca*** v. ***Zakir Ahmed*** [16 DLR (SC) 722] that in all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned. In the case of ***Abul A'la Moudoodi*** v. ***West Pakistan,*** [17 DLR (SC) 209], it was observed that the principles of natural justice should be deemed incorporated in every statute unless these are excluded expressly or by necessary implication by any statute. In the case of ***Abdul Latif Mirza*** v. ***Government of Bangladesh*** [31 DLR (AD) 1] the Appellate Division observed: "It is now well-recognized that the principles of natural justice is a part of the law of the counry."

34. In the case of ***Assessing Officer, N'ganj Range*** v. ***B.E. Ltd.***, reported in 1 BLD (AD) (1981) 450, the Appellate Division further observed:-

> "As we have found the impugned action without jurisdiction, the question of availing statutory alternative remedy does not arise. We are of opinion that the High Court Division has rightly held that the Wirt Petition was maintainable."

35. In the case of ***Khan Md. Abdur Rashid* v. *Bangladesh Open University***, [Writ Petition No.6184 of 2008, date of judgment 04.08.2022] this Court observed:

> "The cardinal principle of natural justice requires that before imposition of major penalty, copy of the inquiry report has to be supplied to the concerned employee [***Government of Bangladesh and others*** vs. ***Md. Tariqul Islam***, 25 BLC (AD) 131]. This principle is so trite that it is deemed to be embedded into the statute, even the statute is silent about it; the purpose being to afford a reasonable opportunity to the employee to explain his position. Therefore, the obligation to supply inquiry report in cases of imposition of major penalty is not an idle formality."

36. Since the Syndicate's decision to demote the petitioner was passed without following the prescribed procedure as laid down in Regulation No. 7 of the *Enquiry Committee and Tribunal (Teachers and Officers) Regulations, 1980*, the question of availing alternative remedy does not arise at all in any view of the matter and, as such, the impugned order dated 28.01.2021 issued by respondent Nos. 2 and 6 purporting the petitioner demoting from the post of Associate Professor to Assistant professor in the Department of Journalism and Mass Communication, University of Dhaka is liable to be declared to have been done without lawful authority which is also *void-ab-initio* .

37. Now, we can turn our eyes on the matter of plagiarism and the role of Dhaka University in preventing such types of academic corruption persuaded by some of the teachers/researchers are concerned.

38. Whether or not the Article was plagiarized is absolutely an academic question of fact which cannot be decided in writ jurisdiction. But being influenced by our conscience we would like to make some observations so that the authority of Dhaka University should take

positive steps to prevent plagiarism as well as took appropriate measures in conducting research works by the concern research students and teachers of the University in upholding the prestige and image of the century old University of the country. In the alleged Article the Enquiry Committee and the Tribunal found that 48 paragraphs out of 60 paragraphs were copied without footnotes or references. The Committee further observed that the software **Turnitin** found 70% of the text to be copied from various sources which is well above the accepted limit of 15%.

39. Plagiarism simply means copying the work of another author without acknowledgment. The petitioner admitted (Paragraph 47 of the Writ Petition) that there was deviation with respect to footnotes and references. She also admitted verbally before the Enquiry Committee that there was 'lack of proper citation'. Plagiarism is nothing but a failure to give proper citations and using the work of another writer without acknowledgement.

40. University of Oxford defines the term 'Plagiarism' as presenting someone else's work or ideas as one's own, with or without their consent, by incorporating it into own work without full acknowledgement. All published and unpublished materials, whether in manuscript, printed and electronic form, are covered under this definition. Plagiarism may be intentional or reckless, or unintentional. Under the regulations for examinations, intentional or reckless plagiarism is an offence.

41. Stanford University, USA has defined the term plagiarism as under: 'Use without giving reasonable and appropriate credit to acknowledging the author or source, of another person's original work, whether such work is made up of code, formulas, ideas, language, research, strategies, writing or other form.'

42. According to Princeton University, "Plagiarism is presenting someone else's work or ideas as his own, with or without their consent by incorporating it into his work without full acknowledgement."

43. Oxford University Library also defined the term as: "Appropriating another person's ideas or words (spoken or written) without attributing those word or ideas to their true source."

44. University of Cambridge further gave definition of plagiarism as: 'Submitting as one's own work, irrespective of intent to deceive, that which derives in part or in its entirety from the work of others without due acknowledgement.'

45. The tendency of plagiarism without proper citation is noticed among some number of teachers and/or researchers of Dhaka University which bleeds our conscience. Plagiarism is a serious wrongdoing and moral lapse. The country as well as the nation never expect such activities from the teachers of the universities in general and the Dhaka University in particular. The Enquiry Committee has recommended formulating specific policy to prevent

plagiarism. In addition, the Committee felt it necessary to train the teachers on ethics, scholarly article writing, the use of citations and publishing.

46. Plagiarism means using someone else's works or ideas without properly crediting the original author. Some common examples of plagiarism include:

(i) paraphrasing a source too closely including a direct quote without quotation marks;

(ii) copying elements of different sources and pasting them into a new document;

(iii) turning in someone else's work as own work;

(iv) copying large pieces of text from a source without citing that source;

(v) taking passages from multiple sources, piecing them together, and turning in the work as own work; and

(vi) copying from a source but changing a few words and phrases to disguise plagiarism.

47. Plagiarism is an intellectual crime. Plagiarism is essentially theft and fraud committed simultaneously. It is considered theft because the writer takes ideas from a source without giving proper credit to the author. It is considered fraud because the writer represents the ideas as her or his own.

48. It is expected that before awarding any punishment against any teachers/officers of the Univeristy, the concerned authority should act in accordance with law giving opportunity of being heard and also provide him/her the copy of the enquiry report so that the latter can take meaningful defence.

49. It is further expected that the Dhaka University authority should immediately procure the latest version of the *software* to detect and prevent plagiarism and also adopt the best practices in this regard. It is our further expectation that the Dhaka University authority should discuss the matter in its Academic Council and after full deliberation should set the formula/criterion to conduct meaningful research work as well as acceptable percent of other persons work as reference in pursuing the individual research work upon according approval from the Syndicate.

50. In view of the above discussion and consideration of the facts and circumstances of the case as well as materials on record, our dispassionate view is that the impugned Memo dated 15.02.2020 (Annexure-A to the Writ Petition) is liable to be declared to have been issued without lawful authority and is of no legal effect and the same is liable to be set aside as being *void-ab-initio* and *coram non judice*.

51. In the result, the Rule is made absolute without any order as to cost. The impugned Memo dated 15.02.2020 is hereby declared as done without lawful authority and is of no legal effect.

52. The respondent Nos. 2-4 and 6-7 are directed to grant all usual service as well as financial benefits to the petitioner with effect from 28.01.2021 forthwith.

53. Communicate the judgment at once.

17 SCOB [2023] HCD 199

HIGH COURT DIVISION
First Appeal No. 32 of 2004

Sirajul Haque alias Sirajul Haque Howlader and others
......appellants
-Versus-
Zulekha Begum and others
......respondents

Mr. Md. Israfil Hossain, Advocate.
......for the Appellants
Mr. Md. Zakaria Sarkar, Advocate.
......for the Respondents

Judgment on 23.08.2022

Present:
Mr. Justice Bhishmadev Chakrabortty
And
Mr. Justice Md. Ali Reza

Editors' Note:
The respondent Nos. 1-4 as plaintiffs filed a Title Suit for declaration that the documents mentioned in the schedule Nos. 1-6 to the plaint are forged. They claimed that Rustom Howlader, who was their father, and the father of the defendant Nos. 1 and 6 also, died at the age of 110. From 20 years before his death he was completely unable to walk or move because of his dire sickness along with blindness and was completely bed ridden. He lived with the defendants in a mess till his death and taking such advantage of his illness those impugned documents were obtained. On the other hand defendants claimed that Rustom Howlader was never sick or bed ridden or blind and was always healthy and performed his own work by himself before his death. The trial Court decreed the suit mainly on the finding that Rustom Howlader was sick from 1980 till his death and he had no normal sense or consciousness. The High Court Division assessing the evidence on record found that the plaintiff had failed to prove that Rustom Howlader was completely sick and bed ridden. It also found that plaintiffs had failed to discharge their onus under sections 101 and 103 of the Evidence Act to prove that the signatures given by Rustom Howlader in all the documents are false. Finally, the Court found that the suit was barred by limitation and consequently set aside the judgment and decree of the trial Court.

Key Words:
Rule 46, 48 of the Registration Rules, 1973 and section 69 of the Registration Act, 1908; Sections 101 and 103 of the Evidence Act; Section 3 of the Transfer of Property Act and Section 68 of the Evidence Act; Section 114(g) of the Evidence Act; Order 3 Rule 2 of the Code of Civil Procedure; Section 85 of the Evidence Act; Section 120 of the Evidence Act; Husband instead of wife or wife instead of husband shall be competent witness; Article 120 of the Limitation Act, 1908;

Rule 46, 48 of the Registration Rules, 1973 and section 69 of the Registration Act, 1908:
Law is settled that identifier or witness of a document is not supposed to know the contents of the document but the identifier according to the Registration Rules is held to be the best competent person in whose presence the executant goes with the execution process before the registering officer. (Para 18)

Sections 101 and 103 of the Evidence Act:
According to the provisions laid down in sections 101 and 103 of the Evidence Act, the entire onus was upon the plaintiffs to prove that the signatures given by Rustom Howlader in all the documents are false because it is their specific case that Rustom Howlader never appeared in public due to his serious ailment and indisposition and blindness and even he was to be taken to the toilet by somebody else and remained bed ridden from 1980 until his death. Plaintiffs had to take resort to expert opinion in order to discharge their initial onus under section 101 of the Evidence Act to prove that those impugned documents were executed not by Rustom Howlader but by an imposter with a scheme to grab the property and Rustom Howlader was completely unable to perform his own affairs due to his serious illness. Law says when the initial onus is discharged by the plaintiff the onus then shifts upon the defendants to show the contrary. (Para 19)

Section 3 of the Transfer of Property Act and Section 68 of the Evidence Act:
The law on attesting witness is guided by section 3 of the Transfer of Property Act and Section 68 of the Evidence Act. The scribe will not be an attesting witness unless he intends to sign the deed as such. In other words a scribe can play the dual role of a scribe and an attesting witness. (Para 20)

Section 114(g) of the Evidence Act; Order 3 Rule 2 of the Code of Civil Procedure read with section 85 of the Evidence Act; Section 120 of the Evidence Act:
Husband instead of wife or wife instead of husband shall be competent witness:
Learned Advocate for the respondent strongly argued that defendant No. 1 Sirajul himself did not come before the court to depose in support of his case and adverse presumption can be drawn under section 114(g) of the Evidence Act for his non examination in the case despite being an important witness. A Power of Attorney given by defendant No. 1 to D.W. 1 through notary public bearing registration No. 135 of 2003 dated 28.06.2003 is kept in the record and under Order 3 Rule 2 of the Code of Civil Procedure read with section 85 of the Evidence Act this power of attorney bears weight. Now question arises whether D.W. 1 being wife of defendant No. 1 holds the same status of defendant No. 1 while deposing in the suit. Question of adverse presumption shall not arise if DW 1 holds the same position. Section 120 of the Evidence Act provides that husband instead of wife or wife instead of husband shall be competent witness. So according to the facts and circumstances of the instant case section 120 shall prevail over section 114(g) of the Evidence Act and the question on adverse presumption as argued does not arise. (Para 21)

Section 114(e) of the Evidence Act:
It has been asserted in paragraph Nos. 14(ka)(6) of the written statement that Rustom Howlader filed Title Suit No. 126 of 1996 against Thana Education Officer, Madaripur and filed application for temporary injunction not to remove the Char Ghunshi Government Primary School. The temporary injunction was rejected against which Rustom Howlader filed Miscellaneous Appeal No. 41 of 1996 in the Court of District Judge, Madaripur. The appeal failed. Then he preferred Civil Revision No. 3104 of 1998 before this Court. The Rule issuing order dated 09.08.1998 is exhibit-Ja and after his death his substituted heirs extended the order of *status quo* till disposal of the rule on 21.08.2000 which is exhibit-Ja(1). Those are public documents and under section 114(e) of the Evidence Act carry presumptive value of its contents and it is to be presumed that Rustom Howlader sworn affidavit in exhibit-Ja until and unless the contrary is proved

by reliable evidence and thus it appears that he was never that sick as has been alleged by the plaintiffs. (Para 23)

The admission of Rustom Howlader that he executed those documents cannot be avoided when plaintiffs could not establish a definite and clear case on Rustom Howlader's sickness. The execution is admitted and plaintiff had no knowledge on execution or passing of consideration being third party to the document. Plaintiffs cannot question about the consideration because it was between parties to the document. The transferee is to prove the payment of consideration when the transferor challenges the same. In the instant case, if the plaintiffs could prove by cogent and credible evidence that Rustom Howlader was seriously ill and blind from 1980 till his death, in that case the onus would lie upon the defendant to prove the payment of consideration. (Para 24)

Article 120 of the Limitation Act, 1908:
According to paragraph No. 7 of the plaint, cause of action arose on 14.07.2002 after having knowledge from the sub-registry office. But on perusal of the records it appears that the certified copies of exhibit-2 and 2(ka) were obtained on 17.07.1995. The certified copies of exhibit-2(Ga) and exhibit-2(Gha) were obtained after filing of the suit on 05.07.2003 and 03.07.2003 respectively. Thus it can be held that the cause of action of the suit is definitely false and the suit is barred by law of limitation. The beneficiaries of exhibit-2(Gha) dated 19.12.1982 being defendant Nos. 4-5 are the sons of plaintiff No. 3 Sahaton and the husband of plaintiff No. 2 Rahaton was the identifier to exhibit-Gha dated 15.09.1994. So it raises serious doubt on the story of cause of action and as such it is held that the suit is barred by limitation under Article 120 of the Limitation Act. (Para 27)

JUDGMENT

Md. Ali Reza, J:

1. This appeal at the instance of defendant Nos. 1-3 is directed against the judgment and decree dated 28.09.2003 passed by the Joint District Judge, Court No. 1, Madaripur in Title Suit No. 06 of 2002 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. The respondent Nos. 1-4 as plaintiffs filed Title Suit No. 06 of 2002 in the Court of the then Subordinate Judge, Court No. 1, Madaripur for declaration that the documents mentioned in the schedule Nos. 1-6 to the plaint are forged, false, fraudulent, inoperative, illegal, without jurisdiction and not binding upon the plaintiffs.

3. The case of the plaintiffs, in short, is that Rustom Howlader who was the father of plaintiffs and defendant Nos. 1 and 6 died at the age of 110 years. He had been suffering from serious illness for about 20 years before his death. He could not walk or move and had no consciousness. His wife Boru Bibi died during his life time. Rustom Howlader died leaving behind 02(two) sons and 04(four) daughters. Plaintiffs are daughters of Rustom Howlader and they lived in their husbands' houses. Rustom Howlader used to live with his sons in one mess. Defendant No. 1 is educated and very cunning person. Taking the advantage of his father's illness he tried to grab the ancestral property. Defendant No. 1 used to try to convince his elder brother Defendant No. 6 by various inducements and money. After Rustom's death

when the plaintiffs went to their father's house and requested for distribution of their ancestral property, defendant No. 1 used to rely on various excuses upon different pretexts. On the eve of completion of the present survey, the plaintiffs through their husbands and the sons came to know that defendant No. 1 was trying to grab the suit land on the basis of various forged documents. Thereafter, plaintiffs inquired into the sub-registry office and received the certified copies of the impugned documents and obtained definite knowledge. Defendant No. 1 managed to obtain gift deed No. 7255 dated 19.12.1983, Heba-bil-Ewaz deed No. 1966 dated 13.02.1984 and other documents bearing Nos. 1371, 7220, 3341, 1912 dated 13.04.1997, 19.12.1982, 15.04.1993, 09.05.1995 respectively beyond the knowledge of the plaintiffs in collusion with scribe Habibur Rahman. Rustom Howlader never executed and registered any document in favour of the defendants nor was paid any consideration for that purpose. Defendant No. 1 fabricated those documents to deceive the plaintiffs from their paternal property. Rustom Howlader never delivered any possession in favour of the defendants. Minor defendant Nos. 2 and 3 acquired no title by the impugned documents. As Rustom was very old and insane and of unsound mind there was no question of his conducting the cases. The papers of Title Suit Nos. 10 of 1990, 18 of 1990, 83 of 1992, Title Appeal No. 49 of 1996, Civil Revision No. 126 of 1996 are manufactured documents in the name of Rustom Howlader. Defendant No. 1 completed master degree but despite passing his M.A. he instead of involving himself in any service is doing agricultural work to grab the paternal property. Rustom Howlader was educated but lost his eye sight in his old age and could not put his signature. Defendant No. 1 had signed in some places of the resolution book of the Char Ghunshi Government Primary School as president. If the signature of the resolution is compared with the signatures of Rustom Howlader given in the impugned documents as executant, it is understood that defendant No. 1 himself signed the name of his father and obtained those documents. Defendant Nos. 1-3 had no capability to pay any money to Rustom Howlader. Rustom Howlader did not execute any Arpannama in favour of Char Ghunshi Mosque or Primary School. Defendant No. 1 has created the documents of mosque and school after obtaining the impugned forged documents in his name so that the local people do not go against him. Defendant Nos. 4 and 5 created the gift deed dated 19.12.1982. Rustom Howlader never attended any marriage ceremony after 1980 nor signed in any marriage certificate. He himself never opened any bank account. Rustom Howlader's appearance and filing of Title Suit No. 126 of 1989 or deposing as PW1 on 07.10.1991 or praying for non prosecution of the suit on 09.11.1991 or filing affidavit on 24.11.1991 are false and those documents are not genuine because at that time he was completely bed ridden. Defendant No. 1 concocted all the documents and did not appear before the Court for fear of being caught on the allegation of forgery. Cause of action arose on 14.07.2002 when plaintiffs at first came to know about the impugned documents. Hence the suit was filed.

4. On the other hand, 04(four) sets of written statements were filed by the defendants. One was filed by defendant Nos. 1-3, defendant Nos. 4, 5, 6 filed another 3(three) sets of written statements separately. Defendant Nos. 4-6 did not contest the suit. Defendant Nos. 1 and 6 are sons of Rustom. Defendant Nos. 2 and 3 are grandsons of Rustom and sons of defendant No. 1 Sirajul. Defendant Nos. 4 and 5 are also grandsons of Rustom and sons of plaintiff 3 Shahaton.

5. The case of the contesting defendant Nos. 1-3 is that Rustom was never sick or bed ridden due to old age before his death. He was always healthy and successful in his work. He used to go to the Hon'ble Supreme Court and Madaripur Court to conduct his own cases. He also used to visit the educational office. Rustom Howlader himself filed written statement in Title Suit No. 83 of 1992 which was dismissed later on. He was the life time president of the

Char Ghunshi Government Primary School. He was defendant No. 28 in Title Suit No. 15 of 1990 and the same was dismissed. He gifted some land to the Char Ghunshi Mosque. When the mosque was destroyed in the river, he later donated more land to rebuild the mosque. Rustom Howlader filed Title Suit No. 126 of 1996 on behalf of Char Ghunshi Government Primary School. He preferred Miscellaneous Appeal No. 41 of 1996 in the Court of District Judge, Madaripur and Civil Revision No. 3104 of 1998 before this Court. He managed accounts in various banks during his life time. He maintained Savings Account No. 6591 in Takerhat Agrani Bank. He attended the wedding ceremony of his granddaughter Fahima. Even after he had transferred the property by the impugned deeds in favour of defendant Nos. 1-5, he still had many properties left which have been being enjoyed by his heirs. Defendant No. 1 and his wife took care of Rustom. Having been satisfied with the care and behavior of defendant No. 1 Rustom wanted a prayer mat and a tajbih and after receiving the same Rustom transferred 4.85 acres of land by a Heba-bil-Ewaz deed on 13.02.1983 in favour of defendant No. 1 and delivered possession. Rustom sold 1.60 acres of land to defendant Nos. 2-3 by kabala dated 15.09.1984. These defendants also purchased 1.73½ acres of land from Rustom by kabala dated 09.05.1995 and got possession. Rustom also sold 0.81½ acres of land to defendant No. 2 on 13.04.1997. Rustom made gift in favour of defendant Nos. 1, 4 and 5 by deed Nos. 7220 and 7255 dated 19.12.1982. Rustom transferred 0.33 acres of land to Char Ghunshi Government Primary School by Arpannama dated 26.10.1996. Defendants never practised any fraud on execution and registration in obtaining the impugned documents. Defendant Nos. 4 and 5 got title and possession in the land covered by the documents executed by Rustom and defendant No. 4 took loan from Janata Bank by mortgaging the same. Rustom was never sick. He cast his vote in different elections on his own foot till 1996. He presided over the meeting as president of the managing committee of the Char Ghunshi Government Primary School on different dates. He also took loan from Utrair Branch, Bangladesh Krishi Bank on 31.03.1984 and repaid the same. He attended in the marriage ceremony of the daughter of defendant No. 6 and signed in the marriage certificate. Rustom filed Title Suit No. 126 of 1989 against gift deed Nos. 7220 and 7255 dated 19.12.1982 and Heba-bil-Ewaz deed No. 1166 dated 13.02.1983. He deposed in that suit on 07.10.1991. Defendant No. 1 Sirajul filed written statement in the suit. Subsequently, both parties came to a compromise through the mediation of the relatives. According to the terms and conditions of the compromise, suit was dismissed for non prosecution and Rustom himself through an affidavit admitted those 03(three) documents on 24.11.1991. In the document dated 05.09.1994, the husband of plaintiff No. 2 was an attesting witness. Plaintiff filed the instant suit upon false claim. The suit being false is liable to be dismissed with cost.

6. The Trial Court framed as many as six issues as to maintainability, defect of party, limitation, whether the impugned documents are forged and obtained by practicing fraud and forgery, whether the claim of the plaintiff is proved to be genuine, whether plaintiffs can get the relief prayed for.

7. During trial, plaintiff examined 03(three) witnesses and contesting defendant Nos. 1-3 examined 05(five) witnesses and both the parties adduced documentary evidence in order to prove their respective cases.

8. The trial Court decreed the suit by judgment and decree dated 28.09.2003 mainly on the finding that Rustom Howlader was sick from 1980 till his death and he had no normal sense or consciousness and admittedly he was a wealthy man and defendant No. 1 and his wife had served Rustom Howlader with due care till his death which was their duty and in such circumstance it is not understood as to why Rustom Howlader transferred the land

covered by the documents in favour of defendants in lieu of such duty although such transfer made out of love and affection is not unusual and further found that since plaintiffs alleged that those documents were obtained by forgery, the onus is upon the defendants to prove that those documents were executed and registered by Rustom Howlader himself. The Court also found that no explanation was offered by the defendants as to why defendant No. 1 Sirajul was absent in the Court and further found that the documents were obtained without consideration because Rustom Howlader executed those documents only with satisfaction and further found that defendant No. 1 himself signed in the resolution book of the school in his name or in the name of his father and the attesting witness as well as scribe to the impugned documents named Habibur signed his name dimly without address to avoid future trouble of committing forgery. The Court also found that defendants did not take possession in the suit land during the life time of Rustom Howlader and defendants did not formally prove the impugned documents and since defendants did not mention the name of Noor Mohammad in their written statement, they are not entitled to raise this question and the Court further found that the suit is maintainable even though no relief was prayed for by the plaintiffs with regard to the Arpannama deeds executed in favour of Char Ghunshi Mosque and School and again found that defendants have got to prove that the impugned documents were executed and registered by Rustom Howlader and those documents were not forged and also found that Rustom Howlader although executed and registered the Heba-bil-Ewaz and gift deeds but those were not acted upon for want of possession.

9. Being aggrieved by and dissatisfied with the judgment and decree dated 28.09.2003 passed by the trial court, the contesting defendant Nos. 1-3 as appellants preferred the instant appeal before this Court.

10. The learned Advocate Mr. Md. Israfil Hossain appeared on behalf of the appellants and learned Advocate Mr. Md. Zakaria Sarkar appeared on behalf of the respondents.

11. The learned Advocate for the appellants submits that Rustom Howlader was never sick and blind in his old age and the case of the plaintiffs that he was very sick and suffered diseases and blindness in his last 20(twenty) years is blatant lie. He further submits that since the executant was not insane and disabled, the impugned documents are valid in law. Rustom executed those documents in a healthy and conscious state of mind. He also submits that the plaintiffs could not make out any case that the impugned documents were executed by false personation. Rustom Howlader never lost his eye sight and he was very much competent to deal with the worldly affairs. He argued that the rule of balance of preponderance of evidence or the best evidence rule stands in favour of the appellants. He further submits that plaintiffs had to take the aid of the expert opinion to prove their own case. He went through the entire documentary evidence and submitted that the entire documentary evidence, if had been considered by the trial court the result of the case would have been otherwise. He also referred and went through the entire oral evidence adduced by both the parties and finally submits that the impugned judgment is bad in law and liable to be set aside. He has referred the case of Sushil Chandra Nath Vs. Sanjib Kanti Nath and another reported in 27 BLD(AD) 197 in support of his submissions.

12. The learned Advocate for the respondents submits that the trial Court upon perusal of the pleadings and considering evidence both oral and documentary adduced by the parties correctly decreed the suit. Referring to the relevant portion of the judgment he sharply and strongly argued that burden of proof lies on the shoulder of the defendants to show that the documents were duly executed by Rustom Howlader upon receiving the consideration with

satisfaction. Referring the evidence of D.W. 1, he further submits that defendant No. 1 is the beneficiary of the document and he had to be present before the Court but despite having chances, he was absent and for such reason an adverse presumption can easily be drawn that in the event of his presence the result of the case would be fatal for him. He also referred exhibit-Chha and submitted that the signatures as shown to be given by Rustom in several places in the resolution book are not similar and the finding of trial Court on this aspect is sound and legal. He also referred exhibit-Yeo, Ta, Tha and argued that the Heba-bil-Ewaz deed was not acted upon because according to exhibit-Yeo the consideration of such document was not proved to be passed and further submitted that according to the admission of D.W. 1, it appears that Rustom Howlader was in home when the suit was dismissed for default as evident from Exhibit-Tha. He again submits that the entire onus is upon the defendants to show that Rustom Howlader had more land than what was transferred by those impugned documents. This big amount of land which was shown to have been transferred is very unusual and trial Court rightly passed the judgment. He again submits that P.W. 1 was corroborated by P.W. 2 and P.W. 3 who are the most competent witnesses. Defence case was not proved in evidence because defendant No. 1 was not examined. He took us through the grounds taken in the appeal and submitted that those grounds are not valid grounds according to law and the same does not deserve any reasonable consideration by this court. Defendants have failed to prove their case. He finally submits that the judgment passed by the trial court is based upon proper appreciation of pleadings and evidence and the same having been passed upon proper application of judicial mind would not be interfered with by this court and as such the appeal is liable to be dismissed with cost.

13. In support of his submission he has cited the case of Shah Mofizuddin Vs. Afil Uddin, 9 DLR 522; Abdul Mannan Sheikh Vs. Solemon Bewa, 59 DLR 392; Amirun Nessa Vs. Golam Kashem, 42 DLR 499 and the case of Nurul Islam Vs. Azimon Bewa, 51 DLR 451.

14. We have heard the learned Advocates, perused the evidence both oral and documentary, carefully gone through the impugned judgment, examined all other connected and relevant papers of the record and the concerned law.

15. It is admitted that Rustom Howlader died leaving behind 04(four) daughters who are the plaintiffs in the suit and 02(two) sons who are defendant Nos. 1 and 6. The specific case of the plaintiffs is that the impugned documents executed in favour of defendant Nos. 1-5 by Rustom Howlader were obtained by fraudulent means and methods. It is also the case of the plaintiffs that Rustom Howlader died when he was about 110 years old and before 20(twenty) years of his death he was completely unable to walk or move because of his dire sickness along with blindness and he was completely bed ridden and could not perform any worldly affairs due to the complete lack of consciousness and even he was to be carried to the toilet and he lived with his sons in a mess till his death and taking such advantage of his illness those impugned documents were obtained by the defendants. P.W. 2 Adel Uddin Howlader who was considered to be a disinterested witness by the trial Court has stated in his examination-in-chief that Rustom Howlader was sick from 1980 and lost his eye sight and he had no normal sense and was never recovered till his death. P.W. 3 who is a distant cousin of both the parties also supported P.W. 1 and P.W. 2. On the other hand, the case of the defendants is that Rustom Howlader was never sick or bed ridden or blind and was always healthy and performed his own work by himself before his death. D.W. 2 neighbor, D.W. 3 the first degree cousin of both the parties, D.W. 4 and D.W. 5 corroborated D.W.1 to prove that Rustom Howlader was not that sick as has been alleged by the plaintiffs. Now it appears

that the main question in this case is to determine whether Rustom Howlader was actually dreadfully sick or not.

16. Plaintiff produced the certified copy of Heba-bil-Ewaz deed dated 13.02.1983 (exahibit-1), certified copy of kabala dated 15.09.1994 (exhibit-2), certified copy of kabala dated 09.05.1995 (exhibit-2(ka)), certified copy of kabala dated 13.04.1997 (exhibit-2(kha)) the original of which were tendered by the contesting defendant Nos. 1-3 and marked as exhibit-Ga, Gha, Gha(1), Gha(2) respectively and all those documents were executed by Rustom Howlader in favour of defendant Nos. 1-3. Plaintiff also filed the certified copy of gift deed 7220 dated 19.12.1982 (exhibit-2(Ga)) and certified copy of gift deed 7255 dated 19.12.1982 (exhibit-2(Gha)) executed by Rustom Howlader in favour of defendant No. 1 and defendant Nos. 4-5 respectively. But neither defendant No. 1 nor defendant Nos. 4-5 produced those documents before the court. Exhibit 2(Ga) and Exhibit-2(Gha) cover the area of 4.74 acre and 1.50 acre of land respectively.

17. Defendants also produced original Arpannama dated 09.05.1995 (exhibit-Uma) executed by Rustom Howlader to the Char Ghunshi Masque, counter foil of a chaque of savings account No. 6591 of the Agrani Bank of Takerhat Branch, Madaripur exhibit-Cha showing last withdrawal of tk. 1500/- (fifteen hundred) in 1993, the resolution book (exhibit-Chha), orders dated 09.08.1998 and 21.08.2000 passed by this Court in Civil Revision No. 3104 of 1998 (exhibit-Ja), (exhibit-Ja(1)) respectively, kabinnama of the marriage of the son of plaintiff No. 3 wherein Rustom Howlader was witness (exhibit-Jha), Judicial acts done in Title Suit No. 126 of 1989 on 07.10.1991, 09.11.1991, 23.02.1992 (exhibit-Yeo, Ta, Tha) respectively.

18. In the additional written statement filed by defendant Nos. 1-3 it was asserted that in kabala dated 15.09.1994 exhibit-2 and Gha the husband of plaintiff No. 2 named Jaynuddin is the identifier and witness. Identification of executants is governed by Rule 46 of the Registration Rules, 1973 derived from section 69 of the Registration Act, 1908 (Act XVI of 1908). The registering officer being satisfied asks the identifier to mention the name of the executant and accordingly thumb impression is done under Rule 48 with serial number. Jaynuddin is also a witness to exhibit-Gha. Defendant filed the original document. Plaintiffs also filed a certified copy of the same. It is true that law is settled that identifier or witness of a document is not supposed to know the contents of the document but the identifier according to the Registration Rules is held to be the best competent person in whose presence the executant goes with the execution process before the registering officer. On 18.08.2003 D.W. 1 stated in examination-in-chief that Jaynuddin who is the husband of plaintiff No. 3 was identifier and witness to exhibit-Gha dated 15.09.1994 but she was not cross-examined on this point and she denied the suggestion that Jaynuddin's name has been appeared in the document by means of forgery. Thus it is apparently clear that the specific case of the plaintiffs on Rustom Howlader's serious sickness and inability to move after 1980 till his death falls through. The finding of the trial Court does not appear to be satisfactory on this point. Jaynuddin did not come before the Court to deny his identification in exhibit-Gha wherein D.W. 5 Habibur is scribe and witness as well.

19. The statement of plaint is vague. It has been averred in paragraph No. 5 of the plaint that any other document except the disputed gift deed, Heba-bil-Ewaz and kabala deeds shall be deemed to be false, fabricated, fraudulent and forged. From reading of the amendment of the plaint with respect to the statement on the signature of Rustom Howlader done in the resolution book it seems that there is an implied admission that in some places Rustom

Howlader put his signature and his presence and signature are not altogether denied. Resolution book is marked in evidence as exhibit-Chha. D.W. 4 Motiar Rahman deposed in support of exhibit-Chha. Question of examination of the signature of Rustom Howlader through expert was reasonably raised from the side of the defence. According to the provisions laid down in sections 101 and 103 of the Evidence Act, the entire onus was upon the plaintiffs to prove that the signatures given by Rustom Howlader in all the documents are false because it is their specific case that Rustom Howlader never appeared in public due to his serious ailment and indisposition and blindness and even he was to be taken to the toilet by somebody else and remained bed ridden from 1980 until his death. Plaintiffs had to take resort to expert opinion in order to discharge their initial onus under section 101 of the Evidence Act to prove that those impugned documents were executed not by Rustom Howlader but by an imposter with a scheme to grab the property and Rustom Howlader was completely unable to perform his own affairs due to his serious illness. Law says when the initial onus is discharged by the plaintiff the onus then shifts upon the defendants to show the contrary. It is very surprising that plaintiffs never ever uttered any word as to what disease their father actually suffered. Rustom Howlader admittedly was a wealthy man. It is unbelievable that he suffered his last 20(twenty) years without any help from any doctor. Plaintiff could examine any doctor in support of their case. But they did not even mention any name of any doctor who treated their father. Although the question on expert opinion was raised but the trial Court did not pay any attention to it. Learned Advocate for the appellant submitted that the trial Court was wrong in traveling in less important places and failed to point out the main question considering the circumstance of the case. He has referred the case of Sushil Chandra Nath Vs. Sanjib Kanti Nath and another reported in 27 BLD(AD) 197 and submitted that it was the bounden duty of the plaintiffs to obtain the expert opinion in order to prove their own case. We have gone through the decision and find merit in his submission.

20. D.W. 5 Habibur Rahman is the witness to Heba-bil-Ewaz dated 13.02.1983 (exhibit-Ga), both scribe and witness to kabala dated 15.09.1994 (exhibit-Gha), both scribe and witness to kabala dated 09.05.1995 (exhibit-Gha(1)), witness to kabala dated 13.04.1997 (exhibit-Gha(2)) and witness to Arpannama dated 13.04.1997 (exhibit-Uma). The law on attesting witness is guided by section 3 of the Transfer of Property Act and Section 68 of the Evidence Act. The scribe will not be an attesting witness unless he intends to sign the deed as such. In other words a scribe can play the dual role of a scribe and an attesting witness. Plaintiffs say that defendants obtained the impugned documents in collusion with the scribe. Trial Court disbelieved D.W. 5 on the finding that he has signed dimly in the documents for fear of being caught on the allegation of forgery but failed to appreciate that he himself came before the Court to prove the documents and exhibits-Gha and Gha(1) clearly show that he is the scribe of Madaripur Sadar Sub-Registry office holding membership No. 236. So he is an easily identifiable person and the finding of the trial Court on D.W. 5 was misconceived.

21. Learned Advocate for the respondent strongly argued that defendant No. 1 Sirajul himself did not come before the court to depose in support of his case and adverse presumption can be drawn under section 114(g) of the Evidence Act for his non examination in the case despite being an important witness. A Power of Attorney given by defendant No. 1 to D.W. 1 through notary public bearing registration No. 135 of 2003 dated 28.06.2003 is kept in the record and under Order 3 Rule 2 of the Code of Civil Procedure read with section 85 of the Evidence Act this power of attorney bears weight. Now question arises whether D.W. 1 being wife of defendant No. 1 holds the same status of defendant No. 1 while deposing in the suit. Question of adverse presumption shall not arise if DW 1 holds the same position. Section 120 of the Evidence Act provides that husband instead of wife or wife

instead of husband shall be competent witness. So according to the facts and circumstances of the instant case section 120 shall prevail over section 114(g) of the Evidence Act and the question on adverse presumption as argued does not arise.

22. Defendants have asserted in paragraph No. 14(ka)(10) of the written statement that Rustom Howlader had many properties left after the land transferred by the impugned documents in favour of the defendants. Trial Court also noticed that Rustom Howlader was a rich wealthy man. Plaintiffs tried to make out an impression that defendant Nos. 1-5 took away all the land of Rustom Howlader by virtue of those impugned documents. It was the duty of the plaintiffs to figure out the entire property belonging to their father. But plaintiffs did not take any step to show that Rustom Howlader owned such quantum of land or the entire land has been taken away by those impugned documents.

23. It has been asserted in paragraph Nos. 14(ka)(6) of the written statement that Rustom Howlader filed Title Suit No. 126 of 1996 against Thana Education Officer, Madaripur and filed application for temporary injunction not to remove the Char Ghunshi Government Primary School. The temporary injunction was rejected against which Rustom Howlader filed Miscellaneous Appeal No. 41 of 1996 in the Court of District Judge, Madaripur. The appeal failed. Then he preferred Civil Revision No. 3104 of 1998 before this Court. The Rule issuing order dated 09.08.1998 is exhibit-Ja and after his death his substituted heirs extended the order of *status quo* till disposal of the rule on 21.08.2000 which is exhibit-Ja(1). Those are public documents and under section 114(e) of the Evidence Act carry presumptive value of its contents and it is to be presumed that Rustom Howlader sworn affidavit in exhibit-Ja until and unless the contrary is proved by reliable evidence and thus it appears that he was never that sick as has been alleged by the plaintiffs.

24. It appears from the record that Rustom Howlader filed Title Suit No. 126 of 1989 for declaration against the gift deed Nos. 7255, 7220 dated 19.12.1982 (exhibits-2(Ga), 2(Gha)) respectively and Heba-bil-Ewaz deed dated 13.02.1983 (exhibit-Ga) and as P.W. 1 he deposed in the suit on 17.10.1991 and in that suit he filed an application for dismissal of the suit for non-prosecution on 09.11.1991 contending that there was an arbitration held between the parties with the help of local respectable persons and he would not proceed with the suit and the same was marked in evidence as exhibit-Yeo and in support of exhibit-Yeo he sworn an affidavit on 24.11.1991 which is exhibit-Ta and subsequently the suit was dismissed for default on 23.02.1992, the order of which was marked in evidence as exhibit-Tha. From a combined reading of exhibit-Yeo, Ta, Tha, it appears that although he made allegation that he did not receive consideration but subsequently he admitted the documents exhibit-2(Kha), 2(GA) and 2(Gha). Exhibit-Yeo is a deposition on oath with an application for dismissal of the suit for non prosecution and exhibit-Ta is an affidavit sworn in the suit. In the case of Alimuzzaman Vs. Musudur Rahman reported in 8 LM(AD) 164 it has been held by our Honourable Appellate Division in paragraph No. 10 that *"An admission of a person is admissible in evidence as against him, though it can be explained away by the maker thereof or the person against whom it is sought to be proved. According to me, the same principle applies to an admission in a signed pleading, or in affidavit, or in any sworn deposition given by a party in a prior litigation, though it is capable of rebuttal. The assertion of a right, whether in a pleadings or other statements, is relevant under section 13 of the Evidence Act and is, therefore, legally admissible in evidence. An admission contained in a plaint or written statement or an affidavit or any sworn deposition given by a party in a prior litigation will be regarded as an admission in a subsequent action, though it is capable of rebuttal."* The admission of Rustom Howlader that he executed those documents cannot be avoided

when plaintiffs could not establish a definite and clear case on Rustom Howlader's sickness. The execution is admitted and plaintiff had no knowledge on execution or passing of consideration being third party to the document. Plaintiffs cannot question about the consideration because it was between parties to the document. The transferee is to prove the payment of consideration when the transferor challenges the same. In the instant case, if the plaintiffs could prove by cogent and credible evidence that Rustom Howlader was seriously ill and blind from 1980 till his death, in that case the onus would lie upon the defendant to prove the payment of consideration.

25. Defendant Nos. 4-5 being sons of plaintiff No. 3 Shahaton although filed written statement but did not contest the suit. They have supported the case of contesting defendant Nos. 1-3. Defendant Nos. 4-5 also did not file their deed of gift 7220 dated 19.12.1982 the certified copy of which was filed by plaintiffs as exhibit-2(Gha). Defendant No. 1 also did not file his deed of gift 7255 dated 19.12.1982. The contesting defendant Nos. 1-3 filed their 04(four) other documents in original which were marked in evidence as exhibit-Ga, Gha, Gha(1), Gha(2) and the plaintiffs also filed the certified copies of those documents which are exhibits-1, 2, 2(ka), 2(kha). The execution of those documents are proved by the other convincing and supporting documentary and oral evidence. It was decided in the case of Shishir Kanti Paul Vs. Nur Mohammad reported in 55 DLR(AD) 39 that a registered document carries presumption of correctness of the endorsement made therein. One who disputes this presumption is required to dislodge the correctness of the endorsement. Plaintiffs completely failed to dispute the presumption of correctness of the documents of defendant Nos. 1-3. This 55 DLR case has been affirmed in the case of Sultan Ahmed Vs. Mohammad Shajahan reported in 3 LM(AD) 463.

26. This is a suit for declaration that the impugned documents mentioned in the schedule to the plaint are forged, fraudulent, collusive and not binding upon the plaintiffs. The suit was filed on 21.08.2002. In the instant suit plaintiffs ought to have made the Char Ghunshi Mosque and Char Ghunshi Government Primary School and Nur Mohammad party to the suit and prayed relief against exhibit-Uma. If exhibit-Uma remains undisturbed the case of defence that Rustom Howlader was healthy and competent stands good and the case of the plaintiffs comes undone. In the instant case after the written statement as well as additional written statement was filed by the defendant Nos. 1-3, plaintiffs although amended the plaint on several occasions but did not make them party to the suit or pray any relief against exhibit-Uma. Nur Mohammad is one of the recipients of exhibit-Gha(2).

27. According to paragraph No. 7 of the plaint, cause of action arose on 14.07.2002 after having knowledge from the sub-registry office. But on perusal of the records it appears that the certified copies of exhibit-2 and 2(ka) were obtained on 17.07.1995. The certified copies of exhibit-2(Ga) and exhibit-2(Gha) were obtained after filing of the suit on 05.07.2003 and 03.07.2003 respectively. Thus it can be held that the cause of action of the suit is definitely false and the suit is barred by law of limitation. The beneficiaries of exhibit-2(Gha) dated 19.12.1982 being defendant Nos. 4-5 are the sons of plaintiff No. 3 Sahaton and the husband of plaintiff No. 2 Rahaton was the identifier to exhibit-Gha dated 15.09.1994. So it raises serious doubt on the story of cause of action and as such it is held that the suit is barred by limitation under Article 120 of the Limitation Act.

28. This is not a case to be decided upon giving emphasis on oral evidence. It is not proved in evidence that Rustom Howlader was ever sick as alleged by the plaintiff rather all the documentary evidence along with the oral evidence explicitly shows that Rustom Howlader was a physically fit person and could perform his daily affairs himself. The recital of the impugned documents shall prevail over the oral evidence. D.W. 2 and D.W. 3 supported the case of possession of the contesting defendant Nos. 1-3. D.W. 2 has got land adjacent to the suit land. He stated in his examination-in-chief that plaintiffs have no possession in the disputed land but on this point he was not cross-examined with a single word. D.W. 3 who is the first degree cousin of both plaintiffs and defendant No. 1 and 6 also supported the possession of the defendants in his examination-in-chief but he was also not cross-examined on that point. Thus it transpires that the possession of the defendants is admitted by the plaintiffs. Trial court failed to consider this simple but material aspect affecting the merit of the case. The finding on constructive possession of the plaintiff arrived at by the trial Court was uncalled for because plaintiffs did not make out any case to ascertain how much land the propositus actually owned. It is admitted that defendant No. 1 and his wife paid respect and took proper care of Rustom Howlader and the defendant Nos. 1-3 being transferees of exhibit-Ga, Gha, Gha(1), Gha(2) as well as son and grandsons of Rustom Howlader admittedly lived in the same mess in one house. There is no case on the part of the plaintiffs that defendant Nos. 1-3 ever maintained any bad relation with Rustom Howlader. The Trial Court also observed that Rustom Howlader being satisfied with defendant Nos. 1-3 transferred the suit land covered by those impugned documents. In the instant case, the oral evidence is evenly balanced. It is presumed that no formal delivery of possession by Rustom Howlader was required to be proved in the instant case because both the executant and transferees live together in the same house. Document presupposes possession and it is the very old maxim that possession goes with title. Possession is presumed to be in favour of such person who has got better title.

29. In the instant case defendants did not file and prove exhibit-2(Ga) and 2(Gha) but proved exhibit-Ga, Gha, Gha(1), Gha(2). Although defendants did not prove exhibit 2(Ga) and 2(Gha) as per law but that does not create any right to the plaintiffs to get a decree to the effect that those are not binding upon them because the they failed to prove their case. Moreover, we observed earlier that the suit is hopelessly barred under article 120 of the Limitation Act and consequently the plaintiffs' suit fails as a whole.

30. Trial Court erred in law in decreeing the suit upon wrongful consideration. The finding of the trial Court is self contradictory. Trial Court misconceived the law and facts of the case and arrived at a wrong conclusion. The impugned judgment and decree call for interference by this Court. From the discussions made above we find merit in the appeal.

31. In the result, the appeal succeeds and accordingly the same is allowed. The judgment and decree dated 28.09.2003 passed by the Joint District Judge, Court No. 1, Madaripur in Title Suit No. 06 of 2002 decreeing the suit is hereby set aside.

32. Send down the lower Courts' record with a copy of the judgment.