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September, 2015

Editors
Justice Moyeenul Islam Chowdhury
Justice Sheikh Hassan Arif

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Supreme Court of Bangladesh

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Syed Aminul Islam
Registrar General
(Senior District Judge)
Supreme Court of Bangladesh

Research Associates
Farjana Yesmin
Deputy Registrar
(Joint District Judge)
High Court Division

Md. Shamim Sufi
Research and Reference Officer
(Senior Assistant Judge)
Appellate Division

Contact:
scob@supremecourt.gov.bd

Supreme Court of Bangladesh

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   Chief Justice
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4. Mr. Justice Syed Mahmud Hossain
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APPELLATE DIVISION

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

CIVIL PETITION FOR LEAVE TO APPEAL NOS.718-720 of 2013
(From the judgment and order dated 23.6.2011 passed by the High Court Division in Company Matter Nos.40, 126 and 127 of 2011.)

Bangladesh Bank:	Petitioners. (In all the cases)
Versus	
Eagleway Investment Ltd. and others:	Respondents. (In C.P. No.718 of 2013)
Sun Ascent Holding Ltd. and others:	Respondents. (In C.P. No.719 of 2013)
Onbright Corporation Ltd. and others:	Respondents. (In C.P. No.720 of 2013)

For the Petitioner: (In all the cases)	Mr. Ajmalul Hossain, Senior Advocate (with Mr. Mahbubey Alam, Senior Advocate), instructed by Mr. Mvi. Md. Wahidullah, Advocate-on-Record.
For the Respondents: (In all the cases)	Not Represented.

Date of hearing : 9th February, 2015.

Fraud practiced upon Court:
Since the judgments were obtained by practicing fraud upon the court, we have no alternative but to set aside the said judgments of the Company Court and the persons concerned should be put to justice. We direct the Registrar to file complaints before the Chief Metropolitan Magistrate, Dhaka against the respondent(s)... for using forged documents for securing judgments from the Company Court. ...(Para 11)

J U D G M E N T

Surendra Kumar Sinha, CJ:

1. Delay in filing these petitions is condoned. The petitioner in these petitions is same but the facts, and the law points being identical, though the respondent No.1 (the respondent) of these petitions is different, these petitions are disposed of by this order in order to avoid repetition.

2. For our convenience the facts in Civil Petition No.718 of 2013 are narrated below:

Eagleway Investments Ltd. was incorporated in Hong Kong. It moved a petition under section 43 of the Companies Act, 1994 for rectification of the share register of the respondent No.3, ICB Islami Bank Limited. It claimed that it purchased 45,000 shares of Tk.1000/- each in the respondent No.3 Bank, formerly the Oriental Bank Limited, equivalent to 8.67% of the issued shares. At the time of purchasing the shares, the respondent submitted to the respondent No.3 a declaration to the effect that it was not purchasing the shares as a nominee of another or in the 'benami' and that it had not purchased any shares in 'benami' before, in fulfillment of the requirements of section 14 Ka(3) of the Bank Company Act, 1991 ('the Act'). During the relevant time, persons and firms associated with the Orion Group, a group of public companies, private companies and firms also purchased shares in respondent No.3 Bank. Bangladesh Bank decided to acquire the respondent's interest basing on information available in its various reports, which proved inadequate and did not fully disclose the true state of affairs. Despite the endeavours of the preceding Directors of respondent No.3 Bank, Bangladesh Bank appointed an administrator for the respondent No.3 on 19th June, 2006, upon suspending the Board of Directors. On 6th August, 2006, Bangladesh Bank superseded the Board of Directors of the then Oriental Bank for one year. On 29th January, 2007, the respondent received a memo from the respondent No.3 notifying that the respondent's shares, along with the shares of 13 others amounting to 69.87% of the issued shares in the respondent No.3 Bank have been forfeited to the Bangladesh Bank immediately by operation of law. The memo alleged that Mr. Obaidul Karim's family had acquired the said shares in the respondent No.3 Bank in the names of 13 individuals/companies. The respondent was not provided with any copy of the Bangladesh Bank's report. Accordingly, the respondent had no knowledge about the facts alleged against it. The respondent did not submit any false affidavit. The respondent purchased the shares upon obtaining specific permission from the Securities and Exchange Commission.

3. It is stated that the respondent does not fall within the definition of 'family' as contained in the explanation of section 14 Ka. The respondent is also not dependent on any shareholders of the respondent No.3 Bank. In August 2007, the paid-up capital of respondent No.3 was increased from Tk.519,106,000.00 to Tk.6,647,000,000.00. Thereafter, respondent No.2 floated a tender to sell respondent No.3's majority shares, whereupon ICB Financial Group Holdings AG, having offered the highest bid, purchased 52.76% shares in respondent No.3 Bank in February, 2008. The name of Bangladesh Bank as the holder of the shares belonging to the respondent has been entered without sufficient cause in the register of members upon omitting the name and, as such, the said register is required to be rectified.

4. No affidavit-in-opposition was filed on behalf of the respondent. The Company Court on construction of section 14A of the Bank Company Act held that this section does not prevent a Company to hold shares more than 10% of the total shares of another company, inasmuch as, a Company does not fall within the definition of family; that the said provision does not also prevent a person to hold shares to the extent of 10% independently notwithstanding that he may have sufficient interest in another company; that section 14Ka(I) does not prevent a sister concern to collectively hold shares more than 10% in a Bank Company; that a company, however, cannot purchase shares in the benami of another Company or person; that several companies having one address may also hold more than 10% shares collectively in one group subject to the condition that the share holding of its individual company shall not exceed 10% shares; that a share holder of a Company has no proprietary interest in the assets of the company; that the allegation that Mr. Obaidul Karim holds shares in the benami of the petitioner is devoid of substance; that the respondent never gave any false declaration nor did it hold 8.67% shares in Oriental Bank in benami of Karim family; that the letter of the Bangladesh Bank dated 29th January, 2007, forfeiting the shares can be challenged in an application under section 43 of the Companies Act since Bangladesh Bank did not forfeit the shares under section 45(1) of the Act and that Bangladesh Bank illegally forfeited shares of the respondent.

5. Mr. Ajmalul Hossain, learned counsel appearing for the petitioner has taken us to some documents filed with the additional paper book and submits that the respondent has perpetrated a gigantic fraud upon the Company Court in securing the impugned judgment, inasmuch as, there was non existence of the respondent-Company on the date of institution of the petition under section 43 of

the Companies Act. In this connection, learned counsel submitted that it revealed on a search that Eagleway Investments Limited bearing registration No.0762586 which was incorporated on 6th July, 2001 stood dissolved prior to obtaining 45,000 shares of the respondent No.3 and its registration was subsequently dissolved by striking off on 27th November, 2009, annexure YY-1 and YY-2 respectively. In view of the above, it was contended that the said company ceased to exist as a legal entity prior to the filing of the company matter and the affidavit sworn on 27th November, 2011. Therefore, it is contended that Mr. Peter YC Koh misrepresented the Commissioner of Oaths of the Company Court.

6. Learned Counsel further submitted that the respondent 'Sun Ascent Holdings Limited' whose registration No.0768757 was corporated on 3rd September, 2001, prior to the obtaining 45000 shares but the Company's registration was subsequently dissolved by striking off on 22 January, 2010 and therefore, it ceased to exist as a legal entity prior to the filing of the Matter No.126 of 2011. It is further contended that the respondent 'Onbright Corporation Ltd.' bearing registration No.0771337 was incorporated on 26th September, 2001 prior to obtaining 43,769 shares but the Company was dissolved on 19th February, 2010 and therefore, the Company ceased to exist prior to the filing of Company Matter No.127 of 2011. Therefore, it is submitted that the said Companies could not have held any shares whatsoever in the respondent No.3 and could not be deemed to have stepped into the shoes of respondent No.3 Bank. In this connection the learned Counsel has drawn our attention to annexure YY-3 of the additional paper book.

7. On perusal of annexures YY-1, YY-2 and YY-3 series, we find substance in the contention of the learned Counsel. These companies which purchased shares in the respondent No.3 Bank ceased to exist on the day of filing petitions for rectification of shares. In course of hearing of these petitions, Mr. Rokunuddin Mahmud was present, who appeared on behalf of the respondent in the High Court Division, took time to meet the points raised by Mr. Ajmalul Hossain, but on the next date on 9th February, 2015, when the matters were taken up for hearing, the learned counsel submitted that the respondent did not enter appearance and that he had no instructions to appear in these matters.

8. On perusal of the documents we have no reason to doubt that the respondent (respondent No.1 in these petitions) are fake Companies set up by interested persons with a view to overcoming the legal impediment to acquire shares of the respondent No.3 Bank, and by practising fraud obtained the judgments from the Company Court. These fake companies had resorted to corrupt practices in making the petitions for rectification of the shares by making completely false statements on behalf of non-existent Companies. It further appears from the order sheets of Matter Nos.4, 126 and 127 of 2011 that those petitions were admitted on 16th May, 2011 and the learned Judge fixed the Matters for hearing on 29th May, 2011. On 26th May, an affidavit of compliance was filed on behalf of the respondent through their counsel Mr. Mustafizur Rahman Khan on 29th May. Mr. Md. Asaduzzaman appeared on behalf of respondent No.3 and by order dated 23rd June, 2011, the Company Matters were allowed. There was no noting regarding the service of notice upon the Bangladesh Bank.

9. In the affidavits of compliance, it was stated that in compliance of the court's order dated 16th May, 2011, 'the petitioner has served notice on the respondents on 23.3.2011 and caused publication of notice on 23.3.2011'. As a matter of fact, no notices were at all served upon the Bangladesh Bank as appeared from the order sheet. We failed to understand how the Company Court without recording any order or without ascertaining whether or not notices upon the Bangladesh Bank were served, heard the Matters and delivered the judgments within 13 days of admission.

10. We noticed from the judgments that the learned Judge noted the submissions of Mr. Ajmalul Hossain on behalf of the petitioner Bangladesh Bank. Mr. Ajmalul Hossain in course of hearing strenuously argued that being a Senior Counsel of this court, he could affirm an affidavit refuting the observations of the Company Court that he argued on behalf of the petitioner. Record shows that Bangladesh Bank has not entered appearance by engaging a Counsel. Therefore, the submission of Mr. Ajmalul Hussain merits consideration. The order sheet clearly suggests that before the service of notices upon the petitioner the Matters were disposed of. The company court has proceeded with the

Matters hurridly without even caring to look at whether or not the Matters were ready for hearing. These facts proved beyond doubt that some local powerful persons made the petitions for rectification of shares by using the names of the respondent, the foreign Companies, and all of them have resorted to fraud for abusing the justice delivery system so as to achieve their evil and corrupt aims. We simply record our dissatisfaction in the manner the learned counsel Mr. Mustafizur Rahman Khan has filed the affidavits of compliance showing service of notices upon the Bangladesh Bank.

11. Since the judgments were obtained by practicing fraud upon the court, we have no alternative but to set aside the said judgments of the Company Court and the persons concerned should be put to justice. We direct the Registrar to file complaints before the Chief Metropolitan Magistrate, Dhaka against the respondent No.1, (1) Sun Ascent Holdings Ltd, Unit # 801, 8th Floor, Pacific House, 20 Queens Road, Central Hong Kong, and Low Siok Foon, daughter of Low Peug Luue, Unit # 801, 8th Floor, Pacific House, 20 Queens Road, Central Hong Kong, (2) Eagleway Investment Ltd. Unit # 801, 8th Floor, Pacific House, 20 Queens Road, Central Hong Kong, Hong Kong SAR and Peter Y.C. Koh, son of late Roll ENG Sing, 8th Floor, Pacific House, 20 Queens Road, Ventral Hong Kong, and (3) Onbright Corporation Ltd, Unit # 801, 8th Floor, Pacific House, 20 Queens Road, Central Hong Kong and Steven Ngee Leng Koh, son of Koh Yew Chuan, Unit # 801, 8th Floor, Pacific House, 20 Queens Road, Central Hong Kong and others for using forged documents for securing judgments from the Company Court. Accordingly, we also direct the Registrar to certify and enclose the forged documents filed by these three fake companies along with the petitions for rectification of share register and the documents included with the additional paper books filed in this Division on 1st February, 2015, the judgments of the Company Court, the petitions under section 43 of the Companies Act, this judgment along with the complaint petitions. These petitions are disposed of with the above findings and directions.

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APPELLATE DIVISION

PRESENT:

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

CIVIL PETITION FOR LEAVE TO APPEAL NOS.1428 AND 1429 OF 2014
(From the judgment and order dated the 24th day of April, 2014 passed by the High Court Division in Election Petition Nos.8 and 9 of 2014)

Major General Abdus Salam (Retd)	. . . Petitioner (in both the cases)
-Versus-	
Bangladesh Election Commission and another	. . . Respondents (in both the cases)
For the Petitioner (in both the cases)	Mr. Mahbubar Rahman, Senior Advocate instructed by Mr. Mohammad Abdul Hai, Advocate-on-Record
For the Respondent (in both the cases)	Mr. Shafique Ahmed, Senior Advocate instructed by Mr. Md. Habibur Rahman, Advocate-on-Record
Date of Hearing	The 13th day of August, 2015

The most significant thing is that for the purpose of filing an election petition under article 49(1) of the RPO only the phraseology "candidate" has been used. In other words, a proposed "candidate" has been given the *locus standi* to file an application raising an election dispute. Admittedly the candidature of the election-petitioner was rejected by the Election Commission on the ground of being a defaulter, he is surely a person who was proposed as a candidate for election as a member of the Parliament of the Constituency in question. But the High Court Division failed to comprehend the proper meaning of "candidate" given in section 2(ii) of the RPO vis-à-vis article 49(1) thereof in observing that *"the petitioner being a candidate of the 10th National Parliamentary Election did not act rather he was an intending candidate and wanted to become a candidate."* And we hold that the petitioner being a proposed "candidate" for election as a Member of the Parliament for the Constituency in question, he had every *locus standi* to file the election petitions and those were maintainable in law. ...(Para 9)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. These petitions for leave to appeal have been filed against the common order dated the 24th day of April, 2014 passed by a Division Bench of the High Court Division in Election Petition Nos.8 and 9 of 2014 rejecting both the election petitions.

2. Facts necessary for disposal of these petitions are that the petitioner herein filed two election petitions before the High Court Division under article 49(2) of the Representation of the People Order, 1972 (in short, RPO) being Nos.8 and 9 of 2014 for the reliefs mentioned therein. In the election petitions, respondent No.2 (hereinafter referred to as the respondent) filed two applications under Order VII, rule 11 of the Code of Civil Procedure (the Code) for rejection of the election petitions on two grounds viz (i) that the election-petitioner not being a candidate would not be able to file the election petition within the meaning of article 49(2) of the RPO and (ii) that the nomination paper of the election-petitioner was rejected by the Election Commission, which was final, he, therefore, would not be able to file the election petitions challenging the said final order of the Election Commission.

3. The applications were contested by the petitioner by filing separate written objection contending, *inter alia*, that the election petitions were very much maintainable in law. The applications for rejection of the election petitions were filed under misconception of law. There was cause of action to file the election petitions, so the applications for rejection of the election petitions were liable to be rejected.

4. The High Court Division by the common impugned order rejected both the election petitions.

5. Heard Mr. Mahbubar Rahman, learned Counsel for the petitioner and Mr. Shafique Ahmed, learned Counsel for the respondent.

6. We have perused the impugned order. The election petitions have been rejected on the view that those were barred by law without mentioning under what provision of law. But from the discussions made in the body of the order, it appears that the Tribunal found the reliefs prayed in the respective election petition barred under articles 14(5) and 51(2) of the RPO. The High Court Division observed that the election-petitioner *"being a candidate of the 10th National Parliamentary Election did no act rather he was an intending candidate and wanted to become a candidate but having been failed to become a candidate for redress of his grievance he instituted the Writ Petition No.12439 of 2013 and 12440 of 2013 under Article 102 of the Constitution of the People's Republic of Bangladesh and the Writ Petitions having been rejected on 26.12.2013, the petitioner allegedly preferred civil miscellaneous petition before the Hon'ble Appellate Division of the Supreme Court of Bangladesh and from the submission of the learned counsel for the petitioner it appears that the civil miscellaneous petitions are still awaiting for disposal."*

7. Let us see whether the High Court Division was correct in taking the above view in rejecting the election petitions.

8. Sub-article (1) of article 49 of the RPO has provided that no election shall be called in question except by an election petition presented by a "candidate" (emphasis supplied) for that election in accordance with the provisions of Chapter-'V'(Chapter-'V' has dealt with election disputes). In article 2 of the RPO: "Candidate" has been defined in clause-(ii) "Candidate" means a person proposed as a candidate for election as a member. Besides the definition of "candidate", two other definitions of the article are relevant viz "contesting candidate" and "returned candidate". According to clauses (VI) of article 2

""contesting candidate" means a candidate who has been validly nominated for election as a member and whose candidature has not been either withdrawn under clause (1) or ceased under clause (2) of Article 16 and according to clause (XX) "returned candidate" means a candidate who has been declared elected as a member under this Order."

9. The most significant thing is that for the purpose of filing an election petition under article 49(1) of the RPO only the phraseology "candidate" has been used. In other words, a proposed "candidate" has been given the *locus standi* to file an application raising an election dispute. Admittedly the candidature of the election-petitioner was rejected by the Election Commission on the ground of being a defaulter, he is surely a person who was proposed as a candidate for election as a

member of the Parliament of the Constituency in question. But the High Court Division failed to comprehend the proper meaning of "candidate" given in section 2(ii) of the RPO vis-à-vis article 49(1) thereof in observing that "*the petitioner being a candidate of the 10th National Parliamentary Election did not act rather he was an intending candidate and wanted to become a candidate.*" And we hold that the petitioner being a proposed "candidate" for election as a Member of the Parliament for the Constituency in question, he had every *locus standi* to file the election petitions and those were maintainable in law.

10. The High Court Division found the election petitions non maintainable on the ground that the reliefs sought in the petitions were barred under articles 14(5) and 51(2) of the RPO; reason for holding so is that the nomination of the election-petitioner was cancelled by the Election Commission in the appeals being Election Appeal No.87 of 2003 and Election Appeal No.79 of 2013 filed by the Bank and the respondent respectively which were final. He, therefore, could not make any prayer in the election petitions for setting aside the "Judgment and Order" dated 11.12.2013 passed by the Election Commission in the respective appeal cancelling his nomination paper for the election of the constituency in question. According to the High Court Division, such prayer has not been contemplated in sub-article (2) of article 51 of the RPO. In finding the election petitions barred under article 51(2) of the RPO, the High Court Division totally failed to consider that besides the above prayer, there were other prayers in the election petitions and prayer (ii) was quite in conformity with the said sub-article. Prayer (ii) reads as follows:

"(ii) Declaration to the effect that the Election of returned candidate Md. Anwarul Abedin Khan, respondent No.2 as Member of Parliament from the Parliament Constituency No.154, Mymensingh-9 in the 10th Parliament Election held on 05.01.2014, is void."

11. In the context, we may look into sub-article (2) of article 51 of the RPO which reads as under:

"A petitioner may claim as relief any of the following declarations, namely-

(a) that the election of the returned candidate is void;

(b) that the election of the returned candidate is void and that the petitioner or some other person has been duly elected; or

(c) that the election as a whole is void."

12. Since the respondent was declared as member of the Parliament in the parliamentary seat in question unopposed, no other prayer as contemplated in the sub-rule was necessary. In the RPO, there is no provision of rejection of the election petition. Article 58 of the RPO has provided that the High Court Division shall dismiss an election petition, if (a) the provisions of article 49 or article 50 or article 51 have not been complied with or (b) the petitioner fails to make the further deposit required under clause (4) of article 57, but in the instant case, no complaint was made by the respondent that the election petitions were filed without complying with those provisions of the RPO. However, it is the provisions of Order VII, rule 11 of the Code under which the applications were filed for rejection of the election petitions and that provision of the Code has not contemplated rejection of a plaint (here the election petitions) for addition of a prayer than the law requires. However, that point, if agitated, can very well be decided along with the other issues involved in the election petitions at the trial of the election petitions.

13. For the discussions made above, we are constrained to hold that the High Court Division erred in law rejecting the election petitions. Therefore, the impugned order calls for interference by this Court. Since we have heard the learned Counsel of both the parties and the petitions have arisen out of an election dispute, which need to be disposed of expeditiously, we are not inclined to give any leave, as that would cause delay in the disposal of the election petitions. Moreso, this Court has been informed that the election petitions are ready for peremptory hearing.

14. In view of the above, these petitions are disposed of in the following terms:

The impugned order rejecting the election petitions is set aside. The High Court Division is directed to proceed with the trial of the election petitions and dispose of the same in accordance with law expeditiously keeping in view the observations made hereinbefore in this judgment.

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APPELLATE DIVISION

PRESENT
Mr. Justice Md. Muzammel Hossain,
Chief Justice
Mr. Justice Surendra Kumar Sinha
Mr. Justice Md. Abdul Wahhab Miah
Ms. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali
Mr. Justice Md. Shamsul Huda

CIVIL APPEAL NO.29 of 2006
(From the judgment and order dated 03.12.2003 passed by the High Court Division in First Appeal No.235 of 1990.)

Uttara Bank Limited .....Appellant

=Versus=

Credit and Commerce Insurance
(Saudi) Limited and others .....Respondents

For the Appellant : Mr. N. I. Bhuiyan, Advocate-on-Record.

For the Respondents : Mr. Syed Shaheed Hossain, Advocate instructed by Mr. Md. Nawab Ali, Advocate-on-Record.

Date of hearing : 11.07.2012.

New defence plea at appellate stage:
Before this Appellate Division the defendant-appellant did not raise any question as to the correctness of the above concurrent findings of the courts of facts, rather it has raised a new plea to the effect that the plaintiffs could not prove that the defendant bank sold the said 152 travellers' cheques. But we are unable to accept this new defence plea at this stage specially in view of the pleadings of the contesting parties and the evidence adduced by them. ...(Para 10)

J U D G M E N T

Nazmun Ara Sultana, J.-

1. This appeal by leave, at the instance of the defendant Uttara Bank Limited, is directed against the judgment and order dated 03.12.2003 passed by the High Court Division in First Appeal No.235 of 1990 affirming the judgment and decree passed in Money Suit No.1 of 1989 of the 2nd Commercial Court, Dhaka.

2. The above mentioned Money Suit No.1 of 1989 was filed by the plaintiff-respondents against this defendant-appellant stating, inter-alia, that in the back ground of an agreement dated 27.12.1982 between the plaintiffs and the defendant Uttara Bank Limited the defendant Uttara Bank Limited was to act as an agent and trustee of Bank of Credit and Commerce International (Overseas) Limited

(shortly BCCI)- the plaintiff No.2- for sale of BCCI Travellers' cheques on 14 different terms contained in the letter dated 27.12.1982 (Ext.2). The plaintiff No.1 was the insurer in the transaction to secure the loss of plaintiff No.2. That on 02.04.1984 the defendant bank's manager Abdus Satter requested to hand over 200 cheques of US$ 500 each to it and BCCI Bank in due course of its business supplied those to Uttara Bank's authorized cashier Mr. Asgar Ali. Mr. Asgar Ali acknowledged the receipt of 200 travellers' cheques by signing a trust receipt dated 05.04.1984 (ext.4) as per agreement. Out of 200 those travellers' cheques Uttara Bank sold 152 cheques to various purchasers and the First National Bank Louisville Kentucky on behalf of BCCI Bank paid US$76000 against those 152 travellers' cheques to the purchasers in between 30.04.1984 to 21.06.1984. Out of that US$76000 BCCI received payment of US$2000 only vide draft No.003569 dated 31.05.1984. The balance US$74000 not being adjusted BCCI, London by its telex dated 27.09.1984 (Ext.11) addressed to Uttara Bank requested for payment giving detail particulars of travellers' cheques valued US$74000 paid by its said banker to the various purchasers. That the remaining other 48 travellers' cheques were not sold by Uttara Bank and those were subsequently recovered from the drawer of Mr. Asgar Ali of Uttara Bank and were returned to BCCI. The defendant bank having not settled the claim, BCCI lodged claim and recovered the value from the insurer (plaintiff No.1) under a letter of subrogation and thereafter BCCI and the insurer jointly filed the suit against Uttara Bank.

3. The defendant Uttara Bank Limited contested the suit by filing written statement denying the material averments made in the plaint and contending, inter-alia, that the defendant bank never wrote to the plaintiff No.2 to supply travellers' cheques and did not authorize Mr. Asgar Ali to receive travellers' cheques on behalf of the defendant, that the requisition letter was not sent by any of the officers of the defendant bank and that the signatures appearing in the requisition letter were not the signature of any of the officers of the defendant bank and this alleged requisition letter was not genuine one and that if any travellers' cheque was received by Asgar Ali that was received by him in his personal capacity for which the defendant bank was not liable at all.

4. The trial court decreed the suit on the finding that the plaintiff was able to prove its case that Asgar Ali was authorized by the defendant bank to receive the travellers' cheques and as such the contention of the defendant bank that Asgar Ali acted beyond the course of his employment in the defendant bank or that the requisition letter was manufactured one was not acceptable. Against that judgment of the trial court the defendant preferred First Appeal No.235 of 1990 before the High Court Division and the High Court Division, after hearing both the parties, dismissed that appeal affirming the judgment and decree of the trial court concurring with the findings of the trial court that the defendant bank's manager Abdus Sattar wrote the requisition letter to the plaintiff bank to issue travellers' cheques of US$1,00,000/- for counter sale and that the unsold travellers' cheques were found in the drawer of Asgar Ali who was in the employment of the defendant bank at the time when the travellers' cheques were supplied by the plaintiff bank, that from the evidence, both oral and documentary, it was clearly proved that Asgar Ali while in the employment of the defendant bank received travellers' cheques of US$1,00,000/- and that the defendant did not pay the amount against 148 travellers' cheques.

5. Being aggrieved by the judgment and decree of the High Court Division the defendant-appellant filed Civil Petition for leave to appeal No.677 of 2004 on the main ground that the plaintiff-respondents failed to prove that the travellers' cheques were ever encashed or sold by the Uttara Bank and as such it cannot claim sale proceeds of those travellers' cheques from Uttara Bank.

6. Leave was granted to consider the submissions of the learned Counsel for the leave petitioner which have been stated in the leave granting order as follows:-

"The learned Counsel for the petitioner submits that the High Court Division has committed error of law in not considering that admittedly the transaction between the petitioner and the respondent Nos.2 and 3 being a credit transaction to act as a seller and trustee of the travellers' cheques of the said respondents and to remit the sale proceeds to the said respondents the petitioner bank is not legally liable to compensate for those travellers' cheques which were never sold by the petitioner bank.

He further submits that the High Court Division has committed error of law in not considering that the respondents having failed to prove that the petitioner bank has sold the travellers' cheques in question, the said respondents cannot claim the sale proceeds of those cheques.

The learned Counsel for the petitioner lastly submits that the High Court Division has committed error of law in not considering that the respondents having failed to prove that the travellers' cheques in question were ever enchased, cannot claim proceeds of those cheques from the petitioner bank who acted as a seller and trustee of the traveller cheques."

7. Mr. N. I. Bhuiyan, the learned advocate-on-record for the appellant has mainly argued before us to the effect that in this case the plaintiff could not prove at all that the travellers' cheques were ever encashed or sold by Uttara Bank and in the circumstances the plaintiff cannot claim the sale proceeds of those travellers' cheques from the defendant bank. The learned advocate has argued that there is no evidence on record to prove that the defendant bank sold those travellers' cheques and in the circumstances the defendant is not legally liable to compensate for those travellers' cheques which were never sold by the defendant bank. The learned advocate has contended that the High Court Division as well as the trial court committed error of law in not considering that the plaintiff-respondents having failed to prove that the defendant-appellant bank sold the travellers' cheques in question they cannot claim the sale proceeds of those traveller chaques.

8. To controvert the above submission of the learned advocate for the appellant Mr. Syed Shaheed Hossain, the learned advocate for the respondents has pointed out that this plea that the plaintiff could not prove the sale of the traveller's cheques in question- was not raised or agitated at all by the defendant-appellant either before the trial court or before the High Court Division. The learned advocate has submitted that in those two courts of facts the defendant-appellant pleaded a case to the effect only that the defendant bank or any of its officers never asked the plaintiff bank to issue any travellers' cheques and that Asgar Ali- the cashier of the defendant bank might have received those travellers' cheques fradulently in his personal capacity and that for this personal and fraudulent act of Asgar Ali the defendant bank cannot be made responsible for payment for those travellers' cheques. The learned advocate has pointed out also that both the courts below, on proper consideration of evidence and other materials on record, disbelieved this case of the defendant and accepted the case of the plaintiff that being authorized by the manager of the defendant bank, namely, Abdus Sattar and on the requisition of the said manager Abdus Sattar the cashier Asgar Ali received 200 travellers' cheques from the plaintiff bank. The learned advocate for the respondents has contended that being defeated in both the courts below the defendant has now made an altogether new case which cannot be considered at all. The learned advocate has submitted further that the plaintiff-respondents stated categorically in their very pleadings that its banker The First National Bank Louisville Kentucky paid the value of 152 travellers' cheques out of which only US$2000 was reimbursed and the balance was not reimbursed and that in support of this statement the plaintiff's witness P.W.1 gave oral evidence and produced Ext-11 giving particulars of payment against the balance travellers' cheques issued by the defendant bank. The learned counsel has pointed out that against these pleadings and evidence of the plaintiffs the defendant did not raise any question either in the trial court or in the appellate court and has argued that in this circumstance the above pleadings and evidence of the plaintiffs are sufficient to prove that those 152 travellers' cheques were sold. The learned advocate for the respondents has prayed for dismissal of this appeal.

9. We have considered the submissions of the learned Advocates of both the sides and gone through the judgment of the courts below and the evidence on record.

10. It appears that before the trial court and also the appellate court this defendant-appellant denied the claim of the plaintiff by pleading a case to the effect only that in fact the defendant bank or any of its officers never asked the plaintiff bank for issuance of any travellers' cheques or never sent any requisition for those travellers' cheques by Asgar Ali, the cashier of the defendant bank and that Asgar Ali might have fraudulently received those travellers' cheques from the plaintiff bank in his own capacity and not in course of his employment in defendant bank and as such the defendant bank was not responsible for payment of the sale proceeds of those travellers' cheques. But it appears that

both the courts of facts, on meticulous examination of the evidence adduced by both the parties and the facts and circumstances, arrived at the concurrent finding that Abdus Sattar- the manager of the defendant bank sent the requisition (Ext.-3) to the plaintiff bank for issuance of 200 travellers' cheques and also authorised Asgar Ali the cashier of the defendant bank to receive those travellers' cheques and accordingly Asgar Ali received those 200 travellers' cheques from the plaintiff bank. Before this Appellate Division the defendant-appellant did not raise any question as to the correctness of the above concurrent findings of the courts of facts, rather it has raised a new plea to the effect that the plaintiffs could not prove that the defendant bank sold the said 152 travellers' cheques. But we are unable to accept this new defence plea at this stage specially in view of the pleadings of the contesting parties and the evidence adduced by them.

11. It appears that the plaintiffs, in their very plaint, have categorically stated that its banker The First National Bank Louisville Kentucky paid the value of 152 travellers' cheques in between 30.04.1984 to 21.06.1984 to various purchasers and in support of this statement of the plaint the plaintiff produced exhibit-11- showing particulars of payment against those travellers' cheques. The exhibit-11 is the Telex dated 27.09.1984 of the BCCI, London, TC Division to Uttara Bank, Dhaka stating in details that The First National Bank Louisville, Kentucky paid total US$ 77500 against 183 travellers' cheques including 148 travellers' cheques of the disputed transaction. The defendant bank did not try even to controvert the above pleading of the plaintiffs and this exhibit-11 produced by the plaintiffs either before the trial court or before the High Court Division. No suggestion even was ever made to any of the P.Ws. to the effect that the plaintiffs did not pay against those travellers' cheques or the purchasers did not encash those. The defendant could not return those travellers' cheques or did not make any statement to the effect that they would return those travelles' cheques to the plaintiff bank. So, in these circumstances we are unable to accept this new defence plea that the plaintiff could not prove the sale of those travellers' cheques by the defendant bank.

12. Considering the above facts and circumstances we find no merit in this appeal and hence this appeal is dismissed without any order as to costs.

2 SCOB [2015] AD 12

APPELLATE DIVISION

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

CIVIL PETITION FOR LEAVE TO APPEAL NOs.342 and 327 of 2011
(From the judgment and order dated 05.08.2010 passed by the High Court Division in Writ Petition No.8493 of 2006)

Orascom Telecom Bangladesh Limited.	.....**Petitioner.** (In C.P.No.327/11
The Chief Executive Officer, Grameen Phone Limited.	.....**Petitioner.** (In C.P.No.342/11
-Versus-	
Kalipada Mridha and others.	.....**Respondents.** (In both the petitions)

For the Petitioners. (In both the petitions.	Mr. Asaduzzaman, Advocate, instructed by Mr. Syed Mahbubur Rhaman, Advocate-on-Record.
Respondents. (In both the petitions)	Not represented.
Date of Hearing.	The 11th May, 2015.

Commercial Use of National Anthem:
There is no gainsaying the fact that each of the leave-petitioners has been charging revenue for playing the national anthem on the mobile phones. On consideration of the Rules, in general, we find that there is no scope for commercial use of the national anthem. Such commercial use of national anthem shows utter disrespect to the national anthem. ...(Para 16)

JUDGMENT

SYED MAHMUD HOSSAIN, J:

1. Both the civil petitions for leave to appeal are directed against the judgment and order dated 05.08.2010 passed by a Division Bench of the High Court Division in Writ Petition No.8493 of 2010 making the Rule absolute with directions.

2. Both the petitions for leave to appeal arising out of the same judgment and order between the same parties and involving similar question of law and fact having been heard together are being disposed of by this single judgment.

3. The facts, leading to the filing of these civil petitions for leave to appeal, in brief, are:

The writ petition is premised on an advertisement published in a comic magazine named "Bicchu" dated 06.08.2006 which was circulated as a magazine of a national daily, "The Daily Jugantor". The advertisement was published in the aforesaid magazine on 06.08.2006 for the subscribers of Grameen Phone, Bangla Link and Aktel (presently Robi) for the downloading of Ring Tone to be played in their respective mobile phones. The said advertisement contained an assortment of songs, both folk and modern in Bangla, Hindi and English to be played in the mobile phone of any individual subscriber as a Ring Tone captioned under the heading বাংলা সিনেমা, থিম, দেশাত্ববোধক, f õ£N£¢a, ®m¡LN£¢a, h¡wm¡ Bd¢eL etc. In the list of patriotic songs, the first item is the National Anthem of Bangladesh.

4. Upon publication of the aforesaid advertisement, the writ-petitioner, as a patriotic citizen of the country, issued a notice demanding justice on 17.08.2006 addressed to the concerned Ministries for withdrawal, cancellation, revocation of the advertisement, so far as it relates to the downloading of the National Anthem as a Ring Tone.

5. Being aggrieved by and dissatisfied with the failure of the writ-respondents to withdraw public offer published in the Daily Jugantor's comic magazine 'Bicchu' dated 06.08.2006 so far as it relates to downloading option for the National Anthem of Bangladesh as Ringtone, the writ petitioner filed a writ petition before the High Court Division and obtained Rule Nisi in Writ Petition No.8493 of 2006.

6. The writ-respondent Nos.6 and 7 filed separate powers but no affidavit-in-opposition was filed controverting the material statements made in the writ petition.

7. The learned Judges of the High Court Division upon hearing both the sides by the judgment and order dated 05.08.2010 made the Rule absolute with directions Feeling aggrieved by and dissatisfied with the judgment and order of the High Court Division, proforma-respondent Nos.8 and 9 as the leave-petitioners have filed these civil petitions for leave to appeal before this Division.

8. Mr. Asaduzzaman, learned Advocate, appearing on behalf of the leave-petitioners of both the petitions, submits that the High Court Division committed illegality in observing that audacity demonstrated by proforma-respondent Nos.8, 9 and 10 warrants a punitive action and that on the basis of such finding passed a punitive order directing each of the leave-petitioners to pay Tk.50,000,00/- without giving it an opportunity of being heard and as such, the impugned judgment is liable to be set aside.

9. We have considered the submissions of the learned Advocate of the leave-petitioner of both the leave-petitions, perused the impugned judgment and the materials on record.

10. The Constitution of the People's Republic of Bangladesh states about the national anthem in sub-article (1) of Article 4 which is quoted below:

"4(1) The national anthem of the Republic is the first ten lines of "Amar Sonar Bangla."

Sub-article (4) of Article 4 provides as under:

"4(4) Subject to the foregoing clauses, provisions relating to the national anthem, flag and emblem shall be made by law."

11. In accordance with the provisions of the Constitution, National Anthem Rules,1978 (in Short, the Rules) were promulgated with effect from 25.10.1978.

12. Schedule-1, Column-1 of the said Rules states the occasion, on which, national anthem is to be played. Schedule-1 states 20 occasions, on which, national anthem, are to be played. Of them, 18 occasions relate to State functions. Serials Nos.19 and 20 are two occasions, which are not State functions. Serial Nos.19 and 20 in Schedule-1, Column-1 are as follows:

"(19) At the beginning of the cinema shows and at the conclusion of the Television programmes.
(20) At the beginning and conclusion of the day's programme of radio broadcast."

13. In this connection, it is pertinent to quote Rule 5 of the Rules, which is as under:
"5. Singing of national anthem by civilians-(1). The national anthem may be sung on an occasion which, though not strictly ceremonial, is significant because of the presence of any Minister.

(2) In all schools, the day's work shall begin with the singing of the national anthem.
(3) Whenever the national anthem is sung, the whole of it shall be sung."

14. On consideration of the relevant provisions of National Anthem Rules,1978, it is explicitly clear that national anthem can be played only at the places and on the occasions specified in the said Rules. The restrictions so imposed have been done for protection and preservation and upholding the sanctity of the national anthem.

15. The national anthem is the nation's cherished property. We protect the national anthem because it is an important song of national unity. Bangladeshis regard the national anthem with an almost mystical reverence regardless of what sort of social, political or philosophical beliefs they may have. Commercial use of national anthem amounts to its desecration.

16. There is no gainsaying the fact that each of the leave-petitioners has been charging revenue for playing the national anthem on the mobile phones. On consideration of the Rules, in general, we find that there is no scope for commercial use of the national anthem. Such commercial use of national anthem shows utter disrespect to the national anthem. Each of the petitioners herein should have refrained from commercial use of national anthem. In an open market economy, each of the leave-petitioners can promote its business but it can do so without offending any existing law of the country. Even China where free market economy is booming does not permit commercial use of its national anthem.

17. Mr. Asaduzzaman, learned Advocate of the leave-petitioners of both the petitions, submits that the impugned judgment was delivered without giving each of the petitioners an opportunity of being heard and as such, the impugned judgment should be set aside. It is of course true that the impugned judgment was passed behind the back of each of the leave-petitioners as no notice was served upon them. As soon as the leave-petitions were filed, each of leave-petitioners has the option to assail the judgment on merit.

18. Mr. Asaduzzaman, however, could not assail the impugned judgment on merit.

19. As such, the question of raising violation of natural justice does not arise at this stage.

20. We are of the view that the High Court Division was justified in making the Rule absolute. We are, however, of the opinion that the donation to be paid by each of the leave-petitioners should be reduced to Tk.30,000,00/- instead of Tk.50,00000/-.

21. Therefore, leave-petitioner, (Orascom Telecom Bangladesh Limited) of leave-petition No.342 shall donate Tk.30,00000/- (thirty lac) to the National Institute of Kidney Diseases and Hospital, Shere-E-Bangla Nagar, Dhaka.

22. Leave petitioner (The Chief Executive Officer, Grameen Phone Limited), shall donate Tk.30,00000/- (thirty lac) to the National Lever Foundation of Bangladesh, 150, Green Road, 2nd Floor, Panthapath, Dhaka.

23. The donations have to be paid as expeditiously as possible.

24. Accordingly, both the leave-petitions are disposed of with the above direction.

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APPELLATE DIVISION

PRESENT
Madam Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali
Mr. Justice Mohammad Anwarul Haque

CIVIL APPEAL NO. 268 OF 2009
(From the judgment and order dated 5th of June, 2007 passed by the High Court Division in Arbitration Case No. 03 of 2006)

TATA Power Company Limited	... Appellant
= Versus =	
M/S Dynamic Construction	... Respondent
For the Appellant	:Mr. Ahsanul Karim, Advocate, instructed by Mvi. Md. Wahidullah Advocate-on-Record
For the Respondent	:Mr. A.Y. Mosheuzzaman, Advocate, instructed by Mr. Bivash Chandra Biswas Advocate-on-Record
Date of hearing	:The 11th of February, 2014
Date of judgment	:The 5th of March, 2014

The arbitral award is generally not open to review by Courts for any error in finding on facts and applying law for the simple reason that it would defeat the very purpose of the arbitration proceedings. ...(Para 20)

Whenever an award is challenged before any Court, the Court, i.e. either District Court or as in this case the High Court Division, does not sit on appeal over the decision of the learned Arbitrator. Therefore, the scope of considering the merits of the case and factual aspects is again very limited. ...(Para 23)

The factual and contractual positions are matters for decision of the Arbitrator and as such, unless there appears to be gross illegality, neither the High Court Division nor this Division would enter into the merit of such arguments. ...(Para 24)

JUDGEMENT

MUHAMMAD IMMAN ALI, J:-

1. This Civil Appeal, by leave, is directed against the judgment and order dated 05.06.2007 passed by a Single Bench of the High Court Division in Arbitration Case No. 03 of 2006 modifying the Arbitral Award dated 29.08.2006 and directing the appellant to pay the respondent a sum of Taka

61,60,000/ only with interest accrued thereon from the date of Arbitral Award dated 29.08.2006 at the rate of 2%.

2. The facts of the case, in brief, are the appellant Tata Power Company Limited (Tata) is a company incorporated under the Indian Companies Act, 1913. The respondent M/S Dynamic Construction (Dynamic) is a proprietorship concern engaged in the construction of civil and electrical works. The appellant was appointed as contractor by the Power Grid Company of Bangladesh Limited (PGCB) an enterprise of the Bangladesh Power Development Board, for the Design and Construction of 230 KV Khulna-Bheramara-Ishurdi Transmission Line on turnkey basis under a contract executed on 30.05.2004. The appellant thereafter invited tenders from qualified contractors of Bangladesh in respect of the said work for being appointed as sub-contractors. The respondent submitted its bid and its offer was accepted. The appellant and the respondent along with two other contractors whose tenders had also been accepted held several meetings and an agreement was signed between the parties. In the final meeting held on 05.8.2004 Minutes of the Meeting (MOM) was drawn up and signed by the appellant and the respondent. In accordance with the provisions of the MOM the respondent was to undertake the work for construction of 68 KM. 230 KV transmission line between Khulna Central and New Khulna Sub-station under certain terms and conditions. The appellant thereafter, vide letter dated 10.09.2004, issued a Letter of Intent (LOI), *inter alia*, with a request to mobilise all resources so as to commence the foundation work on 01.10.2004. Accordingly, the respondent began the work of mobilisation for commencement of the work. It may be noted here that the Letter of Intent(LOI)dated 10.09.2004 stipulated that the respondent should "arrange mobilization of all resources based on this LOI, so as to commence foundation work on 1st October, 2004." However, other conditions were mentioned "which would form an integral part of our detailed Purchase Order". The first of these conditions was that the respondent had "to arrange approval from PGCB before commencement of foundation work i.e. before 1st October, 2004."

3. While the respondent was performing its obligations in accordance with the LOI, the appellant terminated the contract by a fax massage dated 01.01.2005 (transmitted on 08.1.2005). The respondent vide letter dated 02.03.2006 disputed the letter of termination and invoked the arbitration proceeding by issuing a notice of arbitration. The parties mutually agreed to appoint Justice Naimuddin Ahmed to act as the sole Arbitrator for resolving the disputes between them.

4. The respondent (Claimant) made its claim by submitting its statement of claim stating, *inter alia*, that, in part performance of the contract, it mobilised the materials and equipment as instructed but the appellant illegally terminated the contract on 01.01.2005. In the statement of claim, the respondent claimed that he had invested the following amounts towards execution of the contract:

a	Stone Supplier- 2 Persons advance	20,00,000/-
B	Kuchi Stone Supplier-Person Advance	10,00,000/-
C	Rig advance Deposit	8,00,000/-
D	Land collateral with Bank	30,00,000/-
E	Land collateral with Bank	20,00,000/-
F	Stringing Equipment Lease	20,00,000/-
G	Purchase of Automobile for Tk.	10,00,000/-
H	Two times Travel Expense to India	1,00,000/-
I	Land visit supervisor and valuation	2,00,000/-
J	Stockyard for Lease of properties (Land)	3,60,000/-

K	Salary of 2 B.S.C Engineers 3 Diploma	6,00,000/-
.		
		1,30,60,000/-

5. The Claimant prayed for the following relief:

a. A declaration to the effect that the termination of the contract by the respondent No. 1 (appellant) by the fax message dated 01.01.2005 is illegal.
b. Damage to the tune of Tk. 1,30,60,000/ incurred by it for mobilisation of resources and
c. Costs.

6. The appellant denied the allegations made in the statement of claim by filing a statement of defence and also laid a counter-claim against the claimant in the form of damage for a sum of Tk. 8,25,000/-.

7. The Arbitral Tribunal after hearing the parties passed the Award on 29.08.2006. In deciding the Award the learned Arbitrator raised the following issues.

> "1. Was the order of termination of the contract by Respondent No. 1 according to the terms of the contract and lawful?
> 2. Is the Claimant entitled to claim any amount from Respondent No. 1 for his alleged mobilisation of resources?
> 3. Did the Claimant incur any expenditure for mobilisation of resources as alleged? If so, to what extent?
> 4. Is the counter-claim laid by Respondent No. 1 sustainable? If so, to what extent?
> 5. Is the Claimant entitled to get any declaration to the effect that the termination of the contract with it by Respondent No. 1 is illegal and without lawful authority and a violation of the contract?
> 6. Is the Claimant entitled to get any amount for mobilisation of resources? If so, to what extent?
> 7. Is the Respondent No. 1 entitled to get any amount as damage from the Claimant? If so, to what extent?
> 8. To what other relief, if any, are the parties entitled?"

8. Issue No. 1 was decided against the claimant. Issue Nos. 2 and 3 were decided partly in favour of the claimant. The Tribunal came to a finding that the claimant had incurred the following expenditure for mobilisation of resources.

1	Stone Supplier- 2 Persons advance	20,00,000/-
.		
2	Kuchi Stone Supplier-Person Advance	10,00,000/-
.		
3	Rig advance Deposit	8,00,000/-
.		
4	Land collateral with Bank	30,00,000/-
.		
5	Land collateral with Bank	20,00,000/-
.		
6	Stringing Equipment Lease	20,00,000/-
.		
7	Stockyard for Lease	3,60,000/-
.		
8	Salary of 2 B.S.C Engineers 3 Diploma	6,00,000/-
.		
		1,11,60,000/-

9. Issue No. 4 was decided against the respondent No. 1 and its counter-claim was dismissed. The Tribunal determined issues No. 5, 6, 7 and 8 and passed the award in the following terms.

AWARD

"1. The claim of the claimant is allowed in part. The claimant is awarded an amount of Taka 1,11,60,000/- only payable by the respondent No. 1.

The respondent No. 1 shall pay the aforesaid amount of Taka 1,11,60,000/- within one month from this date failing which interest at the rate of 2% per annum on the amount of the award, or, if part payment is made, on the amount remaining unpaid shall be charged and payable by the respondent No. 1.

If the respondent No. 1 fails to comply with the order for payment within the time above, the amount of the award shall be realised according to law.

2. The claim of the claimant for declaration to the effect that the order of termination of the contract between it and the respondent No. 1, by the respondent No. 1 vide its order under Ref. TPCI/BD/PGCB(W7)KI/62 dated January 1st, 2005 is illegal and without lawful authority, is dismissed.

3. The counter-claim of the respondent No. 1 for damages to the tune of Taka 8,25,000.00/-to be payable by the claimant, is dismissed.

4. Considering the circumstance that success is divided and other circumstances, the claimant and the respondent No. 1 are directed to bear their respective costs of this arbitration proceeding.

5. The proceedings as against the respondents Nos. 2 and 3 stand dismissed.

10. Against the said award, the appellant Tata Power Company Limited filed Arbitration Case No. 3 of 2006 before the High Court Division.

11. By the impugned judgment and order, the High Court Division set aside the award of damage for the sum of Tk. 50,00,000/ under the head "land Collateral with Bank" under serial numbers 4 and 5 and upheld the remaining part of the award passed by the learned Arbitrator subject to the aforesaid modification.

12. Against the said judgement and order dated 05.06.2007 the appellant filed Civil Petition for Leave to Appeal No. 114 of 2008.

13. Leave was granted to consider the following grounds:

I. Whether the High Court Division acted illegally in not considering that the learned Arbitrator passed the Award of Tk. 1,11,60,000.00 in favour of the respondent contrary to the provisions of section 73 of the Contract Act, 1872 because the respondent having admittedly committed breach of contract is not entitled to get any compensation and as such, the award is clearly opposed to section 73 of the Contract Act.

II. Whether the High Court Division acted illegally in not considering that the learned Arbitrator misconducted himself in contradicting his own finding, on the one hand holding that the respondent breached the very important term of the contract while on the other hand awarded an amount of Tk. 1,11,60,000.00 as compensation to the respondent who himself was in breach of the contract in complete violation of section 73 of the Contract Act ; and

III. Whether the High Court Division acted illegally in not holding that no work under the contract including mobilisation could be done without obtaining permission from PGCB and no compensation is recoverable from the petitioner under the contract, the learned Arbitrator acted beyond his jurisdiction in traveling beyond the terms of contract, inasmuch as the learned Arbitrator having not identified any breach on the part of the petitioner, the award was opposed to law and public policy inasmuch as the High Court Division did not understand the true perspective of the word 'public policy' and its role in setting aside the said award dated 29.08.2006."

14. Mr. Ahsanul Karim, learned Advocate appearing on behalf of the appellant made submissions laying forth the grounds upon which leave was granted. He further submitted that the High Court

Division should have considered that the claimant having himself been in breach of contract the learned Arbitrator completely misconceived section 73 of the Contract Act making Award of Tk. 1,11,60,000.00 in favour of the respondent. The learned Advocate also submitted that the High Court Division erred in not considering that the learned Arbitrator misconducted himself in not properly considering the provisions of the Contract Act and giving an award in favour of the claimant who did not qualify to make any claim at all since there was admittedly no breach of contract by the respondent (appellant herein). His final submission was that the learned Arbitrator acted beyond his jurisdiction in traveling beyond the terms of contract which were fundamental in any claim based on it. There being no breach on the part of the appellant the award was opposed to law and public policy, inasmuch as the High Court Division did not understand the true perspective of the word 'public policy' and its role in setting aside the said award dated 29.08.2006.

15. Mr. A.Y. Mosheuzzaman, learned Advocate appearing on behalf of the respondent made submission in support of the judgement and order of the High Court Division. In addition he submitted that the loss incurred by the respondent was due to part performance of the contract which was instigated by the appellant in terms of the Letter of Intent dated 10 September, 2004 and Work Order dated 28 October, 2004. It was at the behest of the appellant that the respondent mobilised materials and equipment as instructed by the appellant and, hence, the learned Arbitrator rightly passed an award in favour of the respondent. He further submitted that under section 43 of the Arbitration Act, 2001 an arbitral award may be set aside only if it is opposed to the law for the time being in force in Bangladesh or if it is in conflict with public policy in Bangladesh. He submitted that in the instant case, since the award is neither opposed to the law nor is in conflict with public policy, and there is no allegation that it was induced by fraud or corruption, there was no ground for the appellant to seek an order for setting aside the award. He also submitted that the arbitration award is not liable to be brought under scrutiny before the High Court Division since that Division does not sit as a Court of appeal over the award of the learned Arbitrator. In support of his contention he referred to the decision reported in the case of **Shahabullah (Md.) Vs. The State** reported in ***43 DLR, 1.*** He further submitted that the High Court Division is not at liberty to interfere with the award passed by the learned Arbitrator other than on the grounds mentioned above (as provided under section 43 of the Arbitration Act, 2001). He submitted that the award of the Arbitrator could not be assailed by reassessing and reappraising evidence considered by the learned Arbitrator. In support of his contention he referred to the decision in the case of ***M/s Sudarsan Trading Co., v. The Govt. of Kerala and another*** reported in **AIR 1989 SC, 890** and in the case of ***The President, Union of India and another, v. Kalinga Construction Co. (P) Ltd.*** reported in ***AIR 1971 SC, 1646.***

16. We have considered the submissions of the learned advocates appearing for the parties concerned and perused the impugned judgement as well as other evidence and materials on record.

17. The claim of the respondent in this case, which was contested before the learned Arbitrator appointed upon agreement of both the parties, is based on the LOI dated 10.09.2004 and a Work Order dated 28th October, 2004 which in turn reflected the arrangement between the parties, as contained in the Minutes of Meeting dated 5th August, 2004. In that meeting the appellant and the respondent discussed finalisation of a contract for the construction of a 230 KV Khulna-Bheramara-Ishurdi Transmission Line by the respondent as a sub-contractor. One of the terms agreed in that meeting was that the work order given to the respondent would be valid only if PGCB approved the respondent as a sub-contractor. This condition was again reflected in Column 10 of Article 8 of the Work Order dated 28 October, 2004. It may be mentioned at this stage that the respondent admitted that he did not take approval of the PGCB. On the other hand, the respondent based his claim for expenditure incurred in placing materials and equipment on the site in accordance with the Letter of Intent dated 10 September, 2004.

18. We find that the Letter of Intent (Annexure-C) contains a request by the appellant to the respondent to accept the Letter of Intent and "arrange mobilisation of all resources based on this LOI". We note from the LOI also that there is a condition that the respondent was to arrange approval from PGCB before commencement of foundation work, i.e. before 1st October, 2004. The claim of the

respondent is that on the basis of the LOI and Work Order it was pressurised by the appellant into mobilisation of materials and equipment.

19. At this juncture we note that admittedly neither any work was done nor any mobilisation commenced before 1st November, 2004. The respondent first wrote to PGCB for approval as sub-contractor on 4th November, 2004. In fact PGCB refused to accord approval to the respondent on 14.12.2004. It must also be borne in mind that the appellant was the contractor under PGCB and, therefore, without the approval of the sub-contractor (respondent) by PGCB, the appellant would be unable to complete its contract with PGCB through the engagement of the respondent.

20. However, the terms and conditions of the LOI, Work Order and Minutes of the Meeting are all factual matters which have been dealt with by the learned Arbitrator and which in our view cannot be within the ambits of either the High Court Division or this Division to consider. The High Court Division rightly observed that the arbitral award is generally not open to review by Courts for any error in finding on facts and applying law for the simple reason that it would defeat the very purpose of the arbitration proceedings.

21. The Arbitration Act is a special law enacted with the aim of giving expeditious relief to parties who accede to the system of arbitration agreed upon in their contract and adjudicated upon in accordance with the Arbitration Act, 2001. Under this Act the decision of the Arbitrator making the arbitral award is final and binding both on the parties and on any persons claiming through or under them. Section 39 of the Act provides as follows:

"৩৯। রোয়েদাদ চূড়ান্ত ও বাধ্যকর- (1) ®Lje p¡¢mp Q¢š²l d¡l¡h¡¢qLa¡u p¡¢mp£ VÊChée¡m কর্তৃক প্রদত্ত রোয়েদাদ চূড়ান্ত হইবে এবং উহা পক্ষগণ এবং তাহাদের মাধ্যমে বা অধীনে দাবীদার যে কোন ব্যক্তির উপর বাধ্যকর হইবে।

(2) Ef-ধারা (১)এ যাহা কিছুই থাকুক না কেন, এই আইনের বিধান অনুসারে সালিসী রোয়েদাদের বিরুদ্ধে কোন ব্যক্তির আপত্তি উত্থাপনের অধিকার ক্ষুন্ন হইবে না। "

22. The only ground of challenging the award is to be found section 43 of the Act, which provides that a challenge of the arbitral award is permitted only on the grounds set out in that section. Section 43 of the Arbitration Act, 2001 has been quoted in the impugned judgement. For our purposes the provisions relevant for the instant case are as follows:

"৪৩। সালিসী রোয়েদাদ বাতিলের কারণসমুহ- (১) কোন সালিসী রোয়েদাদ বাতিল করা যাইতে পারে, যদি-

.....

(M) আদালত কিংবা ক্ষেত্রমত, হাইকোর্ট বিভাগ এই মমে p¿Ø qu ®k-

(আ) সালিসী রোয়েদাদ দৃশ্যতঃ বাংলাদেশে প্রচলিত কোন আইনের পরিপন্থী ;

(ই)) সালিসী রোয়েদাদ বাংলাদেশের জননীতির পরিপন্থী; অথবা

.....

23. Thus, the scope of interference with the arbitral award is very limited as has been held in the cases cited by Mr. Moshiuzzaman. Whenever an award is challenged before any Court, the Court, i.e. either District Court or as in this case the High Court Division, does not sit on appeal over the decision of the learned Arbitrator. Therefore, the scope of considering the merits of the case and factual aspects is again very limited.

24. In the instant case the provisions of the Arbitration Act relevant for our purposes, as urged by the learned Counsel for the appellant, are found in section 43 (1)(b)(ii) and(iii). In view of the above proposition that the High Court Division does not sit on appeal over the arbitral award, the submission of the learned Advocate for the appellant with regard to fulfillment or non-fulfillment of the terms of the contract is somewhat redundant. The factual and contractual positions are matters for decision of the Arbitrator and as such, unless there appears to be gross illegality, neither the High Court Division nor this Division would enter into the merit of such arguments.

25. With regard to the question of public policy, the submission of the learned Advocate for the appellant, if we have understood correctly, is that it includes any decision by the learned Arbitrator without following the existing law of the country or traveling beyond the terms of the contract. In the civil petition for leave to appeal it was contended that any misinterpretation of a well settled principle of law or leading precedent or misreading and non-consideration of evidence amount to an act against public policy and that it means and includes also to ensure justice and rule of law.

26. The learned Judge of the High Court Division quoted the explanation in section 34 of the Arbitration and Conciliation Act of 1996 of India ("1996 Act") which is similar to section 43(1)(b)(iii) of our Arbitration Act, 2001, which provides that an award would be treated to be in conflict with the public policy of India, if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81. The High Court Division then went on to suggest what might be considered public policy, but ultimately decided that "the application of the concept of public policy for the purpose of setting aside an award is rendered difficult." The learned Judge concluded that the award was not patently illegal or so unfair and unreasonable that it could be labeled as being in conflict with public policy.

27. We also feel that a definition of public policy would make it easier to decide what would be considered as being in conflict with public policy. In the absence of such definition, we are to rely upon the usual meaning of the phrase 'public policy' which according to Black's Law Dictionary, 18th Edition is: "Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society". It could be said, for example, that if the decision of the learned Arbitrator would have a negative impact on the future of international agreements by foreign companies investing in Bangladesh, then such a decision could be terms as being in conflict with public policy. However, in the facts of the instant case we do not consider that the contract entered into by the parties or the award made by the learned Arbitrator has any impact on the state and the whole of society. We also cannot agree with the submission of the learned Counsel for the appellant that a decision contrary to the law of the country is necessarily in conflict with public policy an envisaged by the Act, 2001. That would be an illegality pure and simple. It would be giving too broad a meaning to the phrase 'in conflict with public policy' to include decisions which are contrary to law, or where the learned Arbitrator has traveled beyond the terms of his reference, or has misinterpreted a principle of law or precedent, or for misreading or non-consideration of evidence. These matters can be considered as matters relating to propriety, but are not, in our view, matters relating to public policy.

28. The appellant before us raised the issue before the High Court Division as well as before this Division that the respondents did not fulfill their part of the contract, inasmuch as they were unable to obtain approval from PGCB and, therefore, according to the terms of the Letter of Intent and the Work Order they could not have commenced the mobilisation. Furthermore, it was submitted that since there was a stipulation that the Work Order for the foundation would commence by 1st of November, 2004, that having not been done, and the respondent having applied for approval from PGCB on 4th of November, 2004, (page 152 of the paper book) they were already in breach of the contract and, accordingly, the appellant rightly terminated the contract. It was pointed out by the learned Advocate for the appellant that the learned Arbitrator found that till 12.01.2005 the claimant could not secure the approval of the PGCB as required by the agreement. The learned Arbitrator observed that the Claimant admitted that he could not procure the approval of the PGCB. As such, the claimant failed to perform an important term of the contract and for this failure the respondent No. 1 (appellant herein) was entitled to terminate the contract as per the term of the contract. Accordingly, the learned Arbitrator found that the order of termination of the contract between the parties by respondent No. 1 (appellant herein) has been according to law and the terms of the contract. This finding of the learned Arbitrator is not amenable to challenge before any Court.

29. On the other hand, the respondent (claimant) claimed before the learned Arbitrator as well as before the High Court Division and this Division that it was entitled to claim damages for incurring expenditure towards facilitating the work with which it had been entrusted under the contract and as

such, mobilisation of resources for commencing the actual work, was rightly claimed. In this connection the learned Arbitrator relied upon the decision in the case of ***Anglia Television Limited v Reed*** reported in ***3 All ER (1971) 690.*** The respondent relied upon this case as well as the materials on record which tend to show that it at the insistence of the appellant that it commenced mobilisation of equipment and materials.

30. One other point argued before us was that the respondent was required to submit a Performance Guarantee and Bank Guarantee before the contract would take effect and that no such guarantee was furnished. It was the claim of the respondent before the learned Arbitrator that due to the failure of the claimant to furnish bank guarantee and to obtain approval of PGCB which were both preconditions of the contract, there was no contract at all.

31. On this issue the learned Arbitrator observed that had there been no contract, the respondent No. 1 (appellant herein) would not have issued the Work Order and would not have issued instructions to the claimant to mobilise resources. The learned Arbitrator relied on the principle laid down in the case of ***Anglia Television Limited v. Reed*** reported in ***3 All ER (1971) 690*** where it was held that the claimant is entitled to recover the damage for expenditure which it claimed to have incurred under mutual arrangement with the respondent No. 1 (appellant herein) in order to facilitate the work under the contract.

32. The High Court Division agreed with the decision of the learned Arbitrator so far as the claim of the respondent is concerned save and except the claim for 50,00000/- Taka in respect of "land collateral with bank".

33. Before the High Court Division as well as before this Division learned Counsel for the appellant made a submission to the effect that only the person in breach of contract is liable for the loss and damage caused by the breach of contract. He submitted that the learned Arbitrator wrongly applied the principle of the decision in ***Anglia Television Limited v Reed.*** He pointed out that in the case under reference the defendant entered into the contract knowing that expenditure had already been incurred by the plaintiffs and, therefore, the defendant must have contemplated, or it was reasonable to impute contemplation to him, that if he broke the contract the expenditure would be wasted.

34. Let us consider Section 73 of the Contract Act which provides as follows:

*"73.**Compensation for loss or damage caused by breach of contract-**when a contract has been broken the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

35. Kamaluddin Hossain J. (as his Lordship was then) in ***Amin Jute Mills vs M/s A.R.A.E.*** 28 D.L.R (AD)76- referring to section 73 of the Contract Act observed as follows:

"An analysis of section shows that, when it is found that a party to a contract is in breach, he must pay compensation for the loss or damages caused by the breach to the other contracting party. That is the principal consideration."

36. It was held in the case of ***K.M. SHAFI LIMITED V. GOVERNMENT OF BANGLADESH AND OTHERS*** reported in ***1983 BLD(AD)109*** that in a dispute over a contract the Arbitrator is the sole judge. *Per* Badrul Haider Chowdhury J. (as his Lordship was then), "Unless the award of the Arbitrator can be assailed on one of the three grounds mentioned in section 30 of the Arbitration Act the long line of cases show that the Court will not interfere even though courts may take a different view of the interpretation of the particular terms of contract. This is a sound principle. Otherwise such disputes should be brought within the jurisdiction of the civil court and thereby opening a flood gate

of litigations nullifying the very spirit of the Arbitration as mentioned in the Arbitration Act" (His Lordship was referring to Act X of 1940).

37. Learned Counsel for the appellant submitted that when the learned Arbitrator found that the claimant (respondent herein) was himself in breach of contract and that the claimed loss and damage was not caused by the breach of the appellant he should have held that the claim is not sustainable.

38. The provisions of section 73 of the Contract Act are quite clear, inasmuch as whenever there is any loss or damage caused by the breach of a party to an agreement then the other party (the innocent party) who has incurred the loss as a result of the breach is entitled to receive compensation for any loss or damage. In other words, in the facts of the instant case, had it been found that the appellants were in breach of contract and the respondents (claimant before the Arbitrator) had incurred loss and damage as a result of the breach, then surely there would have been a claim by the respondents. But in the facts of the instant case it is abundantly clear that the learned Arbitrator found as a matter of fact that the claimant was in breach and that the termination of the contract by the appellant was according to law and the terms of the contract. Having decided this issue against the claimant, clearly the decision in the case of ***Anglia Television Limited v Reed*** no longer remains applicable. The principle in the said case, i.e. the ability to claim to the extent of loss and damage incurred before contract still stands good, but it must be subject to the provision of the Contract Act, i.e. that the person who is in breach will be liable to make good the loss of the person who suffers as a result of the breach. Moreover, in that case the defendant was aware at the time of entering the contract that expenditure had already been incurred for which he would be liable in case of breach by him.

39. We are, therefore, of the opinion that in order to be entitled to claim for a loss incurred due to a breach of contract, the claimant must prove that the loss incurred was due to the breach of the defendant and that the loss incurred was within the contemplation of the defendant at the time of signing the contract.

40. Since in the facts of the instant case the finding of the learned Arbitrator was that it was the claimant who was in breach of the contract and not the defendant, clearly the claimant does not qualify to claim under section 73 of the Contract Act. In this regard we may refer to the decision in the case of ***Bangladesh Power Development Board and others vs. M/s Arab Contractor (BD) Limited and others***, where it was held that:

"An analysis of section shows that, when it is found that a party to a contract is in breach, he must pay compensation for the loss or damages caused by the breach to the other contracting party. That is the principal consideration".

41. In the instant case the clear finding being that the appellant was not in breach of the contract and had rightly terminated the contract due to breach of the terms by the respondent, no question of liability will arise against the appellant. This being a fundamental question of law and the learned Arbitrator having totally overlooked the existing law on the issue, the arbitral award was rightly challenged under section 43 (1)(b)(ii) of the Arbitration Act.

42. In view of the above discussion, we find merit in the appeal which is allowed without, however, any order as to costs. Accordingly, the impugned judgement as well as the Award of the learned Arbitrator are set aside.

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APPELLATE DIVISION

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

CIVIL APPEAL NOS.45-48 OF 2012.
(From the judgment and order dated 6th July, 2010, 27th September, 2010 and 8th October, 2009 passed by the High Court Division in Review Petition Nos.49 of 2010, 48 of 2010, 52 of 2010 and Writ Petition No.2331 of 2009.)

The Bangladesh Agricultural Development Corporation, represented by its Chairman, Krishi Bhaban, 49-50, Dilkusha C/A., Motijheel, Dhaka and others:

Appellants.
(in all the cases)

=Versus=

Md. Abdur Rashid and others : Respondents.
(In C.A. No.45 of 2012)

Md. Ataur Rahman and others : Respondents.
(In C.A. No.46 of 2012)

Md. Rafiqul Islam : Respondent.
(In C.A. No.47 of 2012)

Md. Shafiqul Alam Khan and others: Respondents.
(In C.A. No.48 of 2012)

For the Appellants: (In all cases)	Mr. Mahbubay Alam, Senior Advocate, instructed by Mr. N.I. Bhuiyan and Mr. Shamsul Alam, Advocate-on-Record.
For Respondent Nos.1-5: (In C.A. No.45 of 2012)	Mr. Abdul Wadud Bhuiyan, Senior Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the Respondent: (In C.A. No.47 of 2012)	Mr. Probir Neogi, Advocate, instructed by Mr. Taufique Hossain, Advocate-on-Record.
For Respondent: (In C.A. No.48 of 2012)	Not represented.
Respondent Nos.6-8: (In C.A. No.45 of 2012)	Not represented.
Respondent Nos.2-11: (In C.A. No.46 of 2012)	Not represented.

Dates of hearing: 11-06-2013, 24.07.2013 and 30.07.2013
Judgment on:12.02.2014

Voluntary retirement scheme is a method used to reduce surplus staffs. Participation in the voluntary retirement plan is voluntary. It has to result in an overall reduction in the existing strength of employees. Accordingly, we are not inclined to accept the observation of the High Court Division that the respondents had been terminated in the grab of voluntary retirement. Moreover, the respondents have filed writ petitioners after about 8 years of the acceptance of their prayers and after receiving retirement benefits. ...(Para 21)

The instant process was a policy decision involving complex economic factors. The court would be slow from interfering with the economic decisions as it has been recognized that the economic expediencies lack adjudicative decision and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits. It is the administrators and legislators who are entitled to frame policies and take such administrative decisions as they think necessary in the public interest. The court should not ordinarily interfere with policy decisions, unless clearly illegal. We do not find any violation of constitutional provision or legal limits in the instant scheme. ...(Para 22)

J U D G M E N T

Hasan Foez Siddique, J:

1. Civil Appeal Nos.45 to 48 of 2012 have been heard together. Since all the appeals raised common points of law, they are being disposed of by this single judgment.

2. The common question in these appeals is as to whether employees who opted for voluntary retirement pursuant to or in response of a special scheme floated by the Bangladesh Agricultural Development Corporation (BADC) would be precluded from re-instatement in their services after acceptance of their prayers for voluntary retirement and payment of retirement benefits.

3. In Civil Appeal No.45 of 2012, the respondent Nos.1-5 filed Writ Petition No.8872 of 2008 being aggrieved by the notification dated 26.10.2002 issued by the Secretary, Ministry of Agriculture amending Clauses 4 and 5 of the Notification No.Krishi-5/Ma-2/98(Part-8)/727 dated 17.11.1999 issued by the Government with regard to reorganization of BADC and office order communicated under Memo No. ‡¯^”Qv/1K-1/2002/2003/361 dated 20.10.2002 purportedly terminating 135 employees including writ petitioners. The High Court Division made the said rule absolute holding that identical matter had been disposed of by a judgment and order dated 27.05.2008 by this Division in Civil Appeal Nos.158-184 of 2006 and Civil Appeal No.136 of 2007. Accordingly, the writ respondents were directed to re-instate the writ petitioners to their respective posts with all wages subject to refund of the termination benefits by the writ petitioners, if those were withdrawn by them. BADC filed Review Petition No.49 of 2010 in the High Court Division mainly on the ground that the writ petitioners were not terminated rather they had voluntary retired from their service. The High Court Division rejected the said review petition summarily holding that the service of the petitioners were terminated in the garb of voluntary retirement. Against the said order of rejection of review petition, BADC filing leave petition, obtained leave.

4. In Civil Appeal No.46 of 2012, the writ petitioners Md. Ataur Rahman and 7 others filed Writ Petition No.7724 of 2008 being aggrieved by the above mentioned notifications and the orders of termination from their service. The High Court Division made the said Rule absolute taking similar views. BADC filed Review Petition No.48 of 2010 on similar grounds. The High Court Division rejected the said review petition summarily holding that the order of termination had been passed in the garb of voluntary retirement. Against the said order, BADC, filing Civil Petition for leave to Appeal, got leave. While pressing this appeal No. 46 of 2012 Mr. Mahbubey Alam, learned Senior Counsel, submits that out of 8 writ petitioners, writ petitioners Md. Ataur Rahman, Md. Abdul Hakim, Mozibor Rahman and Md. Anowarul Hoque had retired from their service voluntarily and the rest writ petitioners were terminated. Though the rest writ petitioners namely, Md. Mostafizur Rahman,

Md. Alauddin, Md. Amir Hossain and Nobiul Islam have been impleaded as respondent Nos.5-8 in this appeal but he would not press the appeal against respondent Nos.5-8. Accordingly, the appeal be dismissed in respect of the respondents No.5, Md. Mostafizur Rahman, 6.Md. Alauddin, 7.Md. Amir Hossain and 8. Nobiul Islam.

5. In Civil Appeal No.47 of 2012, respondent Md. Rafiqul Alam was writ petitioner No.5 in Writ Petition No.7682 of 2007. Said Md. Rafiqul Alam and 5 others filed the aforesaid writ petition challenging the above mentioned notices and the orders of termination. Similarly, Rule was also made absolute by the High Court Division observing that since identical matter had been disposed of by this Division, the writ petitioners were entitled to get relief in the light of the said judgment. BADC filed Review Petition No.52 of 2010 impleading Md. Rafiqul Alam, stating that he had voluntarily retired from his service. So, the matter decided by the Appellate Division was not identical so for as it relates to Md. Rafiqul Alam. The High Court Division summarily rejected the said review petition by an order dated 27.09.2010. Then, BADC preferred this appeal getting leave.

6. In Civil Appeal No.48 of 2012, the respondents were 20 in number. They filed Writ Petition No.2331 of 2009 being aggrieved by the above mentioned notifications and the orders of termination. The High Court Division made the said Rule absolute in the light of the decision of the this Division and directed to reinstate the writ petitioners in their service. Against the said judgment and order, BADC preferred this appeal getting leave. Mr. Mahbubey Alam, learned Senior Counsel, submits that he would not press the appeal in respect of other respondents except respondent No.9 Md. Safiul Alam Khondoker who had retired from service voluntarily. Accordingly, the appeal be dismissed against the other respondents except the respondent No.9 Md. Safiul Alam Khondoker.

7. Mr. Mahbubey Alam, learned Senior Counsel appears on behalf of the appellants for all the appeals. On the other hand, Mr. Abdul Wadud Bhuiyan, Senior Counsel appears for respondent Nos.1-5 in Civil Appeal No.45 of 2012 and Mr. Probir Neogi appears for the respondent in Civil Appeal No.47 of 2012.

8. No one appears on behalf of the respondents in other appeals.

9. Mr. Mahbubey Alam, submits that the respondents, against whom he is pressing the appeals, had voluntary retired from their services and had withdrawn their financial benefits. They were not terminated from their service. After acceptance of their prayers for voluntary retirement and payment the financial benefits, the respondents could not claim that they had been terminated from the service. The High Court Division has committed error of law in holding that the service of these respondents had been terminated in the garb of voluntary retirement.

10. Mr. Abdul Wadud Bhuiyan, learned Senior Counsel appearing for the respondent Nos.1-5 in Civil Appeal No.45 of 2012, submits that the prayers for voluntary retirement of respondents were stayed by BADC and allowed them to continue for a considerable period thereby those prayers had been rejected by implication. By the impugned orders all the respondents had been terminated in the garb of voluntary retirement. The High Court Division rightly held so.

11. Mr. Probir Neogi, appearing on behalf of the respondent in Civil Appeal No.47 of 2012, submits that the respondent Md. Rafiqul Alam initially though submitted an application for voluntary retirement but the same was not accepted and by the impugned order he had been terminated. He further submits that Rafiqul Islam did not receive any financial benefit out of same scheme of voluntary retirement like other respondents who had retired from services voluntarily. He submits that the High Court Division rightly declared the order of termination void and meanwhile BADC had reinstated him and he has been serving in BADC.

12. It appears from the materials on record that in Civil Appeal No.45 of 2012 the respondents are 5 in number. They are 1. Md. Abdur Rashid, 2. Md. Fazlur Rahman, 3. Solaiman Ali, 4. Md. Abdur Rashid Mondal, 5. Md. Jahangir Alam. Md. Abdur Rashid prayed for voluntary retirement with effect

from 30.09.1994. BADC, accepting the said prayer by a letter communicated under memo No.স্বেচ্ছা/১ক-1/2002-2003/369 dated 20.10.2002, paid his retirement benefits who received 80% of the payable benefits on 23.11.2002. Respondent No.2, Md. Fazlar Rahman prayed for voluntary retirement from service with effect from 30.09.1994 which was accepted by BADC on 20.10.2002. This respondent received his entire retirement benefits of Tk.2,85,728/- on 26.11.2002 under special scheme of voluntary retirement and 19.05.2003. Respondent No.3, Solaiman Ali prayed for such voluntary retirement with effect from 30.09.1994 which was accepted on 20.10.2002. The payable financial benefits of retirement was 4,48,425/-. He had received Tk.3,65,120/- on 23.11.2002 and Tk.16,610/- on 31.07.2004. The respondent No.4, Md. Abdur Rashid Mondal prayed for voluntary retirement from his service with effect from 30.09.1994. The payable amount against his retirement benefits was Tk.2,62,729/. He received Tk.76,737/- on 12.05.2003 and 23,311/- on 20.12.2004. Respondent No.5, Md. Jahangir Alam prayed for a voluntary retirement from service with effect from 30.09.1994 and payable amount against his retirement benefits was Tk.3,61,145/-. He received Tk.3,51,145/- on 30.11.2002 and Tk.10,615/- on 31.07.2004. Similarly, respondent No.1, Md. Ataur Rahman, 2. Md. Abdul Hakim, 3. Mozibor Rahman, 4. Md. Anowarul Hoque in Civil Appeal No.46 of 2012 filed their respective applications for voluntary retirement from services with effect from 30.09.1994. BADC assessed the payable amount of financial benefits against their services and almost all of them withdrew considerable amount out of the amounts payable under such a special scheme of voluntary retirement.

13. Mr. Probir Neogi, learned counsel for the respondent Md. Rafiqul Alam, in Civil Appeal No.47 of 2012 submits that meanwhile this respondent of this appeal has been re-instated and he has been serving in BADC. After such re-instatement of respondent Md. Rafiqul Alam, we are of the view that the appeal against him is not tenable.

14. In Civil Appeal No.48 of 2012, Mr. Mahbubey Alam, submits that the respondent No.9 Md. Safiul Alam Khondoker had retired from his service voluntarily. From the materials on record it appears that the respondent No.9 Md. Safiul Alam Khondoker prayed from voluntary retirement from service with effect from 30.09.1994. The same was accepted on 20.10.2002. Though it appears that, on 30.10.2002, he was terminated from service but Mr. Alam submits that the same was a clerical mistake. After acceptance of the prayer for voluntary retirement from service, the question of termination thereafter does not arise. It further appears from the materials produced by the appellant that he had also received a considerable amount out of the amount payable as retirement benefits.

15. BADC was said to be overstaffed. For the purpose of effective management, manpower planning was contemplated by the Ministry of Agriculture. In order to downsize the strength of staffs of BADC, the Ministry of Agricultural issued a circular communicated under Memo No.L¢o-5/j-2/(Awn-1)/375 dated 13.12.1992, the Voluntary Retirement Scheme in which some privileges had been specially offered to the employees of BADC who intended to retire from their services voluntarily. As per terms of the scheme, the employees who sought for voluntary retirement, were entitled to accept ex gratia payment as specified therein. In said circular there was a clause wherein it was specifically mentioned, "এই ব্যবস্থা সম্পূর্ন ঐচ্ছিক। তবে, একবার অবসর গ্রহনের ইচ্ছা প্রকাশ করলে তা পরে প্রত্যাহার করা যাবে না।" In their respective applications for voluntary retirement from service the respondents mentioned that in view of the aforesaid circular they decided to retire from service voluntarily. Knowing fully well about the consequence of the aforesaid clause of the circular they offered their prayers. That is, admitted position is that the respondents, while working in the BADC had applied for voluntary retirement, pursuant to the scheme framed by the Ministry of Agriculture to relieve the surplus staffs, which had been accepted by the impugned orders. Since the respondents had been relieved from the duty after acceptance of their offers of voluntary retirement and special payment of retirement benefits, the Jural relationship of the BADC and respondents came to an end.

16. In the case of AIR India Vs. Nergesh Mirza. Supreme Court of India held that Government servant is not entitled to demand as of right, permission to withdraw the letter of voluntary retirement, it could only be given as a matter of grace. In the case of State of Haryana Vs. S.K. Singhal reported

in (1999)4 S.C.C. 293 Supreme Court of India observed that the cases of voluntary retirement can broadly be decided into the following categories:

i. Where voluntary retirement is automatic and comes into force on the expiry of notice period,
ii. When it comes into force; unless an order is passed within the notice period with holding permission; and
iii. When voluntary retirement does not come to force unless permission to this effect is specifically granted by the controlling authority.

17. In the cases, in hand, the respondents, while working in the appellant BADC, had applied for voluntary retirement, and, thereafter, they withdrew all or a considerable amounts of retirement benefits from BADC. Since the respondents had applied for voluntary retirements, such applications should be effective in view of the provision of the circular as quoted above or by the relevant law.

18. Mr. Bhuiyan submits that since the BADC allowed the respondents to continue in service for a considerable period thereby BADC had rejected the prayers for voluntary retirement of the respondents by implication. It is not possible to accept the contention because as a general principle, one who knowingly accepts the benefits of the offer is estopped to deny the validity and binding effect of the offer and acceptance of the same. Moreover, clause 2 of the circular provides, "*Z‡e GKevi Aemi Mn‡bi B"Qv cKvk Ki‡j Zv c‡i cZ¨vnvi Kiv hv‡e bv|Ó* Implication may arise in consideration of statute is of something not expressly declared. Here the circular quoted above provides that option once exercise shall be final. Section 9 of the Public Servant (Retirement) Act also provides so. Since the respondents accepted the exgratia payment, in our considered opinion, could not have resiled therefrom.

19. In the case of Nand Keshwar Prasad Vs. Indian Farmers Fertilizers Co-operative Ltd. Supreme Court of India held that unless controlled by condition of service or the statutory provisions, the retirement mentioned in the letter of resignation must take effect from the date mentioned therein. The option having once been exercised the respondents could not go back on the same because the principle is that one person may not approbate and reprobate expresses two proposition.

20. In view of the specific provision in the circular that, "তবে, একবার অবসর গ্রহনের ইচ্ছা প্রকাশ করলে তা পরে প্রত্যাহার করা যাবে না।", which indicates as absolute terms and since that there is no provision quoted clause to withdraw prayers, we are of the view that prayers of voluntary retirements came in effect after acceptance of the prayers. The moment prayers are accepted the retirement became effective.

21. "Termination" and "voluntary retirement from the service" have different connotations and cannot be equated for the reasons that the termination can be termed as "naked hire and fire" rule and paralled of which was to be found only the "Henry VIII clause". On the other hand, voluntary retirement scheme is a method used to reduce surplus staffs. Participation in the voluntary retirement plan is voluntary. It has to result in an overall reduction in the existing strength of employees. Accordingly, we are not inclined to accept the observation of the High Court Division that the respondents had been terminated in the grab of voluntary retirement. Moreover, the respondents have filed writ petitioners after about 8 years of the acceptance of their prayers and after receiving retirement benefits.

22. The instant process was a policy decision involving complex economic factors. The court would be slow from interfering with the economic decisions as it has been recognized that the economic expediencies lack adjudicative decision and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits. It is the administrators and legislators who are entitled to frame policies and take such administrative decisions as they think necessary in the public interest. The court should not ordinarily interfere with

policy decisions, unless clearly illegal. We do not find any violation of constitutional provision or legal limits in the instant scheme.

23. In view of the discussion made above Civil Appeal No.45 of 2012 is allowed; Civil Appeal No.46 of 2012 is allowed so far as it relates to respondents No.1-4 namely (1) Md. Ataur Rahman, (2) Md.Abdul Hakim, (3) Mozibur Rahman and (4) Md. Anwarul Haque and dismissed against the rests. Civil Appeal No.47 of 2012 is dismissed. Civil Appeal No.48 of 2012 is allowed so far as it relates to respondent No.9 Md. Saiful Alam Khondker and dismissed against the rests.

2 SCOB [2015] HCD 1

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITIONS NO. 9366 of 2011, 9341 of 2011, 8220 of 2011, 9367 of 2011, 9368 of 2011, 9369 of 2011, 9370 of 2011, 2600 of 2012, 5076 of 2012, 5077 of 2012, 5078 of 2012 & 5818 of 2012.

Md. Shafiqul Islam. ..(Petitioner in Writ Petitions No.9366 & 9341/11).
With
Md. Asad-Ul-Amin. ..(Petitioner in Writ Petition No. 8220/11).
With
Md. Rukunuddin Mollah. ..(Petitioner in Writ Petitions No.9367-9370/11)
With
Md. Hasan Murad…Petitioner(in Writ Petition No. 2600/12).
With
Md. Mohiuddin Chowhdury .. Petitioner (in Writ Petitions No. 5076-5078 & 5818 /12).

- Versus –

Bangladesh and others
…….. Respondents in all Writ Petitions.

Mr.Shah Md. Munir Sharif,
Mr.AKM Nurul Alam, Advocates,
For the petitioners (in Writ Petitions nos.9366-9370, 9341 & 8220/ 11).
Mr. Lutfor Rahman, Advocate,
For the petitioner (in Writ Petition no. 2600/12)

Present:
Mr.Justice Mirza Hussain Haider
&
Mr. Justice Kazi Md. Ejarul Haque Akondo

Mr. Zafar Ahmed,with
Mr. Rafi Ahmed, Advocates,
For the Petitioners (in Writ Petitions no. 5076-5078 & 5818/12).
Mr. Pankaj Kumar Kundo, Advocate ,
For the respondent no. 3(In Writ Petitions No.9366 & 9341/2011).
Mr.Moudud Ahmed ,with
Mr. Rajiuddin Ahmed, Advocates,
For the Respondent No.3 (in Writ Petitions no. 5076-5078 & 5818/12).

Mr. Murad Reza, Additional Attorney General, With
Mr. Al Amin Sarker, DAG with
Mr. KM Masud Rumy and
Mr. Zakir Hossain Ripon, AAGs
For the respondent No. 1 in all writ petitions.
Mr.Ibrahim Khalil with
Ms. Bahasti Marjan Advocates
For respondent No. 3 (in Writ Petition No.2600/12.)
Mr. Meah Mohd. Kauser Alam, with
Mr. Kali Pada Mridha,Advocates,
For Respondents no. 3 (in Writ Petitions No. 9367-70/11).
Mr. Rafique ul Haque, Senior Advocate with
Mr. M Amirul Islam , Senior Advocate with
Dr. M Zahir, Senior Advocate with
Mr. Mahmudul Islam, Senior Advocate and
Mr. M I Farooqui , Senior Advocate
(as Amicus Curiae)

Heard on: 17.10.2012, 14.11.2012, & 29.11.2012.

Judgment on: 03. 12. 2012.

Negotiable Instruments Act, 1881:
Section 43 and 138:
Section 43 contains a specific word 'consideration'. The literal meaning of the term 'consideration' is 'pursuant to something' which might be pursuant to an 'agreement' or pursuant to an "act" or "deed" being legally enforceable. Thus, vide section 43 when a negotiable instrument is made, drawn, accepted, endorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. If that be so, any cheque, if dishonored by the bank, under such circumstances, will not attract section 138 of the Act. As such, the specific criteria for the purpose of filing of a case

under section 138 is whether there is consideration; which is a vital question to be looked into for trial and conviction. ...(Para 36)

Section 8, 9, 58 and 138:
Vide section 58 of the Act any cheque, which is lost or has been obtained by duress, if dishonoured, cannot / shall not constitute any offence under section 138 of the Act and any holder of such cheque, who is not a meaningful holder as defined in sections 8 and 9, shall not be entitled to invoke section 138. ...(Para 37)

Section 118 and 138:
Until the contrary is proved, it will be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated, or transferred, was accepted, endorsed, negotiated or transferred for consideration. Section 118(g), however, provides that the holder of a negotiable instrument is a holder in due course; provided that where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him . ...(Para 38)

Section 4, 6, 8, 9, 43, 58 and 118:
The complaint petition should contain the circumstances of obtaining such cheque and reasons for issuing such cheque by the issuer so that the accused can take a meaningful defence/ stand at the trial under all circumstances. However, even in the absence of any such statement in the complaint petition there is no embargo under the Act, to take any defence by the accused person in the light of sections 4, 6, 8, 9, 43, 58 and 118 of the Act and that the trial court shall give the accused persons adequate opportunity to take any such defence during the course of trial.
...(Para 42)

JUDGMENT

MIRZA HUSSAIN HAIDER. J.

1. The petitioners of all these writ petitions challenged the constitutionality of amendment of Section 138 of the Negotiable Instruments Act, 1881 by Act No. XVII of 2000 published on 6.7.2000 to be void as the same is ultra vires the Constitution and, accordingly, they also challenged the proceedings of their respective sessions cases arising out of the respective complaint register cases pending before the Sessions Judge, Metropolitan Sessions Judge or Magistrates to be without lawful authority and of no legal effect .

2. Since in all these Rules the petitioners challenged the constitutionality of amendment of Section 138 of the Negotiable Instruments Act, 1881 and the proceedings of the cases initiated thereunder which are pending before the trial courts and the facts of all these cases being similar with some insignificant variations, discussions of the facts of each and every case separately are avoided. Accordingly, all these Rules are taken up together for hearing and disposed of by this single judgment.

3. Brief facts of all the cases relevant for the disposal of the same are that the Complainants-Respondents filed complaint register cases before the Magistrate courts under section 138 of the Negotiable Instrument Act, 1881 alleging that the accused-writ petitioners, issued cheques in their favour for different purposes but the same have been dishonored and returned without being encashed on different pleas. The allegations of the complainants are that the issuers of the cheques i.e. the writ petitioners have committed an offence under Section 138 of the Negotiable Instrument Act,1881 and, as such, liable to be tried and punished under the said provision of law. The writ petitioners after

appearing before the concerned trial courts obtained bail and moved these writ petitions challenging the aforesaid amendments of Section 138 of the Negotiable Instrument Act, 1881 on the ground that their right of defense has been taken away by such amendment and obtained these Rules and the orders staying the proceedings.

4. In many of the Rules the respondents, including the complainants, entered appearance and denied the material allegations of the writ petitions.

5. Common case of the complainant-respondents are that the allegation as to constitutionality of the amendment is baseless since the amendment has been made more than 12 years back and a good number of cases have already been disposed of under the said provisions of law. It is further stated that the accused-petitioners even under the present amendment are very much eligible to take appropriate defence since the issuance of the cheques has been made in respect of certain purposes and they are as such well competent to present their defense before the trial courts by cross examination of the prosecution witnesses. Hence, the Rules are liable to be discharged.

6. On these background Mr. Munir Sharif, the learned Advocate appearing on behalf of the petitioner in Writ petition No. 9366 of 2011, along with other learned advocates for other petitioners, submits that originally Section 138, under Chapter XVII of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act, 1881) was relating to appointment of "Notaries Public" which was substituted by new Chapter XVII under the heading "On penalties in case of dishonour of certain cheques for insufficiency of funds in the account" by the Negotiable Instruments (Amendment) Act, 1994 (Act No. XIX of 1994), inserting Sections 138, 139, 140 and 141. Thereafter section 138 was further amended in 2000 by the impugned amendment. The old Section 138, before the impugned amendment, reads as follows:

"138. <u>Dishonour of cheque for insufficiency, etc. of funds in the account</u> – *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account [for the discharge in whole or in part, of any debt or other liability] is returned by the bank unpaid, either because of the amount money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to [twice] the amount of the cheque, or with both.*

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice , in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

***Explanation** – For the purpose of this section, "debt or other liability" means as legally enforceable debt or other liability".*

7. It is submitted on behalf of the writ petitioners that in section 138, as it was before the impugned amendment the words 'for the discharge, in whole or in part, of any debt or other liability' and the Explanation thereto with the words 'the debt or other liability means any legally enforceable debt or other liability' was there by which the legislature gave a rationale meaning of offence committed under section 138 of the Act giving immense opportunity to the accused person to take a rightful and meaningful defense as to whether the cheque was issued for the purpose of discharging any legally enforceable debt or other liability as a whole or in part. But by the impugned amendment, the term 'for discharge, in whole or in part, of any debt or other liability' and 'the Explanation' to that

Section has been deleted. As such the impugned amendment, has taken away the right of meaningful defense of any person who is alleged to be guilty under Section 138 of the Negotiable Instrument Act, 1881. Thus, in respect of issuing any cheque by the issuer even after payment of debt or liability in cash or otherwise, if the cheque, which was issued to meet or discharge the said debt or liability already paid, remains with the possessor of the said cheque and, thereafter, if the same is dishonored by the banker of the issuer of the cheque upon its presentation, such issuer/person shall be deemed to have committed offence under section 138 of the Act, 1881 and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to [thrice] the amount of the cheque, or with both. Therefore, it is submitted that by repealing the words 'for the discharge in whole or in part of any debt or other liability' and also by repealing the entire "Explanation", the opportunity of meaningful defense has been taken away which is contrary to Articles 27 , 31 and 35 (3) of the Constitution, meaning that any cheque if dishonored by the bank will come within the mischief of Section 138 of the Act,1881 and any person issuing any such cheque irrespective of any transaction or consideration will be within the mischief of Section 138 of the Negotiable Instrument Act, 1881.

8. It is submitted that in the absence of the words "….. in discharge of a debt or other liability …." there remains no valuable consideration for the contract, which is violative of Section 25 of the Contract Act and if the contract itself is void, there is no valid cheque in the eye of law. Similarly, if there is no valid cheque in the eye of law, the amended provision of section 138 will be in conflict with or repugnant to section 5 of the said Act of 1881, which establishes a cheque as a negotiable instrument, as well as section 6, which clarifies that a cheque is a species of bill of exchange, both being contracts. Unless there is a contract making the cheque a negotiable instrument under the definition clause, the amended Section 138 is repugnant to Sections 5 and 6 which must be understood and interpreted along with Sections 26 and 43 which prescribes, by necessary implication, that all negotiable instruments are contracts primarily. Thus Section 138 of the Negotiable Instrument Act cannot be invoked for the purpose of punishing a person for his cheque being dishonored by the banker. To this end, the learned Advocates for the petitioners submit that unless there be a debt or liability which under the contract or transaction is liable to be met and which under the contract or transaction is liable to be met and which is pre-existing transaction between the parties, the issuer of the cheque under no circumstances can be punished for his dishonored cheque issued for any other purpose.

9. The learned Advocates for the petitioners, upon drawing our attention to a good number of decisions of the Apex Court of our jurisdiction and those of the sub-continent, submit that in numerous decisions it has been held that when the cheque is issued in discharge of a time barred debt, not preceded by valid acknowledgement of debt before expiry from the date of loan, it cannot be said that the cheque is issued for the discharge of legally enforceable debt or other liability, as such no cause of action for proceeding under Section 138 can arise in the event of such cheque being dishonored. It is further contended that the debt or other liability which was prevailing before the impugned-amendment the purpose of the old Section was required to be legally enforceable and, thus, unless any liability legally enforceable is absent, the issuer of the cheque cannot be brought under the mischief of dishonoring any cheque which was not issued for any legally enforceable debt or other liability. In this respect the learned Advocates produced the report of the Law Commission of Bangladesh wherein upon considering the impugned amendment the Commission expressed its view that the 'repealed words should be restored to its original position and the amendment should be cancelled to give a rationale meaning of Section 138 of the Negotiable Instrument Act along with present position of law in comparison to other jurisdiction of the sub-continent.' In this respect, our attention was drawn to the provision prevailing in India, from which the said provision of Section 138 of the Negotiable Instrument Act was brought in our law. Under the Indian jurisdiction the law categorically clarifies the words 'for the discharge, in whole or in part, of any debt or other liability, and the Explanation, "for the purpose of this section, the word 'debt or other liability' means a legally enforceable debt or other liability'. Thus it is submitted that to avoid the confusion about dishonoring any cheque to bring within the mischief of Section 138, understanding dishonoring of each and every cheque should not be made to the court under Section 138 within the purview of Chapter XVII as a

criminal offence, otherwise, there will be anarchy and number of criminal litigations will be high and keeping harmony in criminal dispensation of justice will be a harder one. The learned Advocates for the petitioners submit that unless a cheque is issued for the purpose of meeting any liability or debt, there remains scope to prove the contrary, resulting the offence, if any, a presumptive one and the presumption cannot be the sole basis for conviction/punishment under the criminal jurisprudence. Under Section 118 of the said Act, presumption has been made for holder of the cheque that the same was made or drawn for consideration. Once execution of the cheque is admitted, Section 118 would come into operation which would presume to be supported by a consideration and such presumption is rebuttable and in that case the accused can prove the non-existence of a consideration by raising a probable defence. If the accused discharges the initial onus of poof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus will shift upon the complainant, who is required to prove the existence of consideration and, as a matter of fact upon his failure to prove the same, he would be disentitled to get the relief on the basis of such dishonored cheque. Hence, it is very important that the court cannot insist upon the accused to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated.

10. It is further submitted that whereas the prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is 'preponderance of probabilities' and inference of 'preponderance of probabilities' can be drawn not only form the materials brought on record by the parties but also by reference to the circumstances upon which he relies. Therefore, the standard of proof, so far as the prosecution is concerned, is proof of existence of consideration and on the accused is only mere preponderance of probability. In this respect, the learned Advocates relied on the dictum of the cases of Narendra Singh and another Vs. State of Madhya Pradesh, 2004 (10) SSC 699); Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, 2008 (1) KLT 425(SC); N I Shaju, s/o N I Ippan Vs .T.K Paulose ,Thondanala House [2009(3)KHC 626];

11. The learned Advocates further submit that the leading principle of law regarding Negotiable Instruments is that they are essentially contracts which require consideration. But the amended Section 138 of the Act, 1881 negates the requirement of consideration in violation of section 43 of the said Act, which clearly provides protection to the drawer of the cheque and such protection is guaranteed under Article 31 of the Constitution and the impugned provision of law violates such guarantee and, therefore, the same is void under Article 26 of the Constitution. It is submitted that Section 138 cannot be interpreted and applied in isolation. The other provisions of the said Act of 1881 as a whole have to be taken into consideration for interpretation of Section 138 and the amended Section 138 being repugnant to other provisions of the Act as well as the object of the Act itself, the same is arbitrary and unreasonable which is liable to be struck down .In support of the submissions the learned Advocates for the petitioners relied on scores of decisions of the sub-continent, particularly form the Indian jurisdiction, and concluded that since by the impugned amendment if the cheque, which has been issued and dishonoured by the drawer of the cheque, is not an instrument under the meaning of Section 5 of the Act and if the same is not issued in respect of transaction for some consideration as provided, mere dishonoring the same by the drawer bank shall not bring the issuer/ drawer of the cheque within the mischief of Section 138 of the Act. By taking away the right of defence by the impugned amendment the fundamental rights of the accused-writ petitioners, to be treated equally under Article 27 of the Constitution and the right of protection to be given "in accordance with law and only in accordance with law" as contemplated in Article 31 of the Constitution and, that is how, the impugned amendment of Section 138 of the Negotiable Instrument Act, being in conflict with the provisions of the Part III of the Constitution and thereby the same being hit by Article 26 of the Constitution, the same is liable to be declared ultravires the Constitution and resultantly the criminal cases arising out of the operation of the impugned law are also be declared to be without lawful authority. In support of the aforesaid contentions Mr. Sharif, and other learned advocates of the petitioners relied on the retio decidendi of the cases of ***Moore Vs East cleveland, a Zoning Ordinance Limited (431 US 494) Chintaman Rao vs The State of Madhya Pradesh, reported in AIR 1951 SC118; Rattan Arya vs State of Tamil Nadu & another, reported in***

AIR 1986 Sc 1444; Pathumma and others v State of Kerala and others (AIR 1978 SC 771); State of Madras v. V.G. Row. Union of India and State (AIR 1952 SC 196); Kishan Chand Arora v. Commissioner of Police, Calcutta (AIR 1961 SC 705); Marbury v. Madison [5 U.S. 137]; in case of the case of B. Mohan Krishna Vs. Union of India, 1995(1) ALT 468]; Sankaralingam VS. Union of India and others, [(1996) 86 Comp Cas 709 (Mad)]; case of K. Kumar V. Bapsons Foot Wear, [(1995) 83 Comp Cas 172(Mad)]; case of Swastik Coaters Pvt. Ltd. V Deepak Brothers and others, [1997 (1) ALD (Cri) 370]; case of M/S. Nutech Origanic Chemicals Ltd. And another Vs. GMR Technologies & Industries Ltd. and another, [2003 (1) ALD (Cri) 296], Vempati Balagi and others Vs. D. Vijaya Gopala Reddi and andother , [1999 (2) ALD 669] B. Mohan Krishna V. Union of India [1995 (1) ALT 468 (BD)]. Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir (AIR 1980 SC 1992); Minerva Mills Ltd. and others v. Union of India and others (AIR 1980 SC 1789).

12. Mr. Murad Reza, the learned Additional Attorney General, appearing on behalf of the Respondent No. 1 files affidavit- in-opposition denying all the material allegations of the writ petition and submits that the writ petition is not maintainable since the same has been filed in violation of the maxim, 'what could not be achieved directly cannot be achieved indirectly'. Because the petitioner of writ petition No. 9366 of 2011 earlier moved the High Court Division under section 561A of the Code of Criminal Procedure being Criminal Miscellaneous Case No. 20753 of 2009 and the Rule being discharged the petitioner has taken a different plea in the writ petition for the purpose of achieving his goal of quashing the proceeding which he could not attain by filing an application under section 561 A of the Criminal Procedure Code. Secondly, he submits that extra ordinary remedy provided under Article 102 of the Constitution is for speedy relief and the same is for the vigilant and not for the indolent ones which is required to be sought for, immediately after the grievance is caused. Hence, laches and delay disentitles the petitioner to such remedy. He submits that in these cases, the amendment has come into effect on 6.7.2000 and most of the proceedings have been initiated starting from 2000 and continuing till date. In Writ Petition No. 9366 of 2011 the proceeding was initiated on 5.5.2008 and the position of the writ petition also appears to be the same but surprisingly all the petitioners moved this Court challenging the said amendment in 2011 which is more than 11 years after the law came into effect and in most of the cases when the criminal cases in the court below were initiated against the petitioners and the same continued for considerably a long period and as such the petitioner being indolent cannot get a remedy in this Court.

13. He submits that the petitioner has failed to make out a case on the unconstitutionality of the impugned amendment of the Act 1881. He further submits that the petitioners having failed to cause any rebuttal of challenging the validity of law the presumption will be that when any law is made it is constitutionally valid until the presumption is rebutted by the person who challenges its validity. In these cases the petitioners have failed to show unconstitutionality of the amendment. It is submitted that when the words used in the law are clear and unambiguous the same cannot be declared to be unconstitutional on the ground of unreasonableness or hardship or even such unambiguous or even clear term in law becomes/ causes hardship to the people. In this respect he relied on the case of Solicitor Vs. Syed Sanwar Ali, 27 DLR (AD) 16 (Para 14). He submits that the Negotiable Instrument Act is a special law and the liability created thereunder is strict liability and slight deviation giving a different meaning of the intent of the legislature is not permissible. He next submits that Section 138 of the Negotiable Instrument Act is both penal and procedural law where if the cheque is dishonoured the presumption will be the offender has "mens rea" otherwise why the cheque should be dishonoured and the same being procedural law it cannot be said to be violative of Article 27, 31, 40 or 42 of the Constitution. Accordingly, Mr. Reza submits that the amended provision of Section 138 is a remedial legislation and the very Preamble of the Act speaks of amending the law relating to promissory Notes, Bills of Exchange and Cheques, which is an inherent power given by the statute itself. Since it is remedial law the Court must avoid a construction which would render a statute meaningless and ineffective and would adopt the rule of liberal construction so as to give meaning to all parts of the provisions and to make the whole effective and operative. In doing so, the court must resist the temptation to change the law under cover of interpretation in a liberal way. A court of law is bound to proceed with the assumption that the legislature is an ideal person that does not make any mistake. The elementary rules of construction is that the plain intention of the legislature is to be sought from

the words used and not in the wide sea of speculation and surmise but from the conjectures as are drawn from the words alone or something contained in them, as decided in the case of Doly Enterprise and Others Vs. Additional District Judge and others, reported in 59 DLR (2007) 37. Similar was the finding in the case of Jahid Faisal, reported in 14 BLC 259 and in the case of Abul Hasnat Nurul Kabir Vs. Government of Bangladesh, reported in 29 BLD 275, wherein constitutionality of section 138 of the Act was challenged. Accordingly the learned Additional Attorney General submits that the impugned amendment of section 138 cannot be held unconstitutional or violative of the right as guaranteed under Articles 27,31,40 and 42 of the Constitution.

14. On the question of presumptive value or hardship of the debt or other liability the learned Additional Attorney General submits that in the case of SM Emdadul Hossain (Bulbul) Vs. Jinnur Hossain and another, reported in 15 BLC (AD) 146 the Appellate Division held *"on plain reading of the provisions of law quoted above it appears that the very cheque itself has a 'presumptive value as to debt or liability. Whether any debt or liability, at all, exists or not, is a question to be determined in the proceeding under Section 138 of the Negotiable Instruments Act. One of the ingredients for initiating a proceeding under section 138 of the Negotiable Instrument Act is refusal to honour a cheque. It was further held the appellant has incurred a liability and such liability in the instant case is secured by the cheque given by the appellant to the complainant- respondent no.1 as security and or a performance guarantee. Hence, the question of debt or liability as a whole or in part becomes redundant because of such presumptive value of the cheque itself. Accordingly, one can incur the liability to pay against the cheque for any reason which is not necessarily limited to 'debt' whole or in part. Thus the amendment of Section 138 of the Act cannot be said to be ultra vires the Constitution".*

15. He next submits that no person has a vested right in any course of procedure. Alteration in the form of procedure are always retrospective unless there is some good reason or other way they should not be so. Relying on the case of North Bengal Sugar Mills Co. Limited Vs. Labour Appellate Tribunal and another 2 BLC 547 he submits that the Parliament can take away any vested right with retrospective effect in case of procedural law. In Jahid faisal's case (14 BLC 259) it has been held that "…… the Negotiable Instrument Act being a procedural law, there is no bar in giving its effect retrospectively." Again he submits that Section 13(1) defines Negotiable Instrument which means a promissory note, a bill of exchange or cheque payable either to order or to bearer and section 5 of the said Act defines what is a Bill of Exchange, which amongst others terms it as 'an instrument in writing containing an unconditional order' and Section 6 defines 'a cheque is a bill of exchange drawn on a specified banker and not expressed to payable otherwise than on demand'. Section 19 provides for instrument payable on demand, which includes a promissory note or bill of exchange payable on demand. It is a strict liability. Referring to the case of Syed Anowar Towhid Vs Syed Zahed Ali and another 13 BLC 428, he submits that it has been held that 'the cheque being a bill of exchange the same is covered by the provision of Section 19 of the Negotiable Instrument Act, 1881 in this respect. Thus, he submits that a dated or undated cheque, irrespective of its nature is a valid one and if the same is placed for payment with no date specified for payment, the same shall be treated as payable on demand. The cheque being a bill of exchange the same is covered by the provision of Section 19 of the Act.

16. On the question whether the right of defence is available under the present form of Section 138 he submits that the amended provision of Section 138 stands for the same test as being a remedial legislation, wherein the legislature deleted the words " for the discharge in whole or in part of any debt or other liability," with an intention to cure some defect, errors and procedures for the purpose of making the people, who are in the habit of not honouring the cheque given for whatsoever purpose and the liability of the drawer of the cheque has the presumptive value and such liability is not limited to debt or liability of the petitioners in 'whole or in part'. Thus, those words became redundant because of such presumptive value of the cheque. In that view of the matter the said amendment of Section 138 of the Act cannot be said to be ultra vires the Constitution. In this respect he relied on the cases of SM Emdadul Hossain(Bulbul) Vs. Jinnur Hossain and another, 15 BLC(AD) 146, (para 13). He further submits that no person has a vested right in any course of procedure. In

order to understand what kind of "defense", if any, is available to the accused person under the Negotiable Instruments Act, it is pertinent to know the Apex Court's view in respect of 'at what point of time ' the offense is committed' under Section 138 of the Act.' It is relevant to know that the view of the Apex Court in respect of at what point of time the offense was committed under Section 138 of the Act as reported in the case of Md. Arif Uz-Zaman Vs the State and another 8 ADC 975 (para 13), wherein the Appellate Division held that 'the moment a cheque is dishonoured for any reason whatsoever the offence under the aforesaid Section shall be committed and, in that case, the payee shall have the liberty to file a petition of complaint before the competent Magistrate against the drawer of the cheque, of course, by complying with the Proviso to sub Section (1) of Section 138 of the Act'. Therefore, he submits that the time is one of the grounds as to when the cheque was dishonoured and when the case was filed and when the proceeding of the case was challenged. He submits that the full Bench of the Appellate Division proceeded with the case to consider the defence available to the accused and observed that *"however if a holder or the payee gets hold of a dishonored cheque by fraudulent means or forgery the drawer of the cheque shall have the liberty to take such defence during the trial (8 ADC 975)."* So the submission of the petitioner that the right of defence has been taken away by the amendment, if we take into consideration as valid ground, even then the observation of the Appellate Division in 8 ADC case clearly gives the opportunity to the accused to defend himself upon taking a ground that the dishonoured cheque has been obtained fraudulently, or any such defence whatsoever the petitioner wants to take, can take in course of trial and, thus so far the submissions of the petitioner that their right of defence has been taken away by the impugned amendment is not at all sustainable in law. If the cheque is lost, seized, then he submits that steps as prescribed in the cheque itself can be resorted to. Therefore, as per him, it is a misconceived view of the petitioner that the impugned statute has destroyed the accused's right of meaningful opportunity of defending himself.

17. On the question of the recommendation or observation of the Law Commission Mr. Reza submits that the Law Commission was established by virtue of Law Commission Act, 1996 (Act No.19 of 1996). Section 6 of the said Act elaborately laid down the functions of the Commission including recommendation to the Government in respect of legislating, repealing, examining the laws of the land and modernization of the judiciary etc. But nowhere in the said Act it is provided that the recommendations made by the Commission is binding upon the Government or the legislature. It is a mere recommendation for consideration by the legislature as well as by the Government at the time of enacting any law. In continuation of his submission he contended that in the case of Sheikh Abdus Sabur Vs. Returning Officer & others, 41 DLR (AD) 30 the Appellate Division held that 'the Court has no duty to offer unsolicited advice as to what the Parliament should or should not do. As long as the law enacted by it within the bounds of the Constitution it will be upheld by this Court but if the law is otherwise open to criticism it is for the Parliament itself to respond in the manner it thinks best'. In that view of the matter he submits that the Court has hardly got any scope to make any comment or make any suggestion in respect of impugned amendment to Section 138 of the said Act.

18. In respect of the interpretation of the statute Mr. Reza relied upon the comments of different authors. The Constitutional validity of law made by the legislature is to be presumed valid unless the presumption is rebutted. Accordingly, the law cannot be struck down merely because it fails to spell out the particular objectives of a provision in the legislation itself. It is the established principle of law that where the words used in a law are clear and unambiguous Courts are bound to apply the same, even if such application causes hardship. But the court must avoid a construction which would render a statute meaningless and ineffective. It would adopt the rule of liberal construction so as to give meaning to all parts of the provision as has been held in the case of Doly Enterprise (59 DLR 37). It has been further held "every effort is necessary to make a statute workable and not to render it futile by giving a meaningless interpretation frustrating the legislative intention". That is, the intention of the legislature must be sought from the statute, taking it as a whole into consideration along with other matters and circumstances which led to the enactment of the statute. In arriving at a true meaning of any particular phrase available in the statute the same must not be viewed in an isolated manner from other context rather, it must be viewed in its whole context i.e. the title, the preamble and all other enacting parts of the statute. It is further contended by Mr. Reza that on a liberal construction of a

given statute, the legislative policy and guidance for its execution are brought out, the statute even if skeletal, will be upheld and it will not be valid argument that the legislature should have made more detail provisions, upholding the principle of law. In the case of (Dr) Haniraj L. Chulani Vs Bar Council of Maharashtra and Goa AIR (SC) 1708 (Para 17) it was held that 'it cannot be said that while regulating the entry to the legal profession the Bar Councils would find themselves without any yardstick or guidelines and would be trading an unchartered sea and consequently the rules of enrolment framed by them would fall foul on the altar of permissible delegation of legislative power'. It further held that 'any condition laid down by the state Bar Council for fortifying this laudable object of legislature would remain germane to the exercise of this power and can well be said to be logically flowing from it. Therefore, it cannot be said that any unguided and unchartered power is handed over on a altar by the legislature to the concerned Bar Councils for regulating entry to the legal profession. Any rule, which effectuates this purpose will be within the permissible field and will not fall foul on the altar of Article 14 and Article 19 (1) (g) read with Article 19(6)'. Therefore, Mr. Reza finally submits that a person who has been alleged to have committed an offence has no fundamental right to say to be tried by a particular court in a particular proceeding except in so far as any constitutional object by way of discrimination or the violation of any other fundamental right is involved and as such the Rule should be discharged.

19. Ms. Bahasti Marzan, the learned Advocate appearing on behalf of Respondent No.3(complainant) in Writ Petition No.2600 of 2012, submits that the repealed law is to be interpreted very cautiously as there may arise the question as to grammatical/ literal interpretation; liberal/logical interpretation and strict interpretation. She further submits that Rule of Interpretation gives the guideline of interpreting any law by literal interpretation; by Mischief Rule (Heydlon's Rule) and by Golden Rule. According to her, the Rule of interpretation, Literal Rule, Mischief Rule/ Hoyden's Rule and Golden Rule, is very much applicable. She submits that Mr. Mahmudul Islam in his interpretation of the statue at page 112 has observed that the Mischief Rule was enunciated in Heydon's case which has also been considered in the case of Nazir Hossain vs. State, reported in 17 DLR(SC) 26 and also in many other cases including the case of Abdul Kabir Vs. State, reported in 50 DLR 306. While interpreting the law four things are required to be found out and carried into effect that the object and purpose of the statute is very often applied in construing a statute. According to her, in applying all the four criterions if it is found that when any Act is repealed or amended then there will arise active mode in prospective this mode is followed by mischief rule and the saving clause and when prospective mode is activated then no one can challenge it.

20. On the other hand Mr. Moudud Ahmed, the learned counsel appearing on behalf of the respondent in Writ petitions No.9367 of 2011 to 9370 of 2011, submits that his cases are completely different form the other cases on the plea that the cheques, which have been dishonoured by the bank, were against the payment of house rent which from the Annexure appears that the petitioners in these Rules admitted before the board of arbitrator of local elites that they would pay off the arrear house rents by installment and accordingly issued the cheques which have been dishonoured. So he submits that whether the law is declared to be ultra vires the Constitution for taking out the issue of meeting or discharging any debt or liability as a whole or in part or whether the amendment is not declared ultra vires the Constitution, means the amendment remains as of today the petitioners of these Rules will not get any benefit out of it. Because under all circumstance the dishonoured cheques have been issued by the petitioners to discharge or to meet the debt or liability as a whole or in part, as per their own admission before the arbitration board; and those were for the purpose of discharging or meeting their financial debt or liability of paying arrear house rent, as such the petitioners will not get any benefit in case the Rules are made absolute or discharged. Under such circumstances he submits that the Rule in all these four writ petitions should be discharged so that the landlord i.e., the respondent no. 3 gets his arrear house rent paid off.

21. Another contention has been taken by some of the respondents that the petitioners in obtaining Rules challenged the amendment of law, not the amended law and, as such, even if the amendment of law (Act No. XVII of 2000) is declared to be ultra vires the Constitution but a law amended as it is now, after 12 years will not affect any person under any circumstances because the same has been

embolden in the body of the statute and there is neither any scope nor necessity, even on referring to the amending statue, because the amending statute ceased to have any useful purpose and therefore even if the Rule is made absolute and the impugned provision are declared void and ultra vires the constitution the amended provision of section 138 of the Negotiable Instruments Act, as it remains today, will remain unaffected and continue to be enforced in view of the section 6A of the General Clauses Act, 1887. In support of the aforesaid contention reliance has been made on the decision of Solicitor of Government of Bangladesh Vs Dulal alias Friduddin, reported in Bangladesh Supreme Court Digest (1978-79) at page 92.

22. Having heard all the parties it appears that the main question which has been raised by the petitioners in these writ petitions is that by the impugned amendment, the right of the petitioners' meaningful defence has been taken away and as such the fundamental right, as enshrined in Articles 27,31,32 and 35 (3) of the Constitution, of the petitioner, who issued a Cheque, has been taken away for which the petitioners' fundamental right to equality before law has been infringed.

23. Considering the graveness of the question raised in these writ petitions, we considered it necessary to hear the Senior Counsels of this Court as amicus Curiae and, accordingly, Mr. Rafique ul Haque, Mr. M Amirul Islam, Dr. M Zahir, Mr. Mahmudul Islam and Mr. M I Farooqui, were requested to assist this Court with their opinions and comments on the subject as friends of the Court.

24. Mr. Rafique ul Huq, the learned Senior Counsel contends that prima facie the impugned amendment has taken away the fundamental right of defence but on a close scrutiny of Section 138 it is not so as it does not have any non-obstante clause. He submits that in the absence of non obstante clause the accused person can take shelter of Section 43, 58 and 118 of the Negotiable Instrument Act, 1881 which are applicable in these cases and the Court, while trying such case, are duty bound to try these types of cases reading Section 138 not in an isolated manner but in accordance with Sections 43, 58 and 118 of the Act, 1881.

25. On the other hand, Mr. M Amirul Islam, the learned Senior Counsel of this Court, contended that there must be some equilibrium in enacting any law so that both side's interests are protected. He contended that third paragraph of the Preamble of the Constitution provides about the social security free from exploitation and if omnibus authority is given to show any person on account of his cheque being dishonored and the cheque being issued without any consideration or without for the purpose of meeting any debt or liability, then the person who places the cheque before the bank will have an upper hand upon the issuer and that will not protect the social security and the society shall not be free from exploitation. He next referred to Article 7(2) read with Article 26(2) of the Constitution and contended that both the said provisions provide ample power to draw the attention of this Court when any enactment is inconsistent with the Constitution. Hence, when any person/ drawer of the cheque gets an upper hand and he is not liable to explain as to how and why and/ or for what purpose he got the cheque then the inconsistency as to equality before law as well as the right to protection of law as enshrined in Articles 27 and 31 of the Constitution comes. He next submits that in Article 20(2) of the Constitution it has been provided that the State shall endeavour to create conditions in which as a general principle persons shall not be able to enjoy unearned incomes, in which human labour in every form either intellectual or physical, shall become a fuller expression of creative endeavor and of the human personality. So the impugned amendment will give rise to the attitude of enjoying unearned income. So any person under the present section 138 of the Act of 1881 can use or misuse the said provision of law by way of filing cases for which he may not deserve the said amount of money or any financial benefit which is contrary to Article 20(2) of the Constitution. He next contended that Article 31 provides, right to protection of law and that protection has to be "in accordance with law" and "only in accordance with law". But to that extent the law must be of rational meaning which upholds the spirit of the preamble of the Constitution by ensuring the equality and justice to every citizen of this Country. Otherwise the issuer of the cheque will not have the benefit of meaningful defence to the extent of whether he issued the cheque or not or even if the same is issued for a particular transaction or its consideration and if the accused is not allowed to take such

defence then he will not be protected in accordance with law and or only in accordance with law. Moreover, a law cannot be a law which does not ensure justice under the Preamble of the Constitution.

26. Lastly, he contended that section 43 of the Negotiable Instruments Act clearly shows that unless there is any transaction followed by passing of consideration there cannot be any offence under section 138. So section 138 is totally incongruous/inconsistent with section 43 of the Act. In support of his contention he relied upon several decisions of our jurisdiction as well as those of the Indian jurisdiction wherein the consistent view is that the cheque should be issued by the drawer in discharge of the full or part of the debt or liability and if the said cheque was dishonored due to insufficiency of funds etc, then only section 138 of the Act gets attracted if other conditions are complied with. When from the averment of the complaint petition there is no element that the cheque was issued by the petitioner in discharge of any legally enforceable debt or other liability, the maker of the debt is not liable to be prosecuted or punished. In this respect he relied in the case of Nutech Organic Chemicals Ltd and another Vs GMR Technologies and Industries Ltd and another, 2003 (1) ALD (Cri) 296; B Mohan Krishna Vs Union of India Manu/AP/0086/1995: 1995 (I) ALT468(DB). He also referred the case of Kasturi Lal Vs. J & K AIR 1980 SC 1992 and submitted that the principles provide the yardstick for testing the reasonableness of a legal provision challenged on the ground of violation of fundamental rights. The concept of reasonableness in fact pervades the entire constitutional scheme. The interactions of Articles 14, 19 and 21 of the Indian Constitution analyzed by the Court in the case of Maneka Gandhi Vs Union of India (AIR 1978 SC597) clearly demonstrates the requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights and as several decisions of this Court show, this concept of reasonableness finds its positive manifestation and expression in the lofty ideal of social and economic justice which inspire and animates the directive principles. He also referred the case of Minerva Mills Ltd and others Vs Union of India and others, wherein it has been held that whether directive principles of the state policy can have supremacy over fundamental rights, merely because directive principles are non-justifiable it does not mean that they are subservient to fundamental rights; destroying fundamental rights in order to achieve goals of directive principles amounts to violation of basic structures; To maintain the undisturbed harmony the goals of directive principles should be achieved without abrogating the fundamental rights; directive principles enjoy high place in constitutional scheme; both fundamental rights and directive principles to be read in harmony.

27. Dr. M. Zahir, the learned Senior Counsel, contends that Section 138 of the Negotiable Instrument Act is a "draconian" law which contravenes the fundamental right of protection of right to property. This section is as it stood before the amendment mentions that cheque would be payable for discharge of any debt or liability. This enabled somebody who has drawn a cheque to take the defence that he did not give the cheque in discharge of any debt or liability and there may be other implications, for example, if a signed cheque is obtained by coercion, under influence, fraud, intimidation, blackmail, or theft, then the drawer of the cheque might argue that such a cheque was obtained not to discharge his liability and that was the defence which the issuer of the cheque could take under the earlier law. But the amendment has taken away this right of defence which was available to the drawer of the cheque and as such the same offends the fundamental right to property. Thus he submits that a power should be given to the Court to interpret the section, so as to enable the drawer of a cheque to argue that such a cheque was obtained by illegal means, although this defence is not mentioned in the Section. However, he admits that in view of not incorporating the non-obstante Clause in Section 138 itself all other provisions of the Negotiable Instrument Act, 1881 remains the same with equal application of the same in trial.

28. Mr. Mahmudul Islam, the learned Senior Counsel in response to the request of this Court appeared and contended that unreasonable enactment cannot constitute any criminal liability. By deleting the words "for the discharge in whole or in part of any debt or other liability" or deleting the "Explanation" of Section 138 the legislature has proved and made Section 138 an unreasonable legislation which under no circumstances can constitute any criminal liability. The amendment, thus, by deleting the said portion of the legislation, has made Section 138 an arbitrary one which is contrary

to Article 27. He contends that the issuer of the cheque if does not have any "means rea" or guilty intention to shift the liability of the cheque then criminal liability, under no circumstances, can be constituted. He also contends that Section 138 in the present form though appears to be unconstitutional but such legislation in the absence of having a "non-obstante" clause should not, in any way, be declared unconstitutional. Harmonious interpretation of section 138 should be made upon reading with other provisions of the Negotiable Instrument Act, 1881 which will always give the accused a right of meaningful defence. Thus if there is better way out then law should not be generally declared ultra vires or struck down, which is actually, within the domain of legislature.

29. Mr. M. I Farooqui, the learned Senior Counsel appearing before this Court contends that amendment of law can be challenged if the same is found to be inconsistent with the Preamble or Part III of the Constitution. According to him, the Negotiable Instrument Act, 1881 is a consolidated one as spelt out in Maxwell on the Interpretation of Statutes. The law as to bill of exchange and other negotiable securities forming a branch of the general body of the "Law Merchant" is consolidated by the Act of 1881 and the consolidated statue or law presupposes an existing law which the Parliament does not intend to alter. He also contended that there may be various circumstances for absence of legally enforceable debt or liability. Sections 43 to 45 of the Act of 1881 deal with the effect or absence of consideration. Such absence or failure may be total or partial. Sections 44 and 45 deal with partial absence or failure of consideration whereas Section 43 deals with total absence or failure of consideration. So the issuer of a cheque under the Negotiable Instrument Act as a whole has a right of defence under Sections 43, 44 and 45 as well as under Section 118 of the Act. Section 118 of the Act intended to apply as between the parties to the instrument or those claiming under them. The presumption under Section 118 is a presumption based on the existing law. Therefore the initial presumption in the case of negotiable instrument is that they were made, drawn, accepted or endorsed for consideration under clause (a) of Section 118. Thus the production of the document itself, once the signature is proved or admitted, shifts the burden on the maker, as to how and for what purpose such document was issued. Thus the impugned amendments on the face of other provisions of the Negotiable Instrument Act, 1881, as a whole does not change or alter the tenor of the existing law that has been consolidated. The Parliament in their wisdom have removed certain clauses/words of Section 138 along with Section 139, but it did not override the "general provision of law" existing in Sections 43 to 45 and section 118 of the said Act. Therefore the tenor of the law remains the same as such the impugned amending law has not offended Article 31 of the Constitution.

30. Having heard the submissions of all the parties and the learned Amici Curiae and upon perusal of the writ petitions, supplementary affidavits, affidavits-in-opposition, annexures appended thereto and the decisions referred to by the respective contending parties it appears that the moot point for determination in all these Rules is whether the impugned amendment incorporated by Act No. XVII of 2000 has taken away the right of defense of the issuer of the cheque, who has been made accused in the case filed against him/them, before the concerned court below under section 138 of the Negotiable Instrument Act, 1881 (in short, the Act) and as such whether the amendment is ultra vires the Constitution and whether from a reading of the other existing provisions of the said Act, after amendment, it can be construed that the accused has any right of defense. Further question may arise as to whether on a clear reading of the amended provision under challenge it can be construed as an isolated provision of law or to be construed as a provision to be read along with other provisions of the Negotiable Instruments Act 1881. Thus we will concentrate our discussion only on this point upon brushing aside all other arguments advanced by the parties.

31. In order to appreciate the respective arguments so advanced to that effect we need to see the background of the enactment of the Negotiable Instruments Act and incorporation of section 138 therein. Section 138 of the Negotiable Instruments Act was firstly enacted in 1881 which remained in force even after the partition between Pakistan and India though time and again India amended the said provision suiting their own benefit. In 1988 India went for further amendment of the same. But till 1994 Bangladesh continued with the same provision of law which was enacted originally in 1881. In 1994 the Legislature in Bangladesh incorporated Chapter XVII in the Act in the form as it was amended by India in 1988. Consequent to the said amendment any cheque, for the purpose of

meeting/discharging any debt or liability wholly or partly, if dishonoured, was considered to be a dishonoured cheque within the purview of section 138 and the drawer of such cheque was made responsible to have committed an offence under Section 138 of the Act. However, cheque, which was obtained either by duress or coercion or by way of steeling/theft, or issued not for the purpose of meeting any debt or liability, would not come within the mischief of Section 138. Later in 2000 the Legislature came up with the impugned amendment which is under challenge in these Rules. To get a clearer picture let us see Section 138 both prior and post amendment of 2000, which reads as follows:

Prior to amendment of section 138 as it was before 2000, runs as under:

> **" 138. <u>Dishonour of cheque for insufficiency , etc of funds in the account-</u>** *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person form out of that account [for the discharge in whole or in part of any debt or other liability] is returned by the bank unpaid , either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to [twice] the amount of the cheque , or with both.*
>
> *Provided that nothing contained in this section shall apply unless-*
>
> *(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.*
>
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice , in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and*
>
> *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*
>
> ***Explanation-** For the purpose of this Section, " debt or other liability" means as legally enforceable debt or other liability"*

After the impugned amendment made in 2000 section 138 reads as follows;

> **"138. Dishonour of cheque for insufficiency, etc. of funds in the account-. [1]** *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account[……..…] is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year , or with fine which may extend to [thrice] the amount of the cheque , or with both."*
>
> Provided that .....
>
> (a) .....
>
> (b) .....
>
> (c) .....
>
> (IA).....
>
> (a).....
>
> (b).....
>
> (c) .....
>
> (2).....
>
> (3) ....."

32. Vide the impugned amendment the Legislature having deleted the words '<u>for the discharge in whole or in part, of any debt or other liability</u>' and also having deleted the whole of the "Explanation' took away the circumstances under which a cheque issued for a particular purpose, if dishonoured, would come within the mischief of section 138 i.e. previously, the cheque which was issued only for

the purpose of discharging the debt or liability wholly or partly of any enforceable debt or liability if dishonoured it fell within the mischief of Section 138. Whereas upon deletion of the aforesaid words, vide the impugned amendment, the position of section 138 has become such that any cheque, irrespective of 'for the discharge, wholly or partly, of any debt or liability or for no purpose, if dishonoured, the issuer/drawer of the cheque would fall within the mischief of section 138. The said amendment has been made by the Legislature with clear intention to bring all dishonoured cheques vulnerable within the mischief of that Section.

33. However, section 6 of the Negotiable Instruments Act, 1881 (in short, the Act), as referred by the petitioners, provides that a cheque is *"a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."* Section 8 of the Act defines the word 'Holder' as *"the holder of a promissory note, bill of exchange or cheque means the payee or indorsee who is in possession of it or the bearer thereof but does not include a beneficial owner claiming through a benamidar."* In the explanation of the said section it has been provided that *"where the note , bill or cheque is lost and not found again , or is destroyed , the person in possession of it or the bearer thereof at the time of such loss or destruction shall be deemed to be its holder."* Again, there may be other criteria as provided for in section 9 as to "Holder in due course" – it means *"any person who for consideration becomes the possessor of a promissory note , bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order, before it became overdue without notice that the title of the person from whom he derived his own title was defective ."* In the explanation of that provision it has been provided that *"for the purposes of this section the title of a person to a promissory note, bill of exchange or cheque is defective when he is not entitled to receive the amount due thereon by reason of the provisions on section 58."* Relying on these three provisions of law it has been argued that all cheques are not negotiable instruments if the same does not comply with the requirements of section 6, rather the same is a promissory note under section 4 of the Act; as such all holders or possessors of the cheques are not due holders or possessors under sections 8 and 9 of the Act.

34. In many of the cases the accused petitioners tried to convince this Court that some of the cheques are undated. For such non-mentioning of any date in the cheque the same are not negotiable instruments under the Act. It has further been submitted that a person, if, without any reason, handed over a cheque as security or not in exchange in course of any transaction for the purpose of discharging/meeting any debt or liability, then he is not a holder or possessor of the same within the meaning of "holder in due course" under sections 8 and 9 of the Act. Thus, such holder of a cheque cannot, under any circumstances, fall within the mischief of section 138 of the Act. Consequently, the issuer of the cheque should not be tried under section 138 of the Act if such cheque is dishonored for having obtained the same under duress or by fraudulent means including those which are lost cheques. In support of the said contention it has been argued that the issuer of such cheque had no intention to handover those cheques to the unauthorized holder or possessor. If that be allowed then anarchy will prevail and many persons having bank account will face similar difficult situations for no fault on their part. This contention is also supported by some of the learned amici curiae who also contended that in the absence of non obstante clause in section 138 the accused persons will find their right of defence as provided in sections 43, 58 and 118 read with Sections 4, 6, 8 and 9 of the Act of 1881.

35. In order to appreciate the aforesaid arguments let us first have a look at Sections 43, 58 and 118 of the Negotiable Instruments Act, which are quoted below:

> ***"43.*** **Negotiable Instrument made, etc; without consideration**- *A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.*

Exception I- *No party for whose accommodation a negotiable instrument has been made, drawn, accepted or indorsed can, if he has paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.*

Exception II- *No party to the instrument who has induced any other party to make, draw, accept, indorse or transfer the same to him for a consideration which he has failed to pay or perform in full shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed.**"***

Section 58. **Defective title-***"58. When a promissory note, bill of exchange or cheque has been lost or has been obtained from any maker, drawer, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, neither the person who finds or so obtains the instrument nor any possessor or indorsee who claims through such person is entitled to receive the amount due thereon from such maker, drawer, acceptor or holder unless such possessor or indorsee is, or some person through whom he claims was a holder thereof in due course."*

***Section 118. "*Presumptions as to negotiable instruments of consideration-** *Until the contrary is proved the following presumptions shall be made:*

(a) That every negotiable instrument was made or drawn for consideration and that every such instrument, when it has been accepted, indorsed negotiated or transferred, was accepted, indorsed or transferred for consideration;

as to them;

(b)that every negotiable instrument bearing a date was made or drawn on such date;

as to time of acceptance;

(c) that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

as to time of transfer;

(d)that every transfer of a negotiable instrument was made before its maturity;

(e) As to order of indorsement that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

as to stamp;

(f)that a lost promissory note, bill of exchange or cheque was duly stamped;

that holder is a holder in due course;

(g) that the holder of a negotiable instrument is a holder in due course: provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof ,by means of an offence or fraud, or has been obtained from the maker or acceptor by means of an offence or fraud, or for unlawful consideration ,the burden of proving that the holder is a holder in due course lies upon him."

36. On a close scrutiny of the aforesaid provisions, it appears that section 43 contains a specific word 'consideration'. The literal meaning of the term 'consideration' is 'pursuant to something' which might be pursuant to an 'agreement' or pursuant to an "act" or "deed" being legally enforceable. Thus, vide section 43 when a negotiable instrument is made, drawn, accepted, endorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. If that be so, any cheque, if dishonored by the bank, under such circumstances, will not attract section 138 of the Act. As such, the specific criteria for the purpose of filing of a case under section 138 is whether there is consideration; which is a vital question to be looked into for trial and conviction.

37. Again, vide section 58 of the Act any cheque, which is lost or has been obtained by duress, if dishonoured, cannot / shall not constitute any offence under section 138 of the Act and any holder of such cheque, who is not a meaningful holder as defined in sections 8 and 9, shall not be entitled to invoke section 138.

38. Conversely, on perusal of section 118 of the Act of 1881, it appears that until the contrary is proved, it will be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated, or transferred, was accepted, endorsed, negotiated or transferred for consideration. Section 118(g), however, provides that the holder of a negotiable instrument is a holder in due course; provided that where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor by means of an offence or fraud , or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him .

39. Having minutely going through all the aforesaid provisions of the Act, which have not yet been disturbed by any amendment, it appears that Negotiable Instruments Act 1881 in its various provisions have categorically spelt out what is a negotiable instrument; how the negotiable instrument is issued and such instrument, if issued, then who is the holder or possessor of it and what should be taken into consideration for the purpose of determination whether the cheque is a negotiable instrument and whether the issuer of the cheque is a lawful owner as well as the holder or possessor of the same is also a lawful possessor or holder of the cheque. Last, but not the least, the Act, as a whole, provides that under the Act one can determine whether the cheque is issued for consideration. It is clear from the aforesaid provisions that the Act itself has clearly provided the sequences to determine when and what kind of cheque, if dishonoured, will fall within the mischief of section 138 and what should be the consequences of it.

40. On a careful reading of section 138, it appears that the same has not been incorporated as a special provision in the Act. Rather the same has been incorporated as a general provision similar to other provisions of the said Act. Since it is a general provision similar to other provisions of the Act without incorporating "non-obstante" clause, it can be construed that the other provisions of the Negotiable Instruments Act 1881 shall also be applicable in construing whether any offence has been committed under section 138 of the said Act. So, it is abundantly clear that had section 138 of the Act of 1881 been started with "Notwithstanding anything contained in any other provision of this Act" then it could have placed a different scenario. Since no such 'term' has been provided in the said provision by the impugned amendment, the offence, alleged to have been committed under Section 138 of the said Act, is to be tried upon giving opportunity to the accused to defend himself in the light of the provisions as contained in sections 4,6,8,9,43,58 and 118 of the Negotiable Instrument Act, 1881 as a whole. Some of the learned Advocates for the petitioners, argued that the said defence is not allowed by the trial court rather on the face of a cheque being dishonored, conviction is awarded upon the issuer, which according to the above discussion is not the correct appreciation of law.

41. On a comparative reading of the pre-amended and post-amended provision of section 138 and upon hearing all the learned Amici Curiae it is apparently clear that by the impugned amendment the scope of meaningful defence, which is the fundamental right as enshrined guaranteed in Article under 27 of the Constitution providing 'all citizens are equal before law and are entitled to equal protection of law' has been circumscribed rather has been taken away, which is also contrary to Article 31 of the Constitution which provides that ' every citizen has right to enjoy the protection of law, and to be treated in accordance with law and only in accordance with law is the inalienable right of every citizen'. Similarly, Article 35(3) of the Constitution provides 'Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law'. We have also perused Article 8 and other Articles of the Constitution and considered its scheme, as submitted by the learned Amicus Curiae Mr. M. Amirul Islam and in view of the fact that since the amendment has not provided adequate opportunity of taking defence, from that score the submissions regarding the unconstitutionality of the impugned amendment has substance.

42. Having regard to the position of law, as quoted above, and the submissions of all the learned advocates including the Amici Curiae it appears that if the trial Court does not allow the accused petitioner to take meaningful and adequate defence on a matter arising out of such cheques in the

light of sections 4,6,8,9,43,58 and 118 of the Act, as mentioned above, then the right of defence, which is a fundamental right of each and every citizen could become meaningless. However, section 138 cannot be read in an isolated manner and since the same is not an absolute provision, rather is similar to other provisions of the Negotiable Instrument Act 1881, we need to give a harmonious interpretation of the same which clearly goes to indicate that the accused person(s) is/are entitled to take any plea of meaningful defence. In view of the above observations and finding we are not inclined to declare the impugned amendment unconstitutional as section 138 is to be read with other provisions of the said Act and trial Court has ample power to allow the accused to take any defence as provided for under sections 4, 6, 8, 9, 43, 58 and 118 of the said Act. In the case of ***Md. Arif Uz Zaman, Vs. State and another,*** reported in ***8 ADC 975*** while giving sanction to the question of "right of defence" their lordships of the Appellate Division observed " *however, if a holder or the payee gets hold of a dishonoured cheque by fraudulent means or forgery, the drawer of the cheqeue shall have the liberty to take such defence during the trial"*. Thus in the light of the said observation, we also hold that the complaint petition should contain the circumstances of obtaining such cheque and reasons for issuing such cheque by the issuer so that the accused can take a meaningful defence/ stand at the trial under all circumstances. However, even in the absence of any such statement in the complaint petition there is no embargo under the Act, to take any defence by the accused person in the light of sections 4, 6, 8, 9, 43, 58 and 118 of the Act and that the trial court shall give the accused persons adequate opportunity to take any such defence during the course of trial.

43. From the discussions made hereinabove, since we found that section 138 of the Negotiable Instruments Act is not an isolated enactment and since the same does not contain "*non-obstante*" clause, as such, the same is to be read along with other provisions of the said Act. In that view of the matter when the trial commences, the said Act entitles the accused person to take any defence in the light of sections 4, 6,8,9,43,58 and 118 of the said Act. Therefore, we do not find any reasons /necessity to declare the impugned amendment unconstitutional, *ultra vires* or illegal.

44. Accordingly, all the Rules are disposed of with direction upon all the learned Sessions Judges/Metropolitan Sessions Judges/Special Judges/Joint Sessions Judges/ Assistant Sessions Judges and Judicial Magistrates, to commence and /or to continue with the trial of all the cases filed or pending before them under section 138 of the Act of 1881 and dispose of the same in accordance with law upon giving adequate opportunity of meaningful defence to the accused persons, in the light of the provisions as contained in sections 4, 6, 8, 9, 43, 58 and 118 of the Negotiable Instrument Act, 1881. In this respect, all the aforesaid Courts are hereby directed to enable the accused person to adduce evidence, if any, in the light of his defence, if taken, pursuant to the above provisions of the Act.

45. Stay granted earlier stands vacated.

46. Before parting with this judgment we express our gratitude to all the Senior Advocates, who appeared as Amici Curiae in these cases and rendered their services which has led us to come to the above conclusion.

47. Office is directed to communicate this judgment and order in advance to all the Sessions Judges, Metropolitan Sessions Judges, Special Judges, Joint Sessions Judges, Assistant Sessions Judges and Judicial Magistrates to do the needful accordingly in all the cases under section 138 of the Negotiable Instrument Act, 1881.

48. However, there will be no order as to costs.

2 SCOB [2015] HCD 18

HIGH COURT DIVISION
(Criminal Revisional Jurisdiction)

CRIMINAL REVISION NO.433 OF 2003

Salauddin Mahamud Jahid ....Petitioner.

-Versus-

The State..…… Opposite party.

Mr. Yousuf Hossain Humayun with
Mr. Md. Shahjahan and
Ms. Nasrin Ferdous ……For petitioner.

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

Heard and judgment on 11th August, 2015.

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

Section 227 of the Code of Criminal Procedure, 1898:
The Court under section 227 of the Code of Criminal Procedure is competent to alter or amend the charge at any stage of the proceeding before pronouncement of judgment. Since section 302 of the Penal Code is not applicable even after framing a charge under section 302 of the Penal Code, there is no legal bar to find the accused guilty under lower section of 304 Part II of the Penal Code on proper examination of the facts, circumstances and evidence of the case.

...(Para 8)

JUDGMENT

SALMA MASUD CHOWDHURY, J.

1. This Rule arising out of an application under section 439 read with section 435 of the Code of Criminal Procedure at the instance of the accused petitioner was issued calling upon the Deputy Commissioner, Dhaka to show cause as to why the order No.14 dated 28.4.2003 passed by the Metropolitan Additional Sessions Judge, Court No.4, Dhaka should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The prosecution case in short is that on 5.8.2002 one Kazi Golam Kibria lodged a first information report with Uttara Police Station against the petitioner under section 326/307 of the Penal Code alleging that he gave in marriage of his daughter Kazi Faria Akter Khoma with one Abu Taleb in 1985, out of which wedlock, a daughter named Umme Dardi Tonni was born in 2002 and she was aged about 15 years and in 2001 Abu Taleb divorced the informant's daughter Faria and thereafter in the middle of 2001 he again gave his daughter in marriage with the petitioner Salauddin Mahmud Jahid and they started to live at their residence at House No.10, Road No.20, Sector-7, Uttara Model Town, Dhaka and at about 11.45 p.m. on 4.8.2002 informant's daughter tried to talk with the informant through telephone but the informant failed to understand what she was trying to say and thereafter the informant's grandson Jewel called the informant through telephone asking him to go to the hospital saying that accused petitioner Salauddin Mahmud gave bullet shots to informant's daughter Faria Akter Khoma and granddaughter Tonni and caused grievous injuries and the informant rushed to Dhaka Medical College Hospital and found both of them in injured condition by receiving bullet injuries and the informant came to know that at about 11.30 P.M. when his daughter asked the petitioner to take dinner, the petitioner became furious and at about 11.40 P.M. the petitioner gave shots from his personal pistol towards the chest of the informant's daughter Faria Akter Khoma and hearing the sound of firing, victim Tonni and their maid servant Mukta, made an attempt to resist him,

but the petitioner again shot towards victim Tonni who received two bullet injuries, one is her chest and another on her right waist, and thereafter he again shot towards Faria Akter who received injuries and hence the present case.

3. The police investigated the case and submitted charge sheet against the accused persons under section 302/326/307/212 of the Penal Code.

4. The case record was transmitted to the Court of the Metropolitan Sessions Judge, Dhaka who transferred it to the Court of the Additional Metropolitan Sessions Judge, 4th Court, Dhaka for holding trial who framed charge against the accused persons under section 326/307/302 of the Penal Code which was read over to the accused petitioner who pleaded not guilty of the charge and prayed to be tried.

5. Being aggrieved thereby, the present petitioner filed an application under section 439 of the Code of Criminal Procedure before this Court and obtained the present Rule.

6. Mr. Yusuf Hossain Humayun appearing with Mr. Md. Shahjahan and Ms. Nasrin Ferdous, the learned Advocates on behalf of the petitioner submits that from the plain reading of the first information report, charge sheet and postmortem it appears that the ingredients of section 302 of the Penal Code could not be established against the petitioner and the charge ought to have been framed under section 304 Part II of the Penal Code. He next submits that in view of the fact that the victim died after 13 days of the occurrence and the post mortem report showing that the death was due to septic shock, the charge of a culpable homicidal amounting to murder is not attracted in the present case. The learned Advocate brings into our notice that although the petitioner failed to file an application under section 265C of the Code of Criminal Procedure, but if the Court of Sessions fails to discharge its duty properly, this Court shall interfere in order to prevent the abuse of the process of the Court and vexatious trial and thereby save innocent people from being harassed. In support to his contention the learned Advocate has referred to a decision as reported in 49 D.L.R. (H.C.) page 373. He next submits that no matter whether an application under section 265C of the Code of Criminal Procedure is presented before a Court or not, the trial Court at the time of framing of charge must take into consideration the materials on record presented before it and on hearing the parties frame proper charge. In support to his contention the learned Advocate has referred to a decision as reported in 50 D.L.R. (H.C.) page 103. The learned Advocate next submits that if the injury inflicted did not cause instant death and the victim was alive for about some days at the hospital, this shows the injury inflicted was not likely to cause death, but it endangered the life and ultimately resulted in death and thus the accused appellant cannot be held guilty under section 302 of the Penal Code. In support to his contention the learned Advocate has referred to decisions as reported in 51 D.L.R. (H.C.) page 433 and 36 D.L.R. (H.C.) page 245.

7. Ms. Sakila Rawshan, the learned Deputy Attorney General representing the State opposes the Rule.

8. We have heard the learned Advocate for the petitioner and the learned Deputy Attorney General representing the State and perused the application under section 439 of the Code of Criminal Procedure along with other materials on record. It appears that when there was an altercation between the accused petitioner and his wife, the daughter of the informant, the deceased came in between them being the granddaughter of the informant and the step daughter of the accused petitioner and got the injuries as a result of which she died after 13 days and the postmortem report reveals that the death was caused due to the septic shock. The trial Court framed charge under section 302 of the Penal Code. Admittedly no application under section 265C of the Code of Criminal Procedure was filed before the trial Court. It is the contention of the learned Advocate for the petitioner that the ingredients of section 300 of the Penal Code are not attracted in the present case against the petitioner rather it is under Exception 4 of section 300 of the Penal Code for which charge cannot be framed against the accused petitioner under section 302 of the Penal Code. It appears that the injury inflicted did not cause instant death. The victim was alive for 13 days at the hospital. This shows the injury

inflicted was not likely to cause death but it endangered the life and ultimately resulted in death. It was not a pre-planned attack on the deceased. Incident took place suddenly. It is admitted that the accused and the wife, the informant's daughter, started quarrel and pistol shot was given by the accused on the informant's daughter when the granddaughter of the informant appeared at the place of occurrence and got injuries by pistol shot and after 13 days she died. There was no intention or mensrea to kill the victim on the part of the accused. However faint the doubt may be, benefit must in all fairness go to the accused. No doubt offence has been committed by the accused, but it is for the trial Court to decide, on adducing evidence, whether the allegation comes under section 302 of the Penal Code or section 304 Part II of the Penal Code. In order to dispense fair justice proper charge should be framed, which can be altered at any stage of the proceeding. The Court under section 227 of the Code of Criminal Procedure is competent to alter or amend the charge at any stage of the proceeding before pronouncement of judgment. Since section 302 of the Penal Code is not applicable even after framing a charge under section 302 of the Penal Code, there is no legal bar to find the accused guilty under lower section of 304 Part II of the Penal Code on proper examination of the facts, circumstances and evidence of the case. The trial Court is directed to take into consideration the observations made above.

9. With this direction, the Rule is disposed of.

10. Communicate a copy of the judgment and order to the Courts concerned.

2 SCOB [2015] HCD 21

HIGH COURT DIVISION
(Criminal Miscellaneous Jurisdiction)

Criminal Misc. Case No. 19511 Of 2012

Bo-Sun Park,
South Korean Citizen
son of Tae-Yung Park
Chairman & Managing Director
Tea-Hung Packaging (BD) Limited
Teen Sarak, Police Station-Joydevpur
District-Gazipur and another
… Petitioners

Versus

The State
Represented by the Deputy Commissioner
Gazipur
… Opposite-party

Ms. Tania Amir with
Mr. Sheikh Rafiqul Islam
… For the petitioners

Ms. Salma Rahman, AAG
… For the opposite-parties

Ms. Ok Kyung Oh
…The informant in person

Heard on the 14th & 15th September
And
Judgment on the 16th September, 2015

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

Delay is no ground for quashing the criminal proceeding:
There is no dispute that the F.I.R. has been lodged with a delay of about four years. But, according to the F.I.R. as well as the Criminal Miscellaneous Application, the informant is a Korean woman and she received the copies of forged documents long after from the investigating officer of a previous case. Moreover, delay by itself is no ground for quashing the criminal proceeding. ...(Para 27)

Code of Criminal Procedure
Section 561A:
As the F.I.R. discloses criminal offence under the Penal Code, the proceeding should not be interfered with by this court under its inherent jurisdiction under section 561A of the Code at this stage. ...(Para 29)

JUDGMENT

Zinat Ara, J:

1. On an application made by the petitioners under section 561A of the Code of Criminal Procedure, 1898, a Rule was issued in the following terms:-

"Record need not be called for and a Rule be issued calling upon the opposite parties to show cause as to why the proceedings of Joydevpur Police Station Case No. 53 dated 14.08.2008 corresponding to G. R. No. 915 of 2008 under sections 406/420/468/471 of the Penal Code, now pending in the Court of Chief Judicial Magistrate, Gazipur should not be quashed and/or such other or further order or orders passed as to this court may seem fit and proper."

2. At the time of issuance of the Rule, all further proceedings of the aforesaid Joydevpur P. S. Case No. 53 dated 14.08.2008 corresponding to G. R. No. 915 of 2008 was stayed by this court.

3. The facts of the case, in brief, are as under:-

Both the accused persons and the complainant are Korean citizens. The complainant/informant Ok Kyung Oh is the Ex-wife of accused No. 1 Bo Sun Park. Accused No. 1 is the Chairman and Managing Director of Taehung Packaging (BD) Limited (shortly, the Company) and accused No. 2 is the Director of the Company. They have got a significant foreign investment in Bangladesh and set up an ISO 9001 2000 certified Garments Packaging Industries at Gazipur. Ok Kyung Oh, as complainant, filed a criminal miscellaneous case before the Court of Chief Judicial Magistrate, Gazipur (the CJM, in short) alleging that, with a view to prevent the complainant from functioning as Managing Director (MD) of the Company, the accused had submitted some forged documents before the Registrar of Joint Stock Companies and Firms (RJSC). Whereupon, RJSC filed a case under section 397 of the Companies Act, 1974 against accused No. 1 in the Court of Chief Metropolitan Magistrate, Dhaka (the CMM). The CMM by Memo No. 433 dated 30.01.2005 sent the said complaint to Motijheel Police Station, Dhaka for investigation into the matter by treating the same as F.I.R. After receiving the CMM's order, Motijheel Police Station Case No. 72 dated 20.03.2005 was lodged under sections 465/471/420/406 of the Penal Code. During investigation of the aforesaid P. S. case, the accused handed over some documents of the Company to the investigating officer. The complainant collected photo-stat copies of those documents from the investigating officer and on receiving the copies of documents from the investigating officer of the previous case, the complainant found that the Notices, Board Resolutions, etc. are fake and forged documents, because all the Notices and Board Resolutions submitted by the accused contain the Orion ISO mark and false signatures of the complainant. There was no scope for the Company to use Orion ISO Logo before obtaining the ISO certificate in April, 2001. Therefore, it is evident that the copies of the Board Resolutions of the Company submitted to the Chartered Accountant Firm and RJSC with Orion ISO Logo are forged documents. This was done with a view to prevent the complainant from functioning as Managing Director of the Company. In absence of the complainant, accused No. 1 was the custodian of all the original documents of the Company and taking this opportunity, he, in collaboration with accused No. 2, manufactured the false and fabricated Notices and Board Resolutions of the Company by putting false signatures of the complainant for depriving the right of the complainant in the Company and for harassing her.

4. The CJM, after receiving the complaint, directed the Officer-in-Charge, Joydevpur Police Station for holding investigation and taking legal action accordingly. Upon receiving the complaint through the CJM, Joydevpur P. S. Case No. 53 dated 14.08.2008 has been registered with Joydevpur Police Station.

5. On 27.08.2008, the accused petitioners surrendered before the Court of CJM and prayed for bail. The CJM was pleased to enlarge the accused petitioners on bail.

6. Now, the case is under investigation by the investigating officer.

7. After obtaining bail, the accused-petitioners have filed the instant miscellaneous case seeking quashment of the proceedings in Joydevpur Police Station Case No. 53 dated 14.08.2008 corresponding to G. R. No. 915 of 2008 under sections 406/420/468/471 of the Penal Code, now pending in the Court of CJM mainly on the grounds that the facts of the instant case are so preposterous and absurd upon which no criminal case can be continued; that the informant/complainant, Ex-wife of accused No. 1, with a malafide and ill motive lodged the instant case with a view to harass the accused-petitioners and that no offence is constituted from the contents of the F.I.R.

8. The petitioners have filed two supplementary affidavits annexing a huge bundle of documents and by referring some decisions, have tried to establish that none of the allegations as contained in the F.I.R. constitute any criminal offence.

9. The complainant/informant has filed a counter-affidavit supporting the complaint/F.I.R. stating that specific criminal offence is disclosed from the contents of the F.I.R.

10. Ms. Tania Amir, the learned Advocate appearing for the accused-petitioners, submits that the allegations made in the F.I.R. are preposterous and therefore, the proceeding of the case is liable to be quashed. She next submits that the allegations made in the F.I.R. do not constitute any criminal offence and, as such, there is sufficient grounds for not proceeding further with the maliciously instituted case inasmuch as accused-petitioner No. 1 is the Ex-husband of the informant and after the divorce, out of personal grudge, she has filed the complaint/F.I.R. with some absurd and preposterous allegations. She finally submits that the inordinate delay of about four years in filing the case without satisfactory explanations makes the case doubtful and therefore, the proceedings of Joydevpur Police Station Case No. 53 dated 14.08.2008 corresponding to G. R. No. 915 of 2008 under sections 406/420/468/471 of the Penal Code, now pending in the Court of CJM is liable to be quashed under section 561-A of the Code of Criminal Procedure, 1898 (shortly stated as the Code).

11. In support of her submissions, Ms. Tania Amir has relied on the decisions in the cases of Dewan Mominul Mouzdin Vs. the State, reported in 23 DLR (HCD) 365 and Md. Shokrana Vs the State, reported in 21 BLD (HCD) 296.

12. In reply, Ms. Salma Rahman, the learned Assistant Attorney General, appearing on behalf of the opposite-party-State, takes us through the contents of the F.I.R. and the materials on record and contends that the contents of the F.I.R. constitute definite criminal offence under the Penal Code. She next contends that the documents and papers submitted by the accused-petitioners are to be examined by the investigating officer during investigation stage and at this initial stage of investigation, there is no scope to consider the defence documents by this court. She further contends that since the F.I.R. prima-facie discloses the criminal offence under the Penal Code, there is no scope to quash the impugned proceedings under section 561A of the Code. She also contends that the allegations made in the F.I.R. against the accused-petitioners are neither preposterous nor absurd. She next contends that the complainant/informant being a Korean woman may have lodged the F.I.R. or complaint with some delay, as she came to know about the forged documents afterwards on getting copies thereof from the investigating officer. But, simply for this reason, the investigation of this case should not be interfered with by the Court. She finally contends that in the facts and circumstances of the case, the Rule is liable to be discharged.

13. In support of her arguments, Ms. Salma Rahman has relied on the decisions in the cases of Md. Shamsuddin alias Lambu and others Vs the State and others, reported in 40 DLR (AD) 68 and Ali Akkas Vs. Enayet Hossain and others, reported in 17 BLD (AD) 44.

14. Informant Ok Kyung Oh is present before the Court. She, with the permission of the Court, takes us through the counter affidavit and supports the F.I.R. case.

15. We have examined the criminal miscellaneous application, supplementary affidavits thereto, counter affidavit and the connected materials on record. We have also studied the decisions as referred to by the learned Advocate for the accused-petitioners and the learned Assistant Attorney General for the State.

16. First, we would like to discuss the decisions as referred to by the contending parties before going into the merit of the Rule.

17. In the decision reported in 23 BLD (HCD) 634, as referred to by Ms. Tania Amir, their lordships have referred to the decisions reported in 51 DLR (AD) 159 and 36 DLR (AD) 14. But relying on the latter decision i.e. 36 DLR (AD) 14 made the Rule absolute and the proceeding in that case was quashed. In the decision reported in 51 DLR (AD) 159, it has been held that before exhausting the remedies provided under sections 265C or 241A of the Code of Criminal Procedure initiation of any proceeding under section 561A of the Code of Criminal Procedure for quashing the proceeding is premature which is an admitted principle under law. But at the same time in the ruling reported in 36 DLR (AD) 14 it has been decided that interference even at the initial stage may be

justified where the facts are so preposterous that even on admitted facts no case stand against the accused.

18. In the case reported in 21 BLD (HCD) 296, as relied upon by the accused side, it was decided by their lordships as under:-

"In a criminal case firstly, **any allegation whether in the FIR or in the charge-sheet, must constitute an offence within the meaning of Code of Criminal Procedure. Secondly, the allegations must be based on materials on record and not on mere surmises or suppositions. The process of law must not be used as the engine of harassment. It is found to be so absurd, it will be imperative on the part of the High Court Division to interfere** and quash such proceedings in exercise of its inherent jurisdiction."

(Bold, emphasis given)

19. In the case reported in 17 BLD (AD) 44, as referred to by the learned Assistant Attorney General, their lordships held as under:-

"In the case of Abdul Quader Chowdhury and others Vs The State reported in 28 D.L.R. (AD) 38, this Division has clearly spelt out the categories of cases where the High Court Division should interfere to quash a criminal proceeding. In the decision this Division observed as follows:-

(1) Interference even at an initial stage may be justified where the facts are so preposterous that even on the admitted facts no case can stands against the accused.

(2) Where institution or continuance of criminal proceedings against an accused person may amount to an abuse of the process of the court or when quashing of the impugned proceedings would secure the ends of justice.

(3) Where there is a legal bar against institution or commence of a criminal case against an accused person.

(4) In a case where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged and in such cases no question of weighing and appreciating evidence arise.

(5) The allegations made against the accused persons do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge."

20. Keeping in mind the aforesaid principles for quashment of a criminal proceeding under section 561A of the Code, let us now examine the merit of the Rule considering the facts and circumstances of the instant case.

21. The main argument as advanced by Ms. Tania Amir is that the allegations made in the F.I.R. do not constitute any offence.

22. We have carefully examined the four corners of the F.I.R.

23. It transpires from the certified copy of the F.I.R. (Annexure-A to the miscellaneous application) that it is a detailed F.I.R. of several pages. But the sum and substance of the F.I.R. is that the complainant/informant is a foreign investor in Bangladesh and she is the Managing Director of the Company having 7,000 shares and accused-petitioner No. 1 is the Chairman and accused-petitioner No. 2 is the Director of the Company and that both the accused-petitioners illegally created some forged papers for preventing the complainant/informant from functioning as the Managing Director of the Company; that the accused-petitioners filed four resignation letters and some Resolutions of the Board of the Company and notices and those are all fake and forged documents. It has further been stated that the notices and Board Resolutions contain Orion ISO and false signatures of the complainant, inasmuch as, the Orion ISO Certificate was obtained in April, 2001, the alleged Resolutions of the Board of Directors of the Company and the Notices containing the Orion ISO are of the previous dates and so, those are forged documents created for the purpose of preventing the

informant from acting as the Managing Director of the Company and depriving her right in the Company and to harass her.

24. Thus, from the contents of the F.I.R. as a whole, it transpires that the accused-petitioners created forged resignation letters of the complainant/informant and forged Board Resolutions of the Company and the Notices with a view to prevent the informant from functioning as the Managing Director of the Company. Therefore, it cannot be said that the contents of the F.I.R in their entirety do not disclose offence as alleged.

25. It is true that a voluminous supplementary affidavit has been filed by the accused-petitioners, which shows that there are series of litigations between the accused and the complainant/informant. But, at this stage, there is no scope to examine the said documents and decide the merit of the case. Our considered view is that the accused may submit those documents before the investigating officer, if they so desire. Further, it transpires from order dated 24.05.2012 (Annexure-A-1 to the Criminal Misc. Application) that the learned Senior Judicial Magistrate, Gazipur considering the facts and circumstances of the case by order dated 24.05.2012 directed the accused to produce certain documents as those documents were found to be in the custody of the accused for the purpose of ascertaining about the forged signatures of the complainant/informant on the said documents, etc. Thus, during investigation, if the documents are found to be not forged or collusive or manufactured, the concerned investigating officer would, no doubt, take necessary action in accordance with law. At this initial stage, it cannot be said that the F.I.R. in its entirety does not constitute any criminal offence as alleged against the accused-petitioners and so, we do not think it proper to interfere with the proceedings of Joydevpur Police Station Case No. 53 dated 14.08.2008 corresponding to G. R. No. 915 of 2008 at this stage on this ground.

26. Now let us consider the delayed F.I.R. issue.

27. There is no dispute that the F.I.R. has been lodged with a delay of about four years. But, according to the F.I.R. as well as the Criminal Miscellaneous Application, the informant is a Korean woman and she received the copies of forged documents long after from the investigating officer of a previous case. Moreover, delay by itself is no ground for quashing the criminal proceeding.

28. The above view of ours is supported by the decision reported in 40 DLR (AD) 68, wherein their lordships decided as under:-

"A proceeding is liable to be quashed when the allegation upon which it is based is, on the face of it, groundless or so preposterous that no man of ordinary prudence will take any notice of it. As to the contention that politically rivalry gave rise to the filing of this case, there is hardly any material on record at this stage to substantiate it. **It is only the delay of nine years in filing the case which is sought to be taken as the ground for quashing the proceeding. Mere delay in lodging a complaint is not a ground for quashing a proceeding, for there are varied circumstances in which lodging of any information as to the commission of an offence may be delayed. It is true that no explanation for the delay has been given by the informant while lodging the first information report.** The report itself shows that accused persons had organized a Unit of the "Lalbahini" in the locality, set up a camp in the house of one of the accused and detained many persons and carried out various acts of plunder, torture and extortion. It was stated there that out of fear of life from these persons who were very influential at that time the informant and members of his family dared not to inform the authorities about the incident. Delay of course raises doubt about the truth of the allegation; but it is for the prosecution to prove their case beyond reasonable doubt by adducing all the evidences at their disposal; whether such evidence can be relied upon is a matter which will be considered by the trial Court."

(Bold, to give emphasis)

29. So, we are of considered opinion that as the F.I.R. discloses criminal offence under the Penal Code, the proceeding should not be interfered with by this court under its inherent jurisdiction under section 561A of the Code at this stage.

30. From the contents of the F.I.R., it does not appear to us that the allegations brought in the F.I.R. against the accused-petitioners are preposterous or absurd so, as to quash the proceeding.

31. In view of the above, we find no merit in the submissions of Ms. Tania Amir and we find merit and force in the submissions of Ms. Salma Rahman.

32. In the result, the Rule is discharged.

33. Joydevpur Police Station Case No. 53 dated 14.08.2008 corresponding to G. R. No. 915 of 2008 under sections 406/420/468/471 of the Penal Code, now pending in the Court of Chief Judicial Magistrate, Gazipur will proceed as usual in accordance with law.

34. The order of stay stands vacated.

35. Communicate the judgment to the learned Chief Judicial Magistrate, Gazipur, at once for information and necessary action.

2 SCOB [2015] HCD 27

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 9147 of 2008.

Shafi A Choudhury
…… Petitioner.

-Versus-

Government of Bangladesh and others.
..... Respondents.

Mr. Rfique-Ul- Hoque, Senior Advocate with
Mr. Muhammad Saifullah Mamun, Advocate
…. For the petitioner.

Mr. Md. Mamunur Rashid, Advocate
… For the respondent No.4.

Mr. Syed Hasan Zobair, Advocate.
… For respondent No.2.

Judgment on 03 April, 2014.

Present:
Mr. Justice Md. Ashfaqul Islam
And
Mr. Justice Md. Ashraful Kamal

Banking Companies Act 1991:
Section 5 GaGa read with section 27 KaKa:
The process of enlistment of any defaulter name in the CIB list is a continuing process within the meaning of section 5 GaGa read with section 27 KaKa of Banking Companies Act 1991 and also read with Article 42 of Bangladesh Bank Order 1972. If all these provisions are read together one and only inference that could be made is that if any person or a company is indebted to in any manner with any financial institution and the debt remains unpaid, it is the duty of the respondent Bangladesh Bank in its turn to enlist the name of the incumbent in the CIB list nothing more nothing less. ...(Para 18)

JUDGMENT

Md. Ashfaqul Islam,J:

1. At the instance of the petitioner, Shafi A. Choudhury, this Rule Nisi was issued in the following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why report of Credit Information Bureau (CIB) Bangladesh Bank classifying the petitioner as a defaulter borrower under borrower Code No.913 and serial No. 323 in respect of a Loan granted by the Respondent Pubali Bank Ltd. in favour of the Pro-forma Respondent No.5 [M/S Albert Davit (Bangladesh Ltd] should not be declared to have been made without lawful authority and is a nullity. At the time of issuing Rule an order of injunction was passed restraining the Respondent No.3 from reporting through the Credit Information Bureau showing a defaulter borrower under borrower Code No.913 and serial No. 323 in respect of a Loan granted by the Respondent Rupali Bank Ltd. in favour of the Pro-forma Respondent No.5 [M/S Albert Davit (Bangladesh Ltd] should the be declared to have been made without lawful authority and is a nullity."

2. The fact leading to the Rule, in short, is that Respondent No.5 [M/S Albert Davit (Bangladesh Ltd] is a private limited company established on 21.10.1950. By President Order No.27 the said company was declared as an abandoned property by the government and vested upon Bangladesh Chemical Industries Corporation (BCIC). On 05.11.1971 the Eastern Mercantile Bank (presently Respondent Pubali Bank Ltd.) granted a credit facility under CC (Pledge) and CC (Hypo) for the

amount of Tk.65 lac and 5 lac respectively in favour of the said company. In the year 1984 Government under its "Disinvestment Policy" decided to hand over the said Company to the private sector. Accordingly, the Government published tender notice to sell the said Company. The petitioner as a businessman, along with six other family members participated in a tender floated by the Ministry of Industries for the purchase of shares of the said Company. The said tender was awarded to the petitioner and his family members at Tk.13.77 crores. An agreement for sale was executed on 07.04.1984 between the Ministry of Industries for transfer of shares in the said Company subject to joint audit and verification of all assets including liability to the Respondent No.3 and 4 (hereinafter referred to as the Pubali Bank). The shares of the said Company were never transferred to the petitioner and his family members. As such the petitioner and his family members do not hold any shares in the said Company.

3. On 31.10.1992 the petitioner sent a letter to the Pubali Bank for holding necessary audit to determine the actual liability of the said Company. The respondent Pubali Bank, on the other hand, by several letters asked the petitioner to clear up the outstanding dues and requested the respondent – Bangladesh Bank to write off amount of Tk.53,79,627.00 from the interest account and Tk.39,92,742.00 from the interest suspended account.

4. The Pubali Bank vide its letter No.7893 dated 05.09.1995 informed the company that the liability of said company stood at Tk.1,15,03,916.25 and the same amount is payable in two year installments. This liability was determined by the management of the Pubali Bank and approved by its Board of Directors. The respondent Pubali Bank stated in its letter dated 05.09.1995 that for waiver of interest the permission of Bangladesh Bank would be required since the petitioner was a director of Pubali Bank Limited. The Pubali Bank failed to realize that the petitioner merely acted as an authorized representative/agent of the said company. He had no shares in the said company nor was a director of the same. The respondent wrongly associated the petitioner with the debts and liabilities of the said company. So the petitioner is not a defaulter.

5. Thereafter several years have gone passed but no solution could be reached between the petitioner and writ respondents for different reasons. In paragraph 35 to 37 regard have been taken on several decisions of the Appellate Division and this Division to highlight that the petitioner company is a artificial person and the loan was taken by an artificial person and in the event of default by such artificial person in repayment of the loan, such default of the company would not ipso facto render any member or director of such artificial person a defaulter. Under the said circumstances the petitioner being aggrieved by the enlistment of his name in the CIB list moved this Division and obtained the present Rule and order of injunction as aforesaid.

6. Mr. Rafique-Ul Hoque, the learned Senior Advocate appearing with Mr. Muhammad Saifullah Mamun, the learned Advocate for the petitioner after taking us with the petition and the relevant Annexures thereto mainly contends that although the petitioner has been acting as ex-officio Chairman and Managing Director of the Albert Davit (BD) Ltd. but without holding any share of the said company he cannot be held personally liable to pay dues of the Company since he did not give any personal guarantee or undertaking to pay the said liability. The shares of the said company have not yet been transferred in the name of the petitioner. The petitioner has just been acting as the designated Chairman and Managing Director of the said Company for mere management purpose and he is not the proprietor or owner of the same as mentioned above. The shares of the said Company are still lying with the Ministry of Industries. In such situation, the debts and liability of the said Company cannot legally be attributed to the petitioner and hence he is not a defaulter borrower. He further argued that the Company paid Tk.115,03,916.25 to the Pubali Bank as full and final settlement of liability of the company according to the decision taken in the 252nd and 683rd Board of Directors Meeting of Pubali Bank.

7. Mr. Hoque further submits that enlistment of the name of the petitioner in CIB report showing him as defaulter borrower cannot be sustained in that the elementary principle of Company law is that the company is a legal person and the director is not liable for any debt of the company. Therefore,

the learned Senior Counsel concludes that for the aforesaid reasons the petitioner's name appearing in the list of CIB showing him as a defaulter borrower should be declared to have been done illegally having no legal effect.

8. Mr. Md. Mamunur Rashid, the learned Advocate, on the other hand, by filing affidavit-in-opposition on behalf of respondent No.4 Pubali Bank Ltd. opposes the Rule. Mr. Syed Hasan Zobair, the learned counsel by filing affidavit-in-opposition also opposes the Rule appearing on behalf of respondent No.2-Bangladesh Bank. In supplementary affidavit filed by the respondent – Pubali Bank the other version of the case has been depicted in that admittedly the petitioner took loan over the company Albert David (Bangladesh) Ltd. from the Government along with its assets and liabilities vide agreement dated 07.04.1984. Since inception of taking over the company, it had loan liability with the respondent bank. After execution of agreement the petitioner took over the company vide Ref: No.ADL/GM/83-84 dated 07.04.1984. The petitioner after taking over the company applied to the respondent bank on 21.01.1985 for renewal and enhancement of L/C limit of the company pursuant to which loan was renewed and enhanced vide sanction letter dated 09.04.1985. Subsequently the loan was renewed and enhanced/reduced on several times. As security against the loan the petitioner executed various charge documents such as D.P. Note, Letter of continuity, Stock delivery letter, Stock ownership declaration etc. The petitioner also executed personal guarantee as security against the loan.

9. The Ref: No.ADL/GM/83-84 dated 07.04.1984, application dated 20.01.1985 for renewal and enhancement of loan, renewal of loan vide sanction letter dated 09.04.1985, charge documents and personal guarantee have been annexed to the petition and marked as Annexure- 3, 3(a), 3(b), 3(c), 3(d), 3(e), 3(f) and 3(g).

10. It has been submitted that on application of the petitioner the liabilities of the company was rescheduled vide HO/CD/5614/2001 dated 28.08.2001 which was communicated to the petitioner vide respondent bank's letter No.PBL/HO/CD/6034/2001 dated 12.09.2001. The petitioner having accepted the reschedulement submitted a cheque for Tk.1,03,53,524.62. Regarding the cheque respondent bank wrote a letter to the petitioner on 27.08.2001 informing him that his cheque would have been accepted by the bank had he given an undertaking in writing that the cheque amount was for down payment against its total liabilities of Tk. 4,69,54,072.62 as on 31.03.2001. Thereafter the petitioner confirmed that cheque for Tk.1,03,53,524.62 was made as down payment of liabilities of Albert David (Bangladesh) Ltd.

11. The learned counsel further submits that existence of the company could not be imagined of without the petitioner. The petitioner was all in all of the Albert Davit (Bangladesh) Ltd. He took over the company being a successful bidder along with its assets and liabilities. After taking over the company its loan was renewed, enhanced and rescheduled on his application. He deposited the down payment after reschedulement. All the loan amount used to be drawn by cheque under his own signature. So he is wholly & solely responsible for the defaulted loan liabilities of the company. In law a company is an artificial juristic person. If it is so, then Albert Davit (Bangladesh) Ltd. may be considered as a body of which the petitioner Mr. Shafi A. Choudhury is its heart/soul. The respondent bank filed Artha Rin Suit No.45/2003 in the Artha Rin Court, No.3, Dhaka against the company Albert Davit (Bangladesh) Ltd. impleading the petitioner as its sole responsible person. The suit has been decreed on 25.04.2012 against the petitioner. As such it has been established by the Court's verdict that the petitioner is the only person wholly and solely responsible for repayment of liabilities of the company.

12. Therefore, on the basis of above submissions the learned counsel for the respondent–Pubali Bank as well as Bangladesh Bank by summing up their arguments unequivocally submit that according to Article 43 and 44 of Chapter IV of the Bangladesh Bank Order 1972, Bangladesh Bank is empowered to collect credit information from banks and financial institutions. On the basis of the credit information provided by the concerned Bank or financial Institution, Bangladesh Bank prepares the CIB report of the concerned persons and organizations in good faith in order to discharge its

statutory obligations. However, exact information supplied by the Banks/Financial Institutions is contained in the CIB database without any amendment or alternation in terms of the statute. In the instant petition, the issue whether the writ petitioner was a defaulter or not, whether he was guarantor or not, whether he was a director or not can be determined only through evaluation of the facts and circumstances of the case which is best known to the lender Bank who is the relevant party in the petition. As per the statute Bangladesh Bank is empowered to discharge its duty which they did in the present case and there is no illegality in that respect on the part of Bangladesh Bank and as such the instant Rule is liable to be discharged so far as it relates to the Bangladesh Bank.

13. We have heard the learned counsel of both sides and considered their submissions carefully. We have gone through the entire Annexures of the petition and affidavit-in-oppositions filed by the respondents with precision. At the outset we want to refer to the agreement for sale entered into between the Government of Bangladesh the 1st party and M/S. Albert Davit (Bangladesh) Ltd. as the 2nd party. In the said agreement the petitioner Shafi A. Choudhury put his signature on behalf of the 2nd party i.e. the Company. Let us refer to a pertinent portion of the said agreement dated 07.04.1984, which is as under:

"NOW, THEREFORE, this indenture witnesseth as follows : - 1. THE FIRST PARTY agrees to sell and the shareholders and the highest bidder of the SECOND PARTY agree to purchase of the demised enterprise on "AS IS Where Is Basis" on the 7th April, 1984 on the terms and conditions set out in the following paragraph."

14. Admittedly the petitioner himself on behalf of the company has taken loan from respondent–Pubali Bank by executing all the charge documents of the bank. The petitioner does not also dispute the fact of taking loan and other issues which are long standing unsettled matters mainly related to the payment of loan taken by him of course on behalf of the company. There is no denying that the elementary principle of company law is that the company is a legal entity distinct from of its members. We distinctly observe that though the Company Law governs its field with all the trappings of its own but at the same time the Banking Companies Act is also an independent Special law that rules with authority altogether the different aspect related with the banking matter and stands absolutely on a different footing. By inducting the above elementary principle of company law the cause of action which has arisen under the Banking law cannot be given a go by. This sort of exercise should not be approved in any manner being beyond the scope of jurisprudence. Therefore, we hold that the inference since the petitioner is the Chairman and Managing Director of the Company which is an artificial person and for that reason he is absolved from the clutches of taking loan from the respondent-bank has no backup of law and no legs to stand.

15. Banking Companies Act has an epitome of its own. When the provisions of the banking Companies Act will be in derogation to other provisions of other laws, then the provisions specifically provided in the Act shall have to be followed only. In the case of Belal Hossain –Vs- Kazi Jane Alam and others, 13 MLR (AD) 74 our Appellate Division have held that section 2 of the Act, 1991 provides that provision of said Act shall not affect the provisions of any other law for the time being in force and also not in addition to the provision of any other existing law. (All underlings are mine)

16. Under the backdrop of the discussion as made above let us now go through the laws in the amended Bank Companies Act 1991 since it is the next approach to appreciate the cardinal issue before us. Firstly let us glean the law that governs the method of enlistment of the names of the defaulter persons and also ¯v_ *msMÖn cwZôvb* in the CIB list. Law is very much clear and unambiguous. An elaboration and expansion of the law has been perfected by the amendment in the year 2013 (By Act No.27). The life line of the law in the context of the case in hand is section 5 GaGa which has categorized a defaulter borrower or so to say has given the definition of defaulter borrower. Amended section 5 GaGa runs as follows:-

5(MM) †Ljvcx FY MnxZv A_ †Kvb †`bv`vi e¨w³ ev cwZôvb hvnvi wb‡Ri ev ¯v_ msMÖn cwZôv‡bi Abyôvq c`Ë AMxg FY, ev Dnvi Ask ev Dnvi Dci AwRZ mÿ evsjv‡`k e¨vsK KZ…K Rvix K…Z msÁv Abyôvqx †gqv‡`vËxY nIqvi 6 (Qq) gvm AwZewnZ nBqv‡Q :

Z‡e kZ _v‡e †h, †Ljvcx MnxZv †Kvb cvewjK wjwg‡UW †Kvgcvbxi cwiPvjK bv nB‡j A_ev D³ †Kv¤úvbx‡Z Zvnvi ev Dnvi ‡kqv‡ii Ask 25% Gi AwaK bv nB‡j, D³ cvewjK wjwg‡UW †Kv¤úvbx ¯v_ mswkó cwZôvb ewjqv MY¨ nB‡e bv|

17. The legislature in the said amended law inserted the word "*†`bv`vi*" and cleared the ambiguity whatsoever or at all in respect of definition and scope of defaulter borrower. Further in section 5 (Chha) of the Banking Companies Act definition of "*†`bv`vi*ÔÔ has been given in the following manner : -

"5(Q) †`bv`vi A_ jvf ¶wZi fvMvfwM, Lwi` ev BRviv wfwË‡Z ev Ab¨ †Kvb fv‡e Aww_K mshvM myeav MnYKvix e¨w³ †Kv¤úvbx ev cwZôvb Ges †Kvb Rwgb`vi Bnvi Ašf³ nB‡e|

Section 27 KaKa stands as it is:

"27KK| †Ljvcx FY MnxZvi Zwwjkv- BZ¨vw`| (1) c‡Z¨K e¨vsK †Kv¤úvbx ev Aww_K cwZôvb , mgq mgq, Dnvi †Ljvcx FY MnxZvi Zwwjkv evsjv‡`k e¨vs‡K †ciY Kwi‡e|

(2) Dc-avivi (1) Gi Aaxb cvß Zwwjkv evsjv‡`k e¨vsK †`‡ki mKj e¨vsK †Kv¤úvbx I Aww_K cwZôv‡b †ciY Kwi‡e|

(3) †Kvb †Ljvcx FY MnxZvi Abykxj †Kvb e¨vsK †Kv¤úvbx ev Aww_K cwZôvb †Kvbiƒc FY myeav cv`vb Kwi‡e bv|

(4) AvcwZZ: ejer Ab¨ †Kvb AvB‡b hvnv wKQyB _vKK bv †Kb †Ljvcx FY MnxZvi wei‡× FY c`vbKvix e¨vsK †Kv¤úvbx ev †¶ÎgZ Aww_K cwZôvb cPwjZ AvBb Abyhvw‡i gvgjv `v‡qi Kwi‡e|"

18. If we evaluate all these the laws having bearing on the issue together with the factual aspect of the case it becomes clear that the agreement that was executed in the year 1984 clearly speaks that the petitioner bought the incumbent company ("AS IS Where Is Basis ") assuming all the liabilities of the same. Further we have already stated that there is no dispute that the petitioner in his individual capacity obtained the loan from the respondent-Pubali Bank after furnishing charge documents and complying with the other boundened formalities. And Banking Companies Act has pinpointed the situation that leads to enlistment of the name of any defaulter borrower *(†`bv`vi)* in the CIB list. In many a decision the Appellate Division and this Division finally set at rest that the process of enlistment of any defaulter name in the CIB list is a continuing process within the meaning of section 5 GaGa read with section 27 KaKa of Banking Companies Act 1991 and also read with Article 42 of Bangladesh Bank Order 1972. If all these provisions are read together one and only inference that could be made is that if any person or a company is indebted to in any manner with any financial institution and the debt remains unpaid, it is the duty of the respondent Bangladesh Bank in its turn to enlist the name of the incumbent in the CIB list nothing more nothing less. With the amendment of section 5 GaGa the definition as it could be found now contains a wider version of the category of persons to be included as defaulter borrower.

19. That being the situation we hold that the main argument of Mr. Rafique-Ul Hoque is a fallacious one under the facts and circumstances of the present case. By bringing the elementary principle of company law as it has been stated the settled provision of Banking Companies Act cannot be given a go by. The petitioner herein is indeed a defaulter borrower within section 5 GaGa read with section 27 KaKa of the Bank Company Act and Article 42 of Bangladesh Bank Order 1972.

20. On the conspectus, the irresistible result that follows that this Rule should be discharged with cost.

21. In the result, the Rule is discharged with cost. The order of stay granted earlier by this Court is hereby recalled and vacated.

22. Communicate this order at once.

2 SCOB [2015] HCD 32

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 735 of 2007

Mr. Md. Ashiqur Rahman, Advocate
Md. Habibur Rahman …. For the petitioner.
…… Petitioner

Mr. Md. Abdul Halim, Advocate
-Versus- …. For the Respondents

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

Date of Hearing: 18.08.2015 & 23.08.2015

Date of Judgment: 24.08.2015

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

No authority can act arbitrarily:
Administrative actions by Government and statutory bodies should be judged on the scale of fairness. In other words, no authority can act arbitrarily and whimsically in discharging its duties, thereby affecting the rights and privilege of the property of an individual. ...(Para 16)

Duty of a lawyer:
Mr. Md. Abdul Halim, the learned Advocate appearing on behalf of the respondents, submits that having gone through the writ petition and its Annexures, he finds it difficult to oppose the Rule. We appreciate the submission of Mr. Md. Abdul Halim, which goes to show he has discharged his duties as an officer of the Court. It should be borne in mind by all the learned members of the Bar that the duty of a lawyer lies first to the Court and then to his client.
...(Para 17)

JUDGMENT

Zubayer Rahman Chowdhury, J :

1. By an application under Article 102(2)(a)(ii) of the Constitution of the People's Republic of Bangladesh, the petitioner challenges the legality and propriety of Order No. T.C.B (Clearance-155)/R.O./83/84/2300 dated 31.05.1984 issued by respondent no. 3, as evidenced by annexure 'D', removing the petitioner from service and further, seeking a direction upon the respondents to reinstate the petitioner in service.

2. The Rule is being opposed by respondent nos. 2-5 by filing an affidavit-in-opposition.

3. The petitioner was serving as Jetty Supervisor of Trading Corporation of Bangladesh (briefly T.C.B) and was posted at the Zonal Office, Faridpur. During the course of his service, T.C.B brought an allegation of misappropriation of corrugated tin sheets against Mr. A.K.M. Salehuddin, who was the Officer-in- Charge of the Zonal Officer at Faridpur. The petitioner was servicing as Assistant to Mr. Salehuddin at the relevant time.

4. Subsequently, vide Memo No. T.C.B. (Clearance-155)/R.O./479 dated 30.03.1983, issued under the signature of respondent no. 3, the petitioner was suspended from service. However, no prior show cause notice was issued upon the petitioner before issuance of his suspension order. Subsequently, a charge sheet dated 17.05.1983, under the signature of respondent no. 4, was sent to the petitioner. A departmental proceeding was started and an enquiry officer was appointed, who directed the petitioner to submit a reply to the charge sheet. Upon conclusion of enquiry, the concerned Officer, a Senior Executive, submitted the report on 19.01.1984 with the findings that the charge against the petitioner could not be proved. However, despite the categorical findings by the Enquiry Officer, the petitioner was removed from service by the impugned Memo No. T.C.B. (Clearance-155) R.O/83/84/2300 dated 31.05.1984.

5. The petitioner made representation to the concerned authorities for reinstating him in service. However, T.C.B. issued a letter dated 15.09.1992 informing the petitioner that due to pendency of Money Suit No. 104 of 1990 before the Artha Rin Adalat, Barisal, his application for reinstatement could be considered at that stage. Thereafter, the petitioner filed several applications on various dates for reinstating him in service, but to no effect.

6. It is to be noted that T.C.B. filed a Artha Rin Suit before the Artha Rin Adalat, Barisal against Mr. A.K.M. Salehuddin and another, (being the petitioner) for recovery of Tk. 1,56,299.62 which was dismissed on contest.

7. T.C.B. preferred 1st Appeal No. 148 of 1993, which was dismissed on contest by a Division Bench of the High Court Division by judgment and order dated 23.07.2002, thereby affirming the judgment and decree passed by the Subordinate Judge and Artha Rin Adalat, Barisal dismissing Money Suit No. 104 of 1990. On appeal by T.C.B, the Appellate Division upheld the judgment of the High Court Division passed in 1st Appeal No. 148 of 1993. Subsequently, Civil Petitioner for Leave to Appeal No. 1648 of 2002, was dismissed on contest by judgment dated 07.03.2004.

8. In the meantime, Mr. A.K.M. Salehuddin filed Writ Petition No. 3324 of 2001 challenging the legality of order of his removal dated 31.05.1984. By judgment and order dated 14.12.2004, a Division Bench of this Court made the Rule absolute on contest declaring the order of removal dated 31.05.1984 to have been issued without lawful authority and of no legal effect and also directed the respondent "to pay all attending service benefits and allowances treating him as in service on the date of retirement."

9. However, T.C.B. decided not to challenge the aforesaid judgment passed in Writ Petition No. 3224 of 2001 directing the reinstatement of Mr. A.K.M. Salehuddin in service, which is evident from the office order dated 23.06.2005, as evident by Annexure 'H1' to the writ petition.

10. However, following the death of Mr. A.K.M. Salehuddin on 11.04.2005, T.C.B, at its 893rd meeting of the Board, decided to grant all service benefits and retirement facilities that was due to Mr. A.K.M. Salehuddin treating him to be in service until his retirement on 30.09.2003, as evident from the office order dated 23.06.2005 Annexure 'H1'.

11. In view of the decision taken by the Board of T.C.B. to grant all service benefits to late Mr. A.K.M. Salehuddin treating him to be in service, the petitioner filed an application dated 10.05.2006 addressed to the Secretary, Ministry of Commerce, Bangladesh Secretariat, Dhaka praying for his reinstatement in service. The aforesaid application was forwarded by the Joint Secretary, Ministry of Commerce, who, in turn, forwarded the same to the Joint Secretary (Administration). In this manner, the petitioner's application dated 10.05.2006 was forwarded from one office to another, but without any result. Finding no other alternation, the petitioner caused a Notice of Demand of Justice dated 25.01.2007 to be issued upon the respondents. Once again, there was no response from the other end. Being constrained, the petitioner finally moved this Court and obtained the instant Rule, as noted at the outset.

12. The chronology of evidence, as noted above, makes a sorry reading indeed. The petitioner, a Jetty Supervisor, who was serving along with on Mr. A.K.M. Salehuddin (since deceased), was put on suspension. It is to be noted that no prior of show cause notice was issued upon the two accused persons before their suspension from service. A Enquiry Committee, constituted by T.C.B., conducted an investigation into the charges brought against both Mr. A.K.M. Salehuddin and the petitioner. None of them were found guilty during the investigation, which culminated with the filing of the Enquire Report by the Enquiry Officer, one Mr. A. Munim Chowdhury, a Senior Execution on 06.11.1983.

13. The petitioner made an application before T.C.B. for his reinstatement in service. However, the said application was not considered on the ground of pendency of Money Suit No. 104 of 1990. Subsequently, as noted earlier, the said Money Suit was dismissed on contest and the 1st Appeal preferred by T.C.B. before the High Court Division also met the same fate, as did C.P.L.A. No. 1648 of 2002 preferred by T.C.B.

14. On the other hand, Writ Petition No. 3324 of 2001, which was filed by late Mr. A.K.M. Salehuddin seeking reinstatement in service was also made absolute by a Division Bench of this Court by Judgment dated 14.12.2004 and the appeal therefrom to the Appellate Division at the instance of TCB was also dismissed on contest. However, since late Mr. A.K.M. Salehuddin died on 19.12.2004, the Board granted all his retirement benefits to his family upon his death.

15. Since the petitioner and late Mr. A.K.M. Salehuddin were both charged together and the investigation conducted by the Enquiry Committee also absolved both of them from the said charges, it was incumbent upon the respondents to consider the petitioner's application for reinstatement in service. However, without doing so, the respondents demonstrated extreme high-handedness and acted in an arbitrary manner in dealing with the petitioner's case. Such conduct on the part of the respondents, holding responsible positions in a Statutory Corporation, is not only unacceptable, but strongly deprecated in no uncertain terms.

16. It is now well settled through judicial pronouncement that administrative actions by Government and statutory bodies should be judged on the scale of fairness. In other words, no authority can act arbitrarily and whimsically is discharging its duties, thereby affecting the rights and privilege of the property of an individual. In the instant case, the petitioner service and other benefits are his valuable property. Therefore, the respondents were under a legal duty and obligation to treat the petitioner's case in accordance with law. Regrettably, the respondents failed to discharge their duties and made him go through a protracted litigation since 2007.

17. Mr. Md. Abdul Halim, the learned Advocate appearing on behalf of the respondents, submits that having gone through the writ petition and its Annexures, he finds it difficult to oppose the Rule. We appreciate the submission of Mr. Md. Abdul Halim, which goes to show he has discharged his duties as an officer of the Court. It should be borne in mind by all the learned members of the Bar that the duty of a lawyer lies first to the Court and then to his client.

18. In view of the discussion made above and having regard to the facts and circumstances of the case, we are inclined to hold that the instant Rule merits positive consideration.

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

20. The impugned Order No. T.C.B(Clearance-155)/ R.O./ 83/ 84/ 2300 dated 31.05.1984, is declared to have been without lawful authority and to be of no legal effect.

21. The respondents are directed to reinstate the petitioner in service with effect from the date of his suspension that is, on and from 30.08.1983, if he has not attended the age of retirement in the meantime. However, if the petitioner have already attained the age of retirement, the respondents are hereby directed to treat the petitioner to be in service on and from 31.05.1984 till the date of his

retirement and accordingly, pay all his service and other retirement benefits due to him in accordance with law.

22. The respondents are further directed to ensure that the aforesaid financial dues are paid to the petitioner in full within 60 (sixty) days from the date of receipt of the certified copy of the judgment passed today, failing which, the petitioner will be at liberty to initiate appropriate legal proceedings against the concerned official for non-compliance of the Court's order.

23. Although we were inclined to award substantial costs to the petitioner for the agony and harassment caused to him by the conduct of the respondents, we refrain from doing so as it would probably prolong the matter even further.

24. The office is directed to communicate the order at once.

2 SCOB [2015] HCD 36

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 9150 of 2007

Dr. Muhiuddin Khan Alamgir
..... Petitioner

-Versus-

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

Mr. Shah Monjurul Hoque with
Mr. Khairul Alam Choudhury, Advocates
.....For the petitioner.
Mr. Md. Motaher Hossain (Sazu), DAG with
Ms. Purabi Rani Sharma, AAG and
Ms. Mosammat Khairun Nessa, AAG
….For the respondent no. 1.
Mr. Md. Khurshid Alam Khan, Advocate
....For the respondent no. 2.

Heard on 04.09.2014
Judgment on 10.09.2014

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

Anti-Corruption Commission Act, 2004:

Section 2(Umo) of the Act contemplates that "ce‡a" means the offences mentioned in the schedule of the Act. It is an indisputable fact that the alleged offences were not scheduled offences of the Act at the relevant point of time. So the question of enquiry into the alleged offences by the respondent no. 3 is out of the question. What we are driving at boils down to this: the respondent no. 3 was not empowered to enquire into the alleged offences, but none the less, he enquired thereinto. Furthermore, it is an admitted fact that the enquiry report submitted by the respondent no. 3 was treated as an ejahar by the concerned Police Station which gave rise to the instant case. In this regard, Mr. Md. Khurshid Alam Khan has candidly conceded that the treatment of the enquiry report as an ejahar is not sustainable in law. This being the panorama, we feel constrained to hold that the very initiation of the case is 'de hors' the law. ...(Para 13)

JUDGMENT

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution, a Rule Nisi was issued calling upon the respondents to show cause as to why the transfer of the Druto Bichar Tribunal Case No. 25 of 2007 arising out of D. A. B. G. R. Case No. 01 of 2007 corresponding to Kotwali (Comilla) Police Station Case No. 92 dated 30.03.2007, now pending before the Druto Bichar Tribunal, Chittagong pursuant to SRO No. 209-Ain/2007 dated 28.08.2007 (as evidenced by Annexure-A(4) to the writ petition) and why the continuation of the Druto Bichar Tribunal Case No. 25 of 2007, pending in the said Druto Bichar Tribunal, Chittagong, should not be declared to be without lawful authority being inconsistent with Section 6 of the Druto Bichar Tribunal Ain, 2002 and why the application of the Emergency Power Rules, 2007 to the said case should not be declared to be without lawful authority in the absence of any sanction required thereunder and as being hit by Section 3(3)(Ka) of the Emergency Power Ordinance, 2007 and/or such other or further order or orders passed as to this Court may seem fit and proper.

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

The petitioner is an ex-member of the Civil Service of Pakistan. After his retirement from the Civil Service, he was involved in politics. At one stage, he was appointed State Minister-in-Charge of the Ministry of Planning. Subsequently, he was appointed Minister-in-Charge of the Ministry of Civil Aviation and Tourism and the Ministry of Science and Technology. However, during the currency of the emergency period in 2007, the respondent no. 3, an officer of the Anti-Corruption Commission (respondent no. 2), lodged an enquiry report with Comilla Kotwali Police Station against the petitioner which was subsequently treated as an ejahar on 30.03.2007. On the basis of that ejahar, Comilla Kotwali Police Station Case No. 92 dated 30.03.2007 under Sections 198/420/109/120B of the Penal Code was initiated. It was alleged in the ejahar that by resorting to misrepresentation of facts, the petitioner obtained loan to the tune of Tk. 3,84,000/- from Agrani Bank, Rajgonj Branch, Comilla for construction of a building on his plot of land in Comilla; but he did not utilize the loan for the said purpose and that there was already a building on the plot of land in question which was rented out to another branch of Agrani Bank before sanctioning of the said loan and in this way, the petitioner deceived the bank. Anyway, it is the claim of the petitioner that he adjusted the entire loan amount on time. Although the offence was allegedly committed in between 01.01.1990 and 05.05.1999, that is to say, long before the proclamation of emergency on 11.01.2007, the Emergency Power Rules, 2007 framed under the Emergency Power Ordinance, 2007 can not be invoked. As the alleged offence is not a scheduled offence of the Anti-Corruption Commission Act, 2004, the respondent no. 3 had no legal authority to enquire thereinto and submit an enquiry report which was eventually treated as an ejahar. However, after registration of the case by Comilla Kotwali Police Station, the police investigated the same and submitted charge-sheet against the petitioner under Sections 198/420 of the Penal Code read with Rule 14 of the Emergency Power Rules, 2007. In the said charge-sheet, it was stated that the petitioner was allotted Plot No. 8, Block-N, Section-1 of Comilla Housing Estate on 07.12.1977 and thereafter he transferred the said plot in favour of his son, namely, Mr. Joy Alamgir by a deed of gift dated 01.01.1990. Having submitted the said deed of gift dated 01.01.1990, the petitioner obtained the loan of Tk. 3,84,000/- from Agrani Bank, Rajgonj Branch, Comilla for construction of a building on the plot by having recourse to fraud and deception. On 27.03.1990, he rented out the building on the plot to Agrani Bank, Housing Estate Branch which indicated that the building had been constructed before sanctioning of the loan. This conduct of the petitioner amounted to cheating. But it is his assertion that from the averments made in the charge-sheet, no case was disclosed against him either under Section 198 or under Section 420 of the Penal Code. Be that as it may, by SRO No. 209-Ain/2007 dated 28.08.2007, the case was transferred to the Druto Bichar Tribunal, Chittagong for trial in view of Section 6 of the Druto Bichar Tribunal Ain, 2002 read with Rule 18 of the Emergency Power Rules, 2007. But the Druto Bichar Tribunal has no jurisdiction whatsoever to try the said case thereunder. As the Emergency Power Rules, 2007 framed under the Emergency Power Ordinance, 2007 were not given any retrospective effect beyond 12.01.2007, their applicability to the case does not arise at all. This being so, the initiation and continuation of the case is without lawful authority and of no legal effect. Hence the Rule.

3. Neither the Government-respondent no. 1 nor the Anti-Corruption Commission-respondent no. 2 has filed any Affidavit-in-Opposition opposing the Rule. However, Mr. Md. Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent no. 1 and Mr. Md. Khurshid Alam Khan, learned Advocate appearing on behalf of the respondent no. 2, have advanced submissions before this Court.

4. At the outset, Mr. Shah Monjurul Hoque, learned Advocate appearing on behalf of the petitioner, submits that in view of Section 17 (ka) of the Anti-Corruption Commission Act, 2004, the Anti-Corruption Commission may enquire and investigate the offences mentioned in the schedule of the Act; but indisputably the alleged offences punishable under Sections 198/420 of the Penal Code were not mentioned in the schedule of the Anti-Corruption Commission Act at the material time and this being the position, the respondent no. 3 had no legal authority to enquire into the alleged offences and submit an enquiry report which is malafide on the face of it.

5. Mr. Shah Monjurul Hoque further submits that admittedly the enquiry report submitted by the respondent no. 3 was treated as an ejahar by Comilla Kotwali Police Station and this treatment of the enquiry report as an ejahar is a classic case of illegality and consequentially, the initiation and continuation of the proceedings of the case are a nullity in the eye of law.

6. Mr. Shah Monjurul Hoque next submits by referring to the definition of "ce£¢a" as provided in Section 2(Umo) of the Anti-Corruption Commission Act that the word "ce£¢a" adverts to the offences mentioned in the schedule of the Act and as the alleged offences were not scheduled offences of the Anti-Corruption Commission Act at the relevant time, the entire exercise undertaken by the respondent no. 3 is 'de hors' the law.

7. Mr. Shah Monjurul Hoque also submits that if the complaint of cheating is not made by the person cheated, the case will fail and since admittedly the bank did not initiate the case, its continuation is of no legal effect, regard being had to the 'ratio' enunciated in the decision in the case of Surendranath Saha…Vs…The State reported in 12 DLR 178.

8. Per contra, Mr. Md. Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent no. 1, submits that the materials on record prima facie disclose the commission of the offence of cheating and that being so, it cannot be said that the initiation and continuation of the case are a nullity in the eye of law.

9. Mr. Md. Khurshid Alam Khan, learned Advocate appearing on behalf of the respondent no. 2, submits that the scope of a writ petition in such a matter is very limited in view of the principle enunciated in the decision in the case of the Chairman, Anti-Corruption Commission and another….Vs…Enayetur Rahman and others reported in 64 DLR (AD) 14.

10. Mr. Md. Khurshid Alam Khan further submits that the enquiry was held properly by the respondent no. 3 and in course of enquiry, it transpired that the offences complained of were not scheduled offences of the Anti-Corruption Commission Act at the relevant time and in this view of the matter, it cannot be said that the respondent no. 3 committed any illegality in enquiring into the offences.

11. Mr. Md. Khurshid Alam Khan, however, concedes that the enquiry report submitted by the respondent no. 3 ought not to have been treated as an ejahar by the concerned Police Station and the treatment of the enquiry report as an ejahar is not tenable in law.

12. We have heard the submissions of the learned Advocate Mr. Shah Monjurul Hoque and the counter-submissions of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) and the learned Advocate Mr. Md. Khurshid Alam Khan.

13. At this juncture, we feel tempted to refer to the definition of "ce£¢a" as postulated by Section 2(Umo) of the Anti-Corruption Commission Act. Section 2(Umo) of the Act contemplates that "ce£¢a" means the offences mentioned in the schedule of the Act. It is an indisputable fact that the alleged offences were not scheduled offences of the Act at the relevant point of time. So the question of enquiry into the alleged offences by the respondent no. 3 is out of the question. What we are driving at boils down to this: the respondent no. 3 was not empowered to enquire into the alleged offences, but none the less, he enquired thereinto. Furthermore, it is an admitted fact that the enquiry report submitted by the respondent no. 3 was treated as an ejahar by the concerned Police Station which gave rise to the instant case. In this regard, Mr. Md. Khurshid Alam Khan has candidly conceded that the treatment of the enquiry report as an ejahar is not sustainable in law. This being the panorama, we feel constrained to hold that the very initiation of the case is 'de hors' the law.

14. Of course, the police investigated the case and submitted charge-sheet against the petitioner under Sections 198/420 of the Penal Code. According to the claim of the prosecution, Agrani Bank was defrauded by the petitioner in the matter of obtaining the loan to the tune of Tk. 3,84,000/-.

Admittedly the bank authority did not come forward to lodge any case against the petitioner. In this connection, it transpires that Mr. Shah Monjurul Hoque has rightly relied upon the decision in the case of Surendranath Saha…Vs…The State reported in 12 DLR 178. The principle that has been enunciated in the decision is that where a complaint of cheating before the Court has been made not by the person defrauded but by another on his behalf, the case must fail. Keeping the above principle of law in view, we are led to hold that as the bank authority failed to lodge any case against the petitioner under Section 420 of the Penal Code, the present case initiated at the instance of the Anti-Corruption Commission is bad in law.

15. It is true that in a case of this nature, an aggrieved party can invoke the extra-ordinary jurisdiction of the High Court Division under Article 102 of the Constitution in some exceptional circumstances. It transpires that those circumstances have been specified in paragraph 7 of the decision reported in 64 DLR (AD) 14(supra). Paragraph 7 of the decision has been couched in the following terms:

> "7. 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 extra-ordinary 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 extra-ordinary situations, that is to say, where vires of a statute is 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."

16. Reverting to the case in hand, we find that the very initiation of the case is without any lawful authority inasmuch as admittedly the ejahar is predicated upon the enquiry report submitted by the respondent no. 3. From the materials on record, we find malice in law in the matter of initiation and continuation of the proceedings of the case. In fact, that malice is writ large on the face of the record. A proceeding initiated with bad faith vitiates everything. That is a settled proposition of law. So the initiation and continuation of the case stand vitiated by malice in law.

17. The offences specified in Section 6 of the Druto Bichar Tribunal Ain, 2002 do not attract the offences punishable under Sections 198/420 of the Penal Code. But by applying the provisions of Rule 18 of the Emergency Power Rules, 2007, the case was transferred to the Druto Bichar Tribunal, Chittagong for trial by a notification published in the official gazette on 28.08.2007. The offences punishable under Sections 198/420 of the Penal Code are not serious offences in any view of the matter. The consideration of the Government for transfer of any serious offence to any Druto Bichar Tribunal should be objective. There is no scope for any subjective consideration of the Government in this respect. In view of the materials on record, it seems that the Government was actuated by malice in transferring the instant case to the Druto Bichar Tribunal, Chittagong for trial. So the very transfer of the case to the Druto Bichar Tribunal, Chittagong is not tenable in law.

18. It is undisputed that the Emergency Power Ordinance was promulgated on 12.01.2007 and the Emergency Power Rules were framed thereunder. As the Emergency Power Ordinance of 2007 was not given any retrospective effect, the question of application of the Emergency Power Rules to the instant case does not arise at all. The record indicates that the alleged offence was committed by the petitioner long before the promulgation of the proclamation of the emergency, that is to say, in between 01.01.1990 and 05.05.1999. In this perspective, the question of applicability of the Emergency Power Rules of 2007 to the case in hand can not be raised at all. Precisely speaking, malice in law pervades the case from its very initiation up to the present stage. So the proceedings of the case being without lawful authority can not be proceeded with in the Druto Bichar Tribunal, Chittagong.

19. From the foregoing discussions and in the facts and circumstances of the case, we find merit in the Rule. The Rule, therefore, succeeds.

20. Accordingly, the Rule is made absolute without any order as to costs. The initiation of the Druto Bichar Tribunal Case No. 25 of 2007 arising out of D. A. B. G. R. Case No. 01 of 2007 corresponding to Kotwali (Comilla) Police Station Case No. 92 dated 30.03.2007 and its continuation in the Druto Bichar Tribunal, Chittagong are without any lawful authority and of no legal effect.

21. Communicate a copy of this judgment to the Druto Bichar Tribunal below at once.

2 SCOB [2015] HCD 41

HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

CIVIL REVISION NO. 4636 OF 2004

Abdur Rashid and others.

…….. Pre-emptee-Respondent-Petitioners.

-Versus –

Md. Babul Mia and others.

…….Pre-emptor-Appellant-Opposite-parties.

No one appears.

….. For the petitioners

Mr. Shasti Sarker, Advocate

….. For the opposite parties.

Heard on: 04.03.2015 and Judgment on: 10.05.2015.

Sate Acquisition and Tenancy Act, 1950
Section 96:
The pre-emption application filed within time and no defect of parties in the case and admittedly the pre-emptor is a co-sharer by purchase and it is also found that the pre-emptee-petitioners are also co-sharers by purchase. But on perusal of the record it is found that none of the pre-emptee-petitioners claimed pre-emption after receiving the summons within 2 months of the statutory period as mentioned in sub-section 4 of section 96 of Estate Acquisition and Tenancy Act. When an application has been made under sub-section (1) any of the remaining co-sharer tenants including the transferee, if one of them, and the tenants holding lands contiguous to the land transferred may within the period referred to in sub-section (1) or within two months of the date of service of notice of the application under clause (b) of sub-section (3) which ever be earlier apply to joint in the said application; any co-sharer tenant or tenant holding land contiguous to the land transferred, who has not applied either sub-section (1) or under this sub-section, shall not have any further right to get pre-emption under this section. ...(Para 9)

JUDGMENT

S.M. EMDADUL HOQUE, J:

1. On an application of the petitioners Mr. Abdur Rashid and others under section 115(1) of the Code of Civil Procedure the Rule was issued calling upon the opposite party No.1 to show cause as to why the impugned judgment and order dated 07.08.2004 passed by the Additional District Judge, Gopalgonj in Miscellaneous Appeal No. 21 of 2003 reversing those dated 28.04.2003 passed by the Senior Assistant Judge, Kotalipara, Gopalgonj in Miscellaneous case No. 46 of 2001 dismissing the application for pre-emption should not be set-aside.

2. Facts necessary for disposal of the Rule, in short, are that the opposite party No. 1 as petitioner filed Miscellaneous case No. 46 of 2001 in the Court of Assistant Judge, Kotalipara, Gopalgonj for pre-emption under section 96 of the Estate Acquisition and Tenancy Act contending inter alia that, the pre-emptor is the co-sharer of the disputed land on the basis of the kabala deed dated 27.04.1997 and 26.12.2000. Another co-sharer of the disputed joma namely Basanta Kumar transferred the disputed land to the pre-emptees by kabala deed No. 1874 dated 12.6.2001 without any notice to the pre-

emptor. Came to know about the said transfer the pre-emptor got the certified copy of the same and confirmed about the transfer. The pre-emptor has got no land more than 60 bigha. Hence the case.

3. The case was contested by the pre-emptee petitioner by filing written objection denying all the material allegations made in the plaint contending inter-alia that, the application for pre-emption is not maintainable, and barred by limitation and the pre-emptor has no locus-standi to file the case, the same is bad for defect of parties and the pre-emptor is not a co-sharer of the joma. Further Case is that the land of R.S. Khatian No. 2, S.A. Khatian No.4 and R.S. Khatina No. 136 and S.A Khatian No. 191 originally belonged to Kadernath Mohesh who used to possess the same by way of family amicable arrangement. Thereafter Kadernath died leaving behind son Ananta Kumar Mohesh who transferred the said land to the pre-emptee No. 1 by registered kabala deed dated 6.11.1993 at a consideration of Taka 15,000/-. The pre-emptee No. 1 is a co-sharer of the joma by way of purchase. Ananta Kumar Mohesh also sold some land to the pre-emptee No. 1 by another kabala deed dated 13.01.1997 and as such he again became a co-sharer of the joma. Engineer Shaikh son of Ishaque Shaikh purchased .21 acres of land from Rabindranath son of Feduram Mohesh by kabala deed dated 18.01.2000, against which the pre-emptee No. 1 institute Miscellaneous Case No. 21 of 2000 in the Second Court of learned Joint district Judge, Gopalgonj for pre-emption and got an order of pre-emption on compromise on 2.9.2001 and has been possessing the said land. So by that way he became a co-sharer of the joma. Another co-sharer of S.A. Khatian Nos. 191 and 4 namely Jogobandu Mohesh dies leaving behind one son Biddadhor who inheriting the share of his father transferred the same by kabala deed dated 30.11.1999 to the pre-emptee No. 2. By this way the pre-emptees became co-sharers of the joma. As the pre-emptees are co-sharers of the joma by purchase, so the instant application for pre-emption against them is not maintainable. The case of pre-emption is liable to be rejected.

4. At the trial both the parties adduced oral as well as documentary evidence to prove their respective cases.

5. The trial Court after hearing the parties and considering the evidence on record dismissed the miscellaneous application by its judgment and order dated 28.04.2003.

6. Against the said judgment and order of the trial court the pre-emptor opposite party No. 1 preferred Miscellaneous Appeal No. 21 of 2003 before the learned District Judge, Gopalgonj. The said appeal was heard by the Additional District Judge, Gopalgonj who after hearing the parties and considering the evidence on record allowed the appeal and thereby setting aside the judgment and order of the trial court and allowed the pre-emption of the pre-emptor opposite party No.1 by its judgment and order dated 07.08.2004.

7. Being aggrieved by and dissatisfied with the impugned judgment and order of the appellate court the pre-emptee petitioners filed this revisional application under Section 115 (1) of the Code of Civil Procedure and obtained the Rule.

8. Md. Rezaul Kabir Khan for Mr. Md. Masud Hasan Chowdhury the learned Advocate at the delivery of the judgment prays for time to defer the date of judgment but the learned Advocate ultimately did not turn up to press the Rule. Since this is a pre-emption case and in the instant case only law point is involved and the same was settled by our Apex Court, so considering the above facts and the position of the case I am inclined to dispose of the Rule.

9. It appears that the pre-emptee petitioners purchased the land through registered deed dated 12.6.2001 without serving notice under section 89 of the Estate Acquisition and Tenancy Act. The pre-emptor filed the application for pre-emption on 23.8.2001 and it is found that the deed was registered on 31.07.2001 under section 60 of the Registration Act. The trial court after consideration of the evidence on record opined that the case is not barred by limitation, and no defect of parties in the instant case. The appellate court after consideration of the same also affirmed the said findings of the trial court. The trial court after consideration of the evidence on records opined that the pre-

emptees are also co-sharers by purchase of the case land and the deeds of the pre-emptees are earlier than that of the pre-emptor and the pre-emptor not a co-sharer of the case land. The appellate court after consideration of the evidence on record opined that the trial court committed error of law in holing that the pre-emption is not maintainable against the co-sharer of the case jote. The appellate court relying upon the decision reported in 45-DLR(AD)-133 and the provision of sub-section 4 of section 96 of the Estate Acquisition and Tenancy Act opined that after receipt of the summons the per-emptee ought to have filed application for pre-emption within 2 months but the pre-emptees never sought for pre-emption. The pre-emptee-petitioners without invoking the provision of law, subsequently, raised question that the pre-emption is not maintainable against the co-sharers. The matter has been settled in the case of Golchera Khatun Vs. Sayera Khatoon reported in 45-DLR(AD)-133. I have perused the impugned judgment of the courts bellow, the papers and documents as available on the records, and the referred decisions. Since the pre-emption application filed within time and no defect of parties in the case and admittedly the pre-emptor is a co-sharer by purchase and it is also found that the pre-emptee-petitioners are also co-sharers by purchase. But on perusal of the record it is found that none of the pre-emptee-petitioners claimed pre-emption after receiving the summons within 2 months of the statutory period as mentioned in sub-section 4 of section 96 of Estate Acquisition and Tenancy Act. When an application has been made under sub-section (1) any of the remaining co-sharer tenants including the transferee, if one of them, and the tenants holding lands contiguous to the land transferred may within the period referred to in sub-section (1) or within two months of the date of service of notice of the application under clause (b) of sub-section (3) which ever be earlier apply to joint in the said application; any co-sharer tenant or tenant holding land contiguous to the land transferred, who has not applied either sub-section (1) or under this sub-section, shall not have any further right to get pre-emption under this section. Considering the above facts and circumstances of the case, it is my view that the appellate court rightly decided the same.

10. It also appears that the trial court opined that the pre-emptor did not produce the deed No. 4452 dated 26.12.2000 and it could not be ascertained whether the pre-emptor is a co-sharer in Khatian No. 8197. But at the appellate stage the pre-emptor produced the certified copy of the said deed which was marked exhibited and the plaintiff proved the same by adducing evidence and accordingly, the appellate court on perusal of the exhibit Nos. 1and 2 opined that the pre-emptor is a co-sharer in Khatian No. 1897 and through another deed dated 27.4.1997 the pre-emptor is also a co-sharer by purchase in Khatian No. 191 which is a right finding. I find nothing to interfere with the said finding of the appellate court.

11. Considering the facts and circumstances of the case, I find no merit in the Rule.

12. In the result, the Rule is discharged without any order as to cost. The impugned judgment and order dated 07.08.2004 passed by the Additional District Judge, Gopalgonj in Miscellaneous Appeal No. 21 of 2003 reversing those dated 28.04.2003 passed by the Senior Assistant Judge, Kotalipara, Gopalgonj in Miscellaneous case No. 46 of 2001 is hereby upheld.

13. The order of stay granted earlier by this court is hereby recalled and vacated.

14. Send down the Lower Court’s Record at once.

2 SCOB [2015] HCD 44

HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

CIVIL REVISION NO. 3384 OF 2001

Dulal Krishna Basu
.... Petitioner
-Versus-

Fakir Ziauddin and others
... Opposite Parties

Mr. M. A. Azim Khair, with
Mr. Md. Iqbal Hossain, and
Ms. Farhana Ershad Chowdhury, Advocates.
... For the Petitioner

Mr. Abdul Hye, Advocate
.... For Opposite Parties nos. 1 and 2

Heard On: 30.07.2015 and 06.08.2015
Judgment dated: 11.08.2015

Code of Civil Procedure, 1908
Order 7, Rule 3:
Requirement of law is that the property should be identified by boundaries or numbers. When the plots are identified by numbers, boundaries are not necessary. The identifiable plot numbers having been given with total quantum of land against each plot in the schedule of plaint, there is no difficulty in identifying land of the plots. ...(Para 12)

JUDGMENT

Borhanuddin, J:

1. This rule has been issued calling upon opposite party nos. 1 and 2 to show cause as to why Judgment and decree dated 14.05.2001 passed by the learned Subordinate Judge, 1st Court, Bagerhat, in Title Appeal No. 75 of 1988 reversing judgment and decree dated 27.12.1987 passed by the learned Assistant Judge, Fakirhat, Bagerhat, in Title Suit No. 424 of 1983 dismissing the suit, should not be set aside and/or such other or further order or orders passed as to this court may seem fit and proper.

2. Facts relevant for disposal of the rule are that petitioner herein as plaintiff instituted Title Suit No.71 of 1983, renumbered as Title Suit no.424 of 1983, in the Court of 2nd Munsif, Bagerhat, for declaration and permanent injunction contending interalia that plaintiff is owner of the suit land by inheritance; During possession, plaintiff mutated his name vide Miscellaneous Case No.29/73-74 and paid rents and taxes to the Government exchequer; Plaintiff's father is missing for the last 27/28 years when plaintiff was a child; After attaining majority, plaintiff went to Dhaka for livelihood; Plaintiff's mother Shibani Basu was suffering from insanity; Taking advantage of the situation, defendant nos. 1 and 2 created two registered deed of sale both dated 23.09.1995 which were never acted upon and not binding upon the plaintiff; After creating said deeds, defendants forcibly ousted wife of the plaintiff from suit premises; Having informed, plaintiff came from Dhaka and recovered possession of the suit land with help of local police; Since then plaintiff has been possession the suit land by erecting houses and planting trees thereon; Defendant No.1 through insane Shibani Basu filed miscellaneous case no.16 of 1981 in the 0ffice of Circle Officer(Rev) to record his name; However, the case was ultimately withdrawn by defendant no.1; Thereafter, defendant nos. 1 and 2 filed Miscellaneous Case No. 24 of 1982 under Section 150 of the State Acquisition and Tenancy Act to mutate their name in place of the plaintiff; Plaintiff prayed time for filing written objection but circle officer (Rev) illegally recorded name of Golapi Sundari by cancelling earlier order passed in miscellaneous case no.29/73-74; Defendant nos. 1 and 2 threatened to dispossess the plaintiff from suit land on 1st Magh, 1349 B. S. corresponding to 15.01.1983. Hence, the suit.

3. Defendant Nos. 1 and 2 contested the suit by filing a joint written statement denying material allegations made in the plaint and contending interalia that Golapi Dasi acquired title in suit land as stridhan property; After expiry of Golapi Dasi, her daughter Shibani Basu inherited the same as per Dayabagha School of law; During possession, Shibani Basu proposed to sell the land and defendant

nos. 1 and 2 agreed to purchase the same and paid consideration money by installments; Shibani Basu executed and registered two kabalas both dated 23.09.1995; Since then defendants are in possession of the land; Shibani Basu was not suffering from insanity rather she was all along a normal and intelligent lady; Suit is liable to be dismissed.

4. After hearing the parties and assessing evidence on record, learned Assistant Judge decreed the suit on contest against defendant nos. 1 and 2 and exparte against the rest by his judgment and decree dated 27.12.1987.

5. Being aggrieved, defendants as appellants filed Civil Appeal No. 75 of 1988 in the Court of learned District Judge, Bagerhat. On transfer the appeal was heard and disposed of by the learned Subordinate Judge, 1st Court, Bagerhat, who after hearing the parties and reassessing evidence on record allowed the appeal vide judgment and decree dated 14.05.2001 by setting aside judgment and decree passed by the learned Assistant Judge.

6. Having aggrieved by and dissatisfied with the judgment and decree, plaintiff-respondent as petitioner preferred this revisional application under section 115(1) of the Code of Civil Procedure and obtained the present rule alongwith an order of status-quo.

7. Mr. M. A. Azim Khair, learned advocate appearing for the petitioner submits that the court below committed an error of law resulting in an error in the decision occasioning failure of justice in disbelieving advocate commissioner's report and his testimony as PW 2 without assigning any reason. He also submits that learned Subordinate Judge arrived at a finding relating to possession of defendants in the suit land quoting cross examination of PW 5 that he stated there are houses in the suit land belonged to defendants but from testimony of the PW.5 it is evident that learned Subordinate Judge misread the evidence of PW.5 as such, impugned judgment and decree is liable to be set aside. He further submits that plaintiff described schedule of the land in accordance with provisions of order 7 rule 3 of the Code of Civil Procedure and as such, trial court rightly decreed the suit. In support of his submissions, learned advocate referred to the case of Naresh Chandra Das and others-Vs- Nirmal Chandra Das and others, reported in AIR 1989 ORISSA 248.

8. On the other hand Mr. Abdul Hye Sarker, learned advocate appearing for the opposite party nos.1 and 2 submits that appellate court below after reassessing evidence on record rightly and legally arrived at a finding that plaintiff- petitioner failed to prove his possession in the suit land. He also submits that suit schedule land as described in the plaint is not in accordance with provisions of order 7 rule 3 of the Code of Civil Procedure as such, suit for permanent injunction on an unspecified and undemarcated land is not maintainable. He further submits that since disputed question of title involve in the suit, plaintiff must establish his title by filing a regular suit for title. In support of his submissions, learned advocate referred to the case of Barada Sundari Paul and others-Vs- The Assistant Custodian, Enemy Property (Land and Buildings), Comilla and others, reported in 15 BLD(AD)95; the case of Mati Lal Karmakar and another-Vs- Kalandar Talukder and another, reported in 20 BLD186 and the case of Rafizuddin Ahmed-Vs- Mongla Barman and others, reported in 43 DLR (AD)215.

9. Heard the learned advocates. Perused revisional application, judgment of the courts below alongwith lower courts record and decisions cited by the learned advocates.

10. On perusal of the record, it appears that plaintiff stated in his plaint that his mother was suffering from insanity and he was at Dhaka for business purpose and taking advantage of the situation, defendants created two kabalas by misleading his insane mother Shibani Basu which were never acted upon and as such those kabalas are not binding upon him. It is also stated in the plaint that he recovered possession of the suit land with the help of local police. On perusal of advocate commissioner's report, it appears that advocate commissioner categorically stated that plaintiff has been residing in the houses situated in the suit land with his wife and three minor children. Advocate Commissioner inspected the suit land in presence of local elites and examined as PW 2. It is also

evident from written objection filed by defendant nos. 1 and 2 against local inspection report that defendants are residing in Khulna town, not in the suit land. In such circumstances, I am of the opinion that learned Subordinate Judge committed illegality in disbelieving Advocate Commissioner's report terming the same exparte and not based on fact without assigning any reason in arriving at such a finding. On perusal of the testimony of PW.5, I find substance in the submission of learned advocate for the petitioner that finding of the appellate court below relating to possession based on misreading and non consideration of the evidence on record.

11. Now remains the point whether injunction can be granted on the schedule described in the plaint. It appears from the schedule that the plaintiff mentioned plot numbers and total quantum of land against those plots which tallies with khatian no.1359 marked as exhibit in the suit. Order 7 Rule 3 of the Code of Civil Procedure runs as follows:

"3. Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers".

12. From plain reading of order 7 rule 3 it appears that requirement of law is that the property should be identified by boundaries or numbers. When the plots are identified by numbers, boundaries are not necessary. The identifiable plot numbers having been given with total quantum of land against each plot in the schedule of plaint, there is no difficulty in identifying land of the plots. I find support of this view in the case of Naresh Chandra Das and others-Vs- Nirmal Chandra Das and others, reported in AIR 1989 ORISSA 248, wherein his lordship held:

"Order 7 rule 3 of the Code of Civil Procedure requires that where the property involved in the suit is immovable, the plaint shall contain a description of the property sufficient to identify it, and, in case of such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. As the requirement of the rule itself shows giving boundary of the land is not essential if the survey number or plot number which makes the plot identifiable is given and necessarily a suit cannot be dismissed merely because the boundary is not stated though the identifying plot number is given".

13. In view of the decision referred above, argument of the learned Advocate for the opposite parties that the trial court granted injunction on an unspecified and undemarcated land does not hold water.

14. Under the facts and circumstances of the case and for the reasons stated above, I am of the view that appellate court below committed an error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree which is based on misreading and non consideration of the evidence on record.

15. Facts and circumstances of the cases cited by the learned advocate for opposite parties are quite distinguishable from the facts and circumstances of the case in hand.

16. In the result, Rule is made absolute without any order as to cost.

17. Judgment and decree dated 14.05.2001 passed by the learned Subordinate Judge, 1st Court, Bagerhat, in Title Appeal No. 75 of 1988, is set aside and the judgment and decree dated 27.12.1987 passed by the learned Assistant Judge, Fakirhat, Bagerhat, in Title Suit No. 424 of 1983, is restored.

18. Order of status-quo granted at the time of issuance of the rule is hereby vacated.

19. Send down lower courts record alongwith a copy of this judgment to the court concern at once.

2 SCOB [2015] HCD 47

HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Civil Revision No. 1622 of 2010.

Sultan Ahmed and another.
…. Defendant-Respondent-Petitioners.
-Vs-
Johur Ahmed and others
…. Plaintiff-Appellant-Opposite Parties.

Mr. H.S. Deb Brahman with
Mr. Anwar Hossain Reza and
Ms. Fowjia Akhter, Advocates
---- For the petitioners.
Mr. Swapan Kumar Datta, Advocate
…. For the opposite parties.

Heard On:22.09.13, 24.09.13, 01.10.13, 07.10.13, 08.10.13, 03.11.13 & 17.11.13,
And
Judgment On : 20.11.2013.

Code of Civil Procedure, 1908
Section 9:
The general remedy of the suit under section 9 of the Code of Civil Procedure will be impliedly barred where a right is created by a special law and special forum is provided in it.
...(Para 20)

JUDGMENT

Soumendra Sarker, J:

1. The Rule issued calling upon the opposite party Nos. 1-2 to show cause as to why the impugned judgment and decree dated 27.01.2010 and 03.02.2010 respectively passed by the learned Joint District Judge, 1st Court, and Artharin Adalat, Bhola, in Civil Appeal No. 17 of 2008 allowing the appeal reversing the judgment and decree dated 31.03.2008 and 03.04.2008 respectively passed by the learned Senior Assistant Judge, Charfashion, Bhola in Civil Suit No. 68 of 2004 dismissing the suit 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 facts leading to the issuance of the Rule in a nutshell can be stated thus, the opposite party nos. 1 and 2 being plaintiff instituted the original Other Class Suit No. 68 of 2004 in the Court of learned Assistant Judge, Charfashion, Bhola for a declaration of permanent injunction and declaration contending *inter alia*, that the plaintiffs obtained the suit land by Settlement Case No. 806F/99-2000 followed by kabuliyat from the Government. Therefore, the plaintiffs erected house in plot NO. 3567 under khatian no. 587 and the remaining plot being no. $\frac{3690}{1}$ and $\frac{3690}{2}$ are cultivable land. The defendant no.1 took settlement of .40 acres of land in plot no. 3567 in Miscellaneous Case No. 42F/2000-2001 and the defendant no.2 took settlement of .20 acres of land in plot no. 3690 and .50 acres of land in plot no. 3567 in all .70 acres from the government collusively. The further case of the plaintiff is such that the defendants threatened the plaintiffs in the month of ***Chaitra*** 1490 B.S. at which the plaintiffs instituted the original suit. Subsequently the plaintiffs by filing an amendment petitioner challenging the settlement of the defendants and declaration of title with a further declaration that the order described in schedule "Kha" in respect of the land described in schedule "Ka" of the plaint is fraudulent, illegal and ineffective.

3. The contrary case of the defendants in short is thus that the properties measuring an area 1.50 acres of land is under khatian no. 318 and it is earlier plots were $\frac{1751}{13}$, $\frac{1361}{1}$ and $\frac{1775}{3}$. The defendant no.1 for getting the land settlement from the government prayed for settlement and in settlement case

No. 562A/69-70 he obtained settlement followed by a registered kabuliyat. The settlement khatian No. 18 was opened in favour of the defendant no.1 and possession was handed over. Subsequently the settlement holder defendant no.1 constructed his residence therein. The defendant no.2 in another settlement case no. 1366F/77-78 took settlement from settlement khatian no. 1296 for 1.50 acres of land under plot no. $\frac{496}{1}$ and $\frac{558}{1}$. A separate khatian was opened in his name and possession was handed over. The further case of the defendant is such that .40 acres of land of plot no. $\frac{1775}{3}$ under khatian no. 318 corresponds to Diara plot no. $\frac{1661}{1}$ and $\frac{1451}{13}$ measuring 1.10 acres of land under khatian no. 3567 and .40 acres of land of plot no. $\frac{558}{1}$ under khatian no. 1296 corresponds to Diara plot no. 5567 measuring an area .50 acres and .20 acres of land in plot no. 3690 comprising an area of .30 acres of land. The defendant no.1 after settlement filed a Miscellaneous Case No. 43F/2000-2001 before Assistant Commissioner (Land), Charfashion, Bhola opened khatian no. 581 in the name of the defendant no.1 which was approved by Deputy Commissioner, Bhola and the defendant no.2 after his settlement filed a file Miscellaneous Case No.30F/99-2000 before the same authority and the Assistant Commissioner (Land), Charfashion, Bhola opened khatian no. 584 in the name of defendant no.2 which was also approved by the Deputy Commissioner, Bhola. The plaintiff to the suit after granting a collusive khatian no. 587 in Dokar settlement case no. 806F/99-2000 tried to grave the property but in fact the settlement of the plaintiffs not at all affected by genuine transaction or delivery of possession. Knowing about the false settlement case the defendant applied to the Deputy Commissioner, Bhola for cancellation of the settlement of plaintiff no.1 on 12.02.2004 and thereafter after due enquiry and process of law the settlement of the plaintiffs were cancelled. The plaintiffs having no manner of right, title interest and possession in the suit land filed the suit on false allegation.

4. During trial original suit the learned Senior Assistant Judge, Charfashion, Bhola after taking evidence dismissed the suit on contest on 31.03.2008. Being aggrieved the plaintiffs preferred an appeal being Civil Appeal No.17 of 2008 in the Court of learned District Judge, Bhola which was heard and disposed of by the learned Joint District Judge, Court No.1 and Artharin Adalat, Bhola and the learned lower Appellate Court allowed the appeal reversing the judgment and dismissal decree the suit by the impugned judgment and decree dated 27.01.2010.

5. Being aggrieved by and dissatisfied with the impugned judgment and decree the defendant-respondent-petitioners has preferred this revisional application under section 115(1) of the Code of Civil Procedure and obtained the Rule with an interim order of stay.

6. During hearing of this application Mr. H.S. Deb Brahman, the learned Advocate appeared on behalf of the petitioners while Mr. Swapan Kumar Dutta appeared on behalf of the opposite-parties.

7. The learned Advocate appearing on behalf of the petitioners submits that the learned lower appellate court during passing the impugned judgment and decree committed gross illegality and irregularity resulting in an error in the decision occasioning failure of justice. The learned Advocate further submits that the learned appellate court below without considering the settlement cases marked exhibit-“Gha” (O) and “Cha” (Q) and evidence of P.W.1 the plaintiffs in holding that the plaintiff-opposite parties obtained settlement for the suit land earlier to the defendant, committed error of law and misconstrued the facts of the case. The defendant-petitioners obtained settlement of the suit land in the year 1969-70 and in the year 1977-78 vide exhibit-“Ga” and “Chha” (R) while the plaintiff-opposite parties got settlement in the year 1999-2000 vide Annexure-“Ja”. Therefore, obviously after the settlement of the defendants the plaintiffs obtained the settlement which is no doubt Dokar settlement in favour of the plaintiffs. But the learned appellate court below erroneously held hat the plaintiffs to the case obtained settlement prior to the defendant which is apparently an error of law resulting in an error in the decision. The learned Advocate also submits that the plaintiffs-opposite

parties in settlement case no. 806F/99-2000 obtained settlement as alleged which was fraudulent, collusive and not acted upon. The findings of the trial court not at all rebutted or reverse by the appellate court below after assessment of the evidence and appreciation of law. Without discussing the evidence on record properly in its true perspective and without reversing the observation and findings of the trial court especially on the point of possession the learned appellate court below committed gross illegality which is violative to the provisions laid down in Order XLI rule 31 of the Code of Civil Procedure. The impugned judgment and decree is not a proper judgment of reversal in as much as without discussing the evidence on record and reversing the findings of the trial court the learned Joint District Judge, Bhola decided the merit of the case arbitrarily and thereby in decreeing the suit there has been miscarriage of justice. The learned Advocate lastly submits that the decision of the trial court on possession over the suit land is based on the deposition of the witnesses adduced from the cites of the respective parties which is not at all considered by the trial lower appellate court and there is total non-consideration of material facts resulting in an error in the decision occasioning failure of justice. There is no rent receipt from the side of the plaintiffs from 2000-2004 which has cast a serious doubt in believing the plaintiffs case, especially on their alleged possession after their alleged settlement. In this context; it is clear findings of the trial Court that the plaintiffs have totally failed to prove their prima-facie title and possession to the suit land and this decision was passed on preponderance of evidence and scanning of the deposition given by both the parties. The said observation and decision of the learned Assistant Judge, Charfashion, Bhola is not rebutted referring evidence of the parties which has resulted in an error in the decision. In view of the facts and circumstances of the case the learned Appellate Court below is misconceived in holding that the burden of proof in proving the respective case of the plaintiffs is shifted to the shoulder of the defendants. The original suit as it was found is not maintainable and there is a specific remedy lies upon the respective parties in the Bangladesh Bhumy Babosthapona Manual, 1990 (বাংলাদেশ ভূমি hÉhØq¡fe¡ jÉ¡eu¡m, 1990). Under Section 67 of the said manual reads as follows:

"৬৭। বন্দোবস্ত বাতিল- জেলা কালেক্টর স্বীয় উদ্যোগে বা কোন সুস্পষ্ট অভিযোগের ভিত্তিতে কবুলিয়তের শর্ত ভংগজনিত কারণে লিখিত কারণ দর্শাইয়া যে কোন বন্দোবস্ত বাতিল করিতে পারিবেন কালেক্টরের এইরুপ বন্দোবস্তি বাতিল আদেশের বিরুদ্ধে কমিশনারের নিকট আপীল দায়ের করা যাইবে এবং তাহার সিদ্ধান্ত চুড়ান্ত বলিয়া গণ্য হইবে।"

8. Apparently the matter in dispute lies on settlement which is guided by the special provisions laid down in the State Acquisition and Tenancy Act, 1950. Under section 76 of the State Acquisition and Tenancy Act, 1950 "No Civil Court shall entertain any application or suit concerning any matter relating to the settlement and 76(2) of the aforesaid Act is a barring Clause upon the Civil Court to entertain such dispute. In this regard the learned Advocate Mr. H.S. Deb Brahman has referred several decisions of our Apex Court including the BAR Act. In the instant case without existing the provisions which are expressly provided in the relevant law the plaintiffs to the suit instituted the original suit which is apparently barred by law.

9. As against the aforesaid submission advanced from the side of the learned counsel for the petitioners the learned Advocate appearing on behalf of the opposite parties opposing the Rule submits that the learned appellate court below committed no illegality or irregularity in deciding the merit of the appeal in favour of the defendant-appellant and during disposal of the appeal the learned lower appellate court after considering all the evidence adduced from the sides of the respective parties and on proper sift of evidence in appreciation of law decided the merit of the appeal and reversed the judgment and dismissal decree passed by the trial court. The learned Advocate further submits that the settlement of the defendants as it appears from the face of the papers suffers from non service of notice as *malafide* act of the concern officials and based on fraudulent activities and the learned appellate court below during disposal of the appeal rightly held that the defendants settlement is liable to be decreed illegal and in absence of tangible evidence from the side of the defendants it cannot be held that they acquired any right, title, interest and possession over the suit land. The learned Advocate further submits that the case *nathi* which was called for by the defendants during trial of the original suit go to show that their exhibit-Kha does not tally with the report of the concern '***kanongo'*** dated 04.01.2004 for which the settlement of the plaintiffs were cancelled. Under section

67 of the Bangladesh Bhumy Babosthapona Manual, 1990 (বাংলাcn i¢j h£hØq¡fe¡ j£¡eu£¡m, 1990) the reason for which a settlement can be cancelled is totally absent in the instant case but the authority concern illegally being guided by undue influence cancelled the settlement of the plaintiffs which is a *malafide* act of the government official and for that for the reason stated above the plaintiffs instituted the original suit for getting proper relief from the court of law. The learned Advocate Mr. Swapan Kumar Dutta also submits that there is nothing in the concerned ***nathi*** of settlement that the present plaintiffs were ever notified before cancellation of their settlement which was mandatory before drawing any such inference that the settlement is illegal or Dokar as alleged. The learned Advocate for the opposite parties referred from the judgment of the appellate court below read as follows :

"এই মামলার গুরুত্বপূর্ণ একটি বিষয় হলো এই যে, মামলার বাদীদের অনুকূলে স্বীকৃত মতেই সরকার নালিশী সম্পত্তি বাবদ বন্দোবস্ত দিয়েছে। তাই এই বন্দোবস্ত বাতিল করতে হলে নালিশী সম্পত্তি বাবদ ১নং ¢hh¡দী পূর্বেই বন্দোবস্ত পেয়েছিল তা প্রমান করার দায়িত্ব ১নং বিবাদীর উপরেই বর্তায়, বাদীর উপর নয়। ১নং বিবাদী কোন নিরপেক্ষ সাক্ষ্যের মাধ্যমে এই বিষয়টি প্রমান করতে পারে নাই। বাদী তার সাক্ষ্যে এবং জেরায় ৩৫৬৭ দাগের সম্পত্তি $\frac{1775}{3}$ দাগের নয় বলে দাবী করে আসছে। সাবেক $\frac{1775}{3}$ দাগের সম্পত্তি বাদীপক্ষের বন্দোবস্ত প্রাপ্ত ৩৫৬৭ দাগের সম্পত্তি তা প্রমান করার মত কোন সাক্ষ্য প্রমান উপস্থাপিত না হওয়ায় কোনভাবেই একথা বিশ্বাস করা যায় না যে, বাদীপক্ষের বন্দোবস্ত প্রাপ্ত সম্পত্তি বিবাদী পক্ষ আগেই বন্দোবস্ত পেয়েছিল। অন্যদিকে বিজ্ঞ বিচারিক আদালতের বিচা l L A¢a¢l š²®Sm¡ f£ej¡pL (l¡Sü) LaL 3567 ew দাগের সম্পত্তি বাবদ বন্দোবস্ত বাতিলের বিষয়টি এই সম্পত্তি বাবদ বিবাদীপক্ষের অনুকূলে প্রদত্ত বরাদ্দের আদেশের সত্যায়িত কপি দেখে বিশ্বাস করেছেন এবং ৩৫৬৭ নং দাগের সম্পত্তি $\frac{1775}{3}$ নং দাগের সম্পত্তি হিসাবে পূর্বে বন্দোবস্ত দেয়ার কারণে সরকার বিবাদীদের অনুকূলে প্রদত্ত বন্দোবস্ত বাতিল করার অধিকার সংরক্ষন করেন বলে মন্তব্য করেছেন। নথিতে এ ধরনের বরাদ্দ বাতিল আদেশের কোন প্রমান পাওয়া যায় না। এ রকম কোন বরাদ্দ বাতিল করার পূর্বে বরাদ্দ প্রাপ্ত ব্যক্তিদের নোটিশ প্রদানের মাধ্যমে তাদের বক্তব্য শোনা বা ®n¡e¡l ®Qøা করার আইনগত বাধ্যবাধকতা বিদ্যমান । আইনগত এই দায়িত্ব সরকার পালন করেছে তাও বিবাদীপক্ষ কোন গ্রহণযোগ্য সাক্ষ্যের মাধ্যমে প্রমান করতে পারে নাই। "

10. The learned Advocate after citing several decisions of this court and our Apex Court submits that under section 9 of the Civil Procedure Court a Civil Court is quite competent to entertain the original suit and the learned appellate court below after thorough discussions over the evidence on record passed the impugned judgment and decree which deserve no interference of this court in absence of misreading or non-reading of evidence and non-consideration of material facts resulting in an error occasioning failure of justice.

11. Heard the learned Advocates of both sides, perused the case record, exhibited documents, deposition of the witnesses and all other connected papers.

12. It appears from the case record that the pertinent question of the instant case is as to whether the settlement which was granted in favour of the defendants was genuine or affected after due process of law and as to whether the authority concern i.e. the collector cancelled the settlement of the plaintiffs legally. From the argument advanced it is also a matter of adjudication that the civil court was empowered to entertain the suit especially when the matter relates to settlement which is guided by the special law.

13. On perusal of the case record it transpires that during pendency of the original suit the plaintiffs filed an application for declaration of title and also for a declaration that the order of cancellation of his settlement dated 24.06.2004 by the Assistant Commissioner (Land), Charfashion, Bhola is illegal, fraudulent and not acted upon. The said amendment petition was filed under the purview of Order VI rule 17 of the Code of Civil Procedure. During trial of the original suit four witnesses were adduced from the side of the plaintiffs and three witnesses were examined from the sides of the defendants. The learned Assistant Judge, Charfashion, Bhola during disposal of the original suit after framing six different issues decided that the plaintiffs to the suit after adducing credible, tangible evidence failed to discharge their onus in proving their prima-facie title and

possession in the disputed property and also failed to establish that the settlement in favour of the defendants was false and not acted upon. The learned appellate court below in his findings observed that the plaintiffs' title to the suit land has been denied by the defendants by virtue of their settlement and the evidence which was laid from the side of the defendants does not prove their *bonafide* and disprove the respective plea of the plaintiffs to the suit land. It was further observed by the lower appellate court the land in dispute is not identical with the settlement papers and the defendants since not filed any plot index or any Commission was held by a survey knowing Advocate Commissioner the land relates to the paper of settlements suffers from vagueness.

14. In this regard it was argued from the side of the learned counsel for the petitioners that it was an incumbent duty as well as onus upon the plaintiffs to investigate the land or specify the land in the schedule and for the removal of alleged vagueness or unspecification it is the plaintiff who is required to hold Commission to establish their case and the plaintiffs to the suit because of their institution of the original suit must have to prove their case beyond all reasonable doubt and it is the established principle of civil law that the plaintiffs must prove their case and they cannot banked upon weakness of their adversary.

15. Having going through the connected papers on record including the evidence adduced from the sides of the respective parties it appears that exhibit-Kha is the Diara khatian which is not challenged by the plaintiffs but the lower appellate court passed his findings which is unwarranted in law as well as facts of the case. Furthermore, the finding of the learned Joint District Judge is not consistent with the papers on record that there is no existent of plot no. $\frac{1755}{3}$ in settlement khatian no. 318. Furthermore, the plot no. $\frac{1755}{3}$ or $\frac{1775}{3}$ which are Diara plots has gone into khatian no. 3567 (Diara) is not based on any documentary evidence. As a whole the observation and findings of the appellate court as to the identity of the suit land as described itself contradictory and not consistent or identical with the relevant documents. The decision as it appears from the impugned judgment and decree that the order of cancellation of settlement does not lie in the concern ***nathi*** is not correct and it can be treated as non-consideration of material documents. Beside this the oral evidence of the plaintiffs' witnesses which is not at all discussed by the lower appellate court has make the judgment and decree not in accordance with law. Under Order XLI rule 31 of the Code of Civil Procedure the learned appellate court below ought to discuss the evidence on record and evaluate the same in its true perspective before arriving at a decision over the material in issue but in the instant case as I have gone through the learned Joint District Judge, Bhola not at all consulted the relevant evidence and deposition of the witnesses which is violative of the provisions as cited above. The findings of the trial court in view of the rent receipts and settlement papers in consultation with the evidence not at all rebutted by the lower appellate court and in this context it can be easily held that the impugned judgment and decree cannot be treated as a proper judgment of reversal in the eye of law.

16. It is evident from exhibit-"Cha" series i.e. the rent receipts from the side of the defendants that the settlement which were granted in favour of the defendant nos. 1 and 2 pursuant to kabuliyat, exhibits Ga and "Chha" were affected and by acceptance of rent the government accepted the settlement holders as tenant. Vis-à-vis; it is from the face of the documents that the plaintiffs after filing the suit in the year 2004 procured two rent receipts vide exhibit nos. 1 and 1(ka). The positive findings of the trial court on the defendant-petitoners settlement wich were prior to the plaintiffs and pursuant to that their possession over the disputed property after payment of rent were thoroughly considered and it is a clear findings of the trial court that the defendants by virtue of their settlements do possess the suit property while the plaintiffs has failed to discharge their onus in proving their respective case. Particularly, their settlements and possession over the disputed property rebutting the said objection findings and decisions of the trial court the lower appellate court in a very evasive manner decided the merit of the appeal which is unwarranted in law.

17. Apart from this; on careful scrutiny over the connected papers on record on point of maintainability of the suit it is apparent from the face of the paper that the settlement upon which the

respective cases of the parties banks is guided on Special Law. Section 76 of the State Acquisition and Tenancy Act, 1950 shall have to be followed in the instant case and 76(1) of the Act runs as follows:

"76. (1) Except as otherwise expressly provided in this Act, any land which vests in the Government under any of the provisions of this Act shall be absolutely at the disposal of the Government; and the Government shall be competent to make settlement of such land in accordance with such rules as it may make in this behalf or to use or otherwise deal with such land in such manner as it thinks fit:

Provided that no land shall be settled with a person unless he is a person to whom transfer of land can be made under section 90:

Provided further that in making settlement of any cultivable land preference shall be given to an applicant for settlement who cultivates land by himself or by the members of his family and holds a quantity of cultivable land which, added to the quantity of cultivable land, if any, held by the other members of his family, is less than three acres."

18. Section 76(2) contemplates no Civil Court shall entertain any application or suit concerning any matter relating to the settlement, by any officer of the Government of any land under sub-section (1).

19. In this connection I may not be out of place to advert that our Appellate Division in a case law reported in 11 BLD(AD)294 in the case of *Chand Miah and others –vs.- Abdur Razzaque Mahmud Chowdhury and others*, held,

"It is settled law that the jurisdiction of the Civil Court may be expressly barred or it may be barred by necessary implication. Such implied ouster takes place when a Special Statute provides for a special forum for redress of the grievances, if any, and when the decision of that forum is declared to be final, vide, Secretary of State Vs. Mask & Co. 44 CWN 709. The Judicial Committee in that case referred to the dicta of Willes J., in Wolverhampton New Water Works Co. V. Hawkesford, (6 C.B (N.S) 336 at p. 356(1859), which was approved of in the House of Lords in Neville V. London Express Newspaper Limited (L.R. (1919)AC 368) viz. "where the statute creates a liability not existing at common law and gives also a particular remedy for enforcing it with respect to that class, it has always been held that the party must adopt the form of remedy given by the statue."

In the recent case of Md. RAfiqul Alam Vs. Mustafa Kamal 42 DLR(AD) 137=(1990)10 BLD(AD)151, we have held following the aforesaid dicta and the decision of the Privy Council that the jurisdiction of the Civil Court is impliedly barred in respect of any election dispute because a separate forum has been created under the special law i.e. the Local Government (Union Parisahad) Oridnance, 1983 for the resolution of such dispute."

20. The general remedy of the suit under section 9 of the Code of Civil Procedure will be impliedly barred where a right is created by a special law and special forum is provided in it as the instant case be. Special law overrides the general jurisdiction conferred on civil courts to entertain suits of civil nature-Where a right is created by a special law and a method of enforcing the right is pointed out by the law creating such right, the general remedy of suit under the Code will be impliedly barred. In such a case the method provided by the special law must be followed.

21. The jurisdiction of Civil Court in the instant case has been expressly barred under section 76 of the State Acquisition and Tenancy Act, 1950 and a bear reading of the section itself shows that the jurisdiction of Civil Court has been curtail from entertaining any suit or application against any order passed or any action taken under this law. Apparently in the instant case without exhausting the specified forum as provided the plaintiffs instituted the original suit and I have already ..there earlier that the Civil Court was not empowered to entertain the original suit and the matter in controversy which is apparently such a dispute which arise out from a settlement granted by the government and it subsequent cancellation of earlier settlements granted in favour of the plaintiff-opposite-parties. The facts remains that the allegation on fraud, *malafide* practice and non service of notice can be agitated in appropriate forum and in this regard the arguments advanced from the side of the learned counsel for the petitioners that the plaintiffs to the suit not at all raised such plea in their pleading is consistent with the plaint itself. Under Order VI rule 2 of the Code of Civil Procedure,

"Every pleading shall contain and contain only, a settlement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures."

22. Consulting the decision referred from the side of the learned counsel for the opposite parties of this court reported in 24 BLD 395 and 45 DLR, 727, 23 DLR 205, I have reason to inclined such a view that the decisions as cited therein are not identical with the present case. Due to different facts and circumstance of the case those are not applicable in our instant case.

23. On careful scrutiny over the connected papers including the impugned judgment and decree it is noticed that the defendants' settlement deeds which prior to the plaintiffs has been marked as exhibit-"Ga" and "Chha" respectively. Exhibit-"Kha" is the settlement khatian of the defendant no.1 followed by his settlement dated 29.01.1987 and exhibit-"Kha" is the Diara khatian of the defendant no.1. In respect of the remaining defendant-petitioner no.2 his settlement dated 09.09.1978 is followed by exhibit-Uma, this settlement khatian and exhibit- "Kha" and its corroborating Diara khatian exhibit-"Gha". This documentary evidence all these documentary evidence were overlooked by the learned appellate court below and there has been non-consideration of material evidence resulting in an error in the decision occasioning failure of justice.

24. Having regard to the facts, circumstances and discussions referred to above I am constrained to hold such a view that the impugned judgment and decree suffers from material illegality and non-consideration of material facts including misreading and non-reading of evidence resulting in an error in the decision which have been founded on misconception and misinterpretation of material document including relevant laws and as a result the judgment and decree is perverse which is contrary to law, evidence and material on record.

25. In the result, the Rule having much substance is made absolute without any order as to costs. The impugned judgment and decree dated 27.01.2010 and 03.02.2010 respectively passed by the learned Joint District Judge, 1st Court, and Artharin Adalat, Bhola, in Civil Appeal No. 17 of 2008 allowing the appeal reversing the judgment and decree dated 31.03.2008 and 03.04.2008 respectively passed by the learned Senior Assistant Judge, Charfashion, Bhola in Civil Suit No. 68 of 2004 is hereby set aside.

26. The order of stay granted by this Court at the time of issuance of the Rule stands vacated.

27. Send back the lower Court's record at once.

2 SCOB [2015] HCD 54

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 9490 OF 2013

Md. Shafiqul Islam and another
..... Petitioners
-Versus-
Government of the People's Republic of Bangladesh and others
.....Respondents.

Mr. Abdus Salam Mamun with
Ms. Shajeda Akter Bakul, Advocates,
.... For the petitioners.

Mr. Syed Mamun Mahbub, Advocate
.... For respondent No.4.

Heard on 15.06.2015 and 30.06.2015.
Judgment on 01.07.2015.

Present:
Mr. Justice Md. Rezaul Hasan
And
Mr. Justice Farid Ahmed.

A judgment or order becomes effective (subject to correction of error or review by the same Court, as the case may be) the moment it is pronounced in the open Court. A certificate to that effect issued by a learned lawyer is sufficient proof to the parties or persons concerned, according to the law declared in 44 D.L.R. (AD) 219. Besides, as per provisions of article 111 of the Constitution of the Peoples Republic of Bangladesh, the judgment passed by the Appellate Division is binding on the High Court Division too, alongwith the subordinate Courts. Hence, if the Appellate Division pronounces any judgment then it becomes binding on the High Court Division (in similar cases), whether the same is signed or not. If the High Court Division considers it just and proper to wait till the judgment is pronounced by the Appellate Division to be signed, then it (HCD) can at best keep the matter awaiting judgment. But, it should not pronounce any judgment contrary to the judgment pronounced, in the open Court, by the Appellate Division, on the matter having relevance to the case before this Division. However, to cover this interim period, this Division may pass such interim order as the ends of justice may demand. ...(Para 14)

Md. Rezaul Hasan, J.

1. This Rule Nisi, on an application under Article 102 of the Constitution of the People's Republic of Bangladesh (the Constitution), has been issued calling upon the respondents to show cause as to why the proceedings of the Special Case No.15 of 2013 arising out of Bandarban Police Station Case No.7 dated 16.07.2008 corresponding to G.R. 168 of 2008 under section 161/109 of the Penal Code read with section 5(2) of the Act II of 1947 now pending in the Court of the Senior Special Judge Bandarban, vide Annexure-E to the writ petition, and the suspension order passed under Memo No. LGED/CE/E-66/2001 (part-1) 5127 and LGED/CE/E-66/2001 (part-01) 5126 dated 01.07.2013, respectively, passed by the respondent No.06 suspending the petitioners from their post of service, vide Annexure-G and H to the writ petition, should not be declared to have been taken and done without any 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. In the instant writ petition the petitioners have filed two sets of supplementary affidavits. Let these affidavits be treated as part of the substantive petition.

3. The petitioners' case, in brief, is that both the petitioners have filed two petitions on 14.10.2010, under section 19Ka of the then Truth and Accountability Commission (TAC), seeking exoneration from the charges brought against them under the Anti-Corruption Act, 2004 (ACC Act, 2004) and they have fulfilled all the pre-conditions laid down in the TAC for getting exoneration from

the charges brought against them; that TAC is a special law and section 26(3) empowered the Commission to exonerate the person who is an accused under the ACC Act and ACC in writing a letter to the said Commission was informed the Court concerned to discharge the petitioners from the charges brought against them; that by two letters, both issued on 31.12.2008 (Annexures B and C respectively), under provision of section 26(3) of the TAC both the petitioners were exonerated from the charges brought against them for the reasons recorded in their two letters; that in spite of obtaining two letters of exoneration from the charges under TAC dated 31.12.2008 the Senior Judicial Magistrate, Bandarban Partattya Zila took cognizance against the accused-petitioners by the Court's Order No.10 dated 25.01.2009, which has been transferred to Senior Special Judge, Bandarban and it has been registered and re-numbered as Special Case No.15 of 2013 arising out of Bandarban Police Station Case No.07 dated 16.07.2008, corresponding to G.R. No.168 of 2008, under sections161/109 of the Penal Code read with section 5(2) of the Act II of 1947 now pending before the Senior Special Judge, Bandarban; that the TAC having authority to exonerate the accused and having exonerated both the petitioners by two letters dated 31.12.2008 (Annexures B and C) pursuant to the application made by the petitioners to the TAC both dated 05.11.2008 (Annexures 'X' series) started proceeding which is liable to be declared illegal to have been taken and done without any lawful authority and is of no legal effect.

4. The petitioners have also challenged the virus of orders of suspension of the petitioners from their services vide both memo dated 01.07.2013 (Annexures 'H' and 'I').

5. Hence this writ petition and the Rule.

6. With reference two letters dated 31.12.2008 (Annexures 'B' and 'C'), the respondent No.4 has submitted an affidavit-in-opposition and also a supplementary affidavit to their affidavit-in-opposition denying all material facts and asserting that the action taken by the respondents are quite lawful. In the supplementary affidavit, at paragraph No.10, deep regret has been recorded as well as unconditional apology has been sought for the mistake made in that paragraph, by stating incorrect facts supported by affidavit. At paragraph No.3 of the supplementary affidavit the respondent No.7 has also shown that the ACC has taken legal step against Emon Shahriar and others, apparently that the TAC was struck down by a judgment dated 13.11.2008 reported in 16 BLC 100 and the said judgment was affirmed by the Appellate Division in C.P.L.A. No.1816 of 2010, vide judgment and order dated 16.5.2011, reported in 18 BLC (AD) 47.

7. Let the supplementary affidavit do form part of the main affidavit-in-opposition.

8. Learned Advocate Mr. Abdus Salam Mamun, appearing along with learned advocate Ms. Shajada Akter Bakul, having placed the writ petition with two supplementary affidavits, affidavit-in-opposition as well as having drawn attention to the other materials on record, first of all submits that Truth and Accountability Commission Act, 2008 (TAC) is a special law that empowered the TAC to exonerate the accused-petitioners as authorised by the provisions of section 26(3) of the TAC. Both the petitioners have accordingly filed two separate applications on 05.11.2008 (Annexure 'X' series) seeking exoneration from the charges brought against them by the ACC, subject to compliance of the conditions laid down in the said Ordinance. The TAC being satisfied, by two separate letters, both dated 31.12.2008 (Annexures 'B' and 'C' respectively), exonerated them from all charges brought against them. Copy of the said letters were forwarded to the Senior Judicial Magistrate, Bandarband Parbattya Zila, as recorded in Order No.10 dated 25.01.2009 and as mentioned in paragraph No.6 of the supplementary affidavit, sworn on 12.09.2014. Inspite of receiving the said two letters, the Senior Judicial Magistrate, Bandarban Parbattya Zila, took cognizance and had transmitted the cases to the Senior Special Judge, Bandarban, wherein it has been recorded as Special Case No.15 of 2013, which is still pending before that Court. Besides, the learned Advocate further submits that both the petitioners were suspended from the services by respondent No.6 (Annexure H and H2 respectively), after they were exonerated from the charges on 31.12.2008. Accordingly, the learned Advocate asserts that the proceeding initiated against the petitioners by way of taking cognizance against them on 25.01.2009 and continuation of the said proceeding before the Senior Special Judge, Bandarban being

Special Case No.15 of 2013 as well as both the letters of suspension are liable to be declared to have been initiated and issued without lawful authority and are of no legal effect. Before conclusion, learned Advocate for the petitioners submits that one Emon Shahriar was exonerated after the TAC Ordinance was struck down by the judgment and order dated 13.11.2008 by the High Court Division, subsequently upheld by the Hon'ble Appellate Division on 16.5.2011 in CPLA No.1816 of 2010. Learned Advocate for the petitioner has referred to the case of Emon Shahriar, reported in 17 BLC (2012) 866, and submits that by the judgment delivered on 15.03.2012, in that writ petition filed by one Emon Shahriar, Rule was made absolute, and the concerned memo dated 19.10.2011 issued by the ACC against the said petitioner (Emon Shahriar) directing him to appear before respondent No.6 (in that writ petition) on 24.8.2011 was declared to have been made without lawful authority. Accordingly, he emphasis that this case has similarity to the case of Emon Shahriar and the petitioners are entitled to get similar relief as was given to Emon Shahriar, even after striking down the Ordinance on 13.11.2008. But the ACC imparted discriminatory treatment to these petitioners by continuation of the proceeding disregarding the aforesaid letters dated 31.12.2008 as well as the decision of a Bench of this Division given in the case of Emon Shahriar Vs. People's Republic of Bangladesh & others. Accordingly he summarised that there is no bar in making this Rule Absolute in spite of the fact that TAC Ordinance was struck down on 13.11.2008 by this Court.

9. Learned Advocate for the respondent No.4 Mr. Syed Mamun Mahbub, on the other hand, submits that the Rule issued in this writ petition is liable to be discharged on the sole ground that letters of exoneration dated 31.12.2008 (Annexures B and C respectively) were issued after the TAC Ordinance was struck down on 13.11.2008, vide the case of Adilur Rahman Kha and others Vs. Bangladesh and others, reported in 16 B.L.C. 100 and that judgment was affirmed by the Appellate Division in CPLA No.1816 of 2010 on 16.5.2011, between Monzur Ahmed Bhuiyan and others Vs. Adilur Rahman Khan and others, reported in 15 BLC (AD) 47. As such the aforesaid two letters dated 31.12.2008, he continues, were issued when the TAC had no authority to issue such letters. He therefore submits that the Rule issued in this writ petition is liable to be discharged. As regards the case of Emon Shahriar, reported in 17 B.L.C. 866, the judgment was given by a Bench of the High Court Division stating the reasons that the judgment passed by the Appellate Division in CPLA No.1816 of 2010 was not signed at the date the judgment was pronounced in the case of Emon Shahriar. He also submits that although it was incorrectly stated in paragraph No.10 of the affidavit-in-opposition that no action was taken against Emon Shahriar, indeed, legal action was taken against him by ACC, as clarified in the supplementary affidavit, after getting the correct fact and picture. He, therefore, prayed for discharging the Rule.

10. We have heard the learned Advocates of both the sides, perused the petition, the affidavit-in-opposition and the supplementary affidavits filed by both the sides along with the documents on record.

11. It is not disputed that both the petitioners have submitted applications on 05.11.08 as per provisions of section 19Ka of the TAC Ordinance seeking exoneration from the charges brought against them, subject to fulfilment of the conditions laid down in the said Ordinance. It is also correct that the said Ordinance was a special law and that section 26(3) of the TAC Ordinance empowered the TAC to exonerate the applicants and had in fact been exonerated the applicants, by two separate letters, both of dated 31.12.2008 (Annexure B and C respectively).

12. However, we find that the TAC Ordinance 2008 was struck down by a Bench of this Division on 13.11.2008 and the said judgment was affirmed by the judgment and order dated 16.5.2011 of the Appellate Division passed in CPLA No.1816 of 2010, as reported in 15 BLC (AD) 47. As such we find that on 31.12.2008, when the two letters (Annexure B and C), were issued by TAC exonerating the two petitioners from all criminal charges brought against them, the TAC had no existence and they had no authority to issue these two letters, both dated 31.12.2008 (emphasis added).

13. We have also consulted the case reported in 17 BLC 866, wherein by a judgment dated 15.3.2012 the Rule was made absolute by a Bench of this Division. However, that case has no relevance in the disposal of this Rule. On the other hand, having considered the supplementary affidavit, filed today on behalf of respondent No.4, we find that the ACC has continued proceeding against Emon Shahriar and others. As such we find that 17 BLC 866 is of no help to the petitioners.

14. Referring to the judgment on Emon Shahriar, reported in 17 BLC 866 and so far as the question practice and procedure is concerned, our considered view is that, **a judgment or order becomes effective (subject to correction of error or review by the same Court, as the case may be) the moment it is pronounced in the open Court. A certificate to that effect issued by a learned lawyer is sufficient proof to the parties or persons concerned, according to the law declared in 44 D.L.R. (AD) 219. Besides, as per provisions of article 111 of the Constitution of the Peoples Republic of Bangladesh, the judgment passed by the Appellate Division is binding on the High Court Division too, alongwith the subordinate Courts. Hence, if the Appellate Division pronounces any judgment then it becomes binding on the High Court Division (in similar cases), whether the same is signed or not. If the High Court Division considers it just and proper to wait till the judgment is pronounced by the Appellate Division to be signed, then it (HCD) can at best keep the matter awaiting judgment. But, it should not pronounce any judgment contrary to the judgment pronounced, in the open Court, by the Appellate Division, on the matter having relevance to the case before this Division. However, to cover this interim period, this Division may pass such interim order as the ends of justice may demand.**

15. We accept the apology offered on behalf of the respondent No.4 and do hereby require them to be cautious in future in making statements supported by swearing affidavit before this Court.

16. For the above stated reasons we do not find any merit in this Rule.

O R D E R

17. In the result, the Rule is discharged. The order of stay granted at the time of issuance of the Rule is hereby vacated.

18. No order as to cost.

19. Communicate this judgment and order to the Court concerned.

2 SCOB [2015] HCD 58

HIGH COURT DIVISION
(ADMIRALTY JURISDICTION)

ADMIRALTY SUIT NO. 17 of 2015

City Seed Crushing Industries Ltd.
...Plaintiff

-versus-

M.V. TRITON SEAGULL and others.
...Defendants

Mr. M.A. Hannan with
Mr. Abdus Samad Azad, Advocates
...For the Plaintiff

The 6th April, 2015

Court Fees Act, 1870
Section 13-15:
The parties are entitled to refund of the Court fees if it is found that the apparatus of the Court and its process have not been used for the cause for which the parties have taken recourse to the proceedings of the Court. This underlining principle of the Court Fees Act as well as the provisions under sub-Section (11) of Section 89A of the Code have also been recognized and affirmed in the cases as referred to by Mr. Hannan, in particular the case of Bhola v. Sardar Muhammad, PLD 1976 Lahore 1268. ... (Para 9)

JUDGMENT

Sheikh Hassan Arif, J:

1. This is an application for withdrawal of the suit as well as for refund of the Court fees paid by the plaintiff. This application was partially allowed by this Court vide order dated 23.03.2015. By that order dated 23.03.2015, the suit was allowed to be non-prosecuted/withdrawn, and by the same order this Court fixed 05.04.2015 for necessary orders as regards the prayer of the plaintiff for refund of the Court fees. Consequently, after deferments, the issue of refund of the Court fees will now be deposed of by this order.

2. The aforesaid Admiralty Suit No. 17 of 2015 was originally filed by the plaintiff on 12.03.2015 along with the highest Court fee of Tk. 1,00,000.00 (one lac) as per the provisions of the Admiralty Court Act, 2000 ("the said Act") and the applicable Rules, namely Admiralty Rules, 1912. It appears from record that though the suit was filed claiming compensation for short-landing, the plaintiff did not press for admission of the suit and as such neither the same was admitted by any order of this Court and nor any notices were issued on the defendants. Before such formal admission of the Suit, the plaintiff has come up with the aforesaid application for non-prosecution/withdrawal of the same and for refund of the Court fees. In support of the application for refund of the Court fees, the plaintiff mainly relies on the underlining principles of the provisions under Section 89-A, in particular sub-section (11) thereof, and Order 23, Rule-1 of the Code of Civil Procedure.

3. Mr. M.A. Hannan, learned Advocate appearing for the plaintiff-applicant, has made the following submissions in support of the plaintiff's prayer for refund of the Court fees:

a) Since sub-section (11) of Section 89-A of the Code of Civil Procedure has made it obligatory on the Court to issue certificate directing refund of the Court fee in case of settlement of dispute between the parties through mediation process, and such mediation process can be initiated after filing of the written statement by the defendants, in the present Admiralty Suit there is no bar in allowing refund of the Court fees inasmuch as that the instant suit has even not yet admitted by a formal order and no notices have been issued on the defendants;

b) Since Section 7 of the Admiralty Court Act, 2000 has made the provisions of the Court Fees Act, 1870 applicable, the refund of Court fees should be allowed in the instant case in view of the underlining principles of Sections 13, 14 and 15 of the said Court Fees Act.

4. In support of his above submissions, Mr. Hannan relies upon three decisions of our sub-continent, namely **Bhola v. Sardar Muhammad, PLD 1976 Lahore 1268, Jan Mohammad vs. Amolak Ram, AIR 1936, Lahore 301, Krutibasa Nayak vs. Sri Jagannath Mahapravu, AIR 1975, Orissa 211**.

5. To reach a conclusion as to whether the court fees in the instant suit at present stage can be refunded or not, we have examined the relevant provisions of the Admiralty Court Act, 2000, applicable Admiralty Rules, namely Admiralty Rules, 1912, relevant provisions of the Code of Civil Procedure as well as the Court Fees Act, 1870. We have also examined the corresponding provisions of the Original Side Rules of this Court as well as the Calcutta High Court (as amended time to time).

6. It must be noted at the very out-set that there is no specific provision for refund of Court Fees either in the said Admiralty Court Act, 2000 and the applicable Admiralty Rules, 1912. There is also no specific provision in the Admiralty Court Act, 2000 as to the applicability of the provisions of the Code of Civil Procedure except Section 6 of the said Act which provides that the presentation or filing of the plaint (j¡jm¡ lS) in the Admiralty Court shall be done in accordance with the provisions of the Code of Civil Procedure. For all practical purposes, Admiralty Suits before the Admiralty Court in Bangladesh are now being preceeded and disposed of in accordance with the provisions of the said Act of 2000 and the Admiralty Rules, 1912. While Rule 2 of the Admiralty Rules, 1912 has made the said Rules applicable to all suits instituted in the Admiralty Court, Rule 51 of the said Rules provides that in the absence of any provisions in the said Rules regarding any matter, the said Admiralty proceedings shall be regulated by the Rules and practice of the Court in suits brought in it in exercise of its ordinary Original Civil jurisdiction. Therefore, applicability of the Original Side Rules of this Court have been preserved by the provisions under Rule 51 of the Admiralty Rules, 1912 though the Letters Patent of 1865, under the authority of which the said Original Side Rules were framed, have been repealled by the Law Reform Ordinance, 1978. This position of preservation of the Original Side Rules as well as the application of the provisions of the Code of Civ il Procedure in absence of specific provisions in the said Act of 2000 and the Rules of 1912 has been confirmed by this Court in two earlier decisions, namely **King Shipping Trading Company vs. M/S. L.S. Lines and others, 1986 BLD-117 and Multcargo Limited vs. M.V. Poul Barcelona and others, 2 L.G. (2005)-287.**

7. However, in the said Original Side Rules (as we have examined), this Court has not found any specific provision as to the refund of the Court Fees. In such a situation, Rule 61 of the Admiralty Rules 1912 provides the this Admiralty Court has inherent power to make orders under the Ordinary Rules and practice in the absence of the specific provisions in the above mentioned Act and Rules.

8. Keeping in mind the above position, let us now examine the relevant provisions of the Code of Civil Procedure as well as the Court Fees Act, 1870. It appears from Section 89A of the Code, in particular sub-section (11), that in case of mediation under the supervision of the Court, or by the Court, after submission of written statements by the defendants, it has been made incumbent upon the Court to issue certificate allowing refund of the court fees in favour of the concerned parties. Sub-

section (13) of Section 89A of the Code also recognizes the right of the plaintiff to withdraw the suit at any stage under the provisions of the Order 23 of the Code. It further appears that in view of the provisions under Rule-1 of Order 23, a plaintiff is allowed to simply withdraw the suit without any condition. In which case, he will not be permitted to file the suit afresh with the same cause of action. However, in view of the provisions under Rules 2 and 3 of Order 23, if the said suit is withdrawn with a permission of the Court to file the same afresh for any formal defect or any other reasons, the Court may impose condition or costs on the plaintiff. In the instant Admiralty Suit, we are dealing with the former situation which is that a plaintiff has simply withdrawn the suit even before admission of the same. This Court is of the view that the conditions as mandated under Rules-2 and 3 of Order 23 of the Code will not apply here as this situation only relates to simple withdrawal of the suit without any entitlement of the plaintiff to file the same afresh.

9. Now, since Section 7 of the Admiralty Court Act, 2000 has made provisions of the Court Fees Act, 1870 applicable, we may take recourse to the relevant provisions of refund of the Court fees as provided under Sections 13-15 of the said Court Fees Act. The underlining principles of the said provisions are that the parties are entitled to refund of the Court fees if it is found that the apparatus of the Court and its process have not been used for the cause for which the parties have taken recourse to the proceedings of the Court. This underlining principle of the Court Fees Act as well as the provisions under sub-Section (11) of Section 89A of the Code have also been recognized and affirmed in the cases as referred to by Mr. Hannan, in particular the case of **Bhola v. Sardar Muhammad, PLD 1976 Lahore 1268.** In the said case, a Lahore Bench of the Pakistan High Court held that in the absence of specific provisions, the underlining principles of Sections 13, 14 and 15 of the Court Fees Act can be taken recourse to in exercise of the inherent powers of the Court to refund the court fees. The situation before the Lahore Bench was withdrawal of an appeal which was only admitted and did not go further. In that case, the appellant was allowed to refund of court fees though that situation was not specifically covered by the provisions under Sections 13, 14 and 15 of the Court Fees Act. In the said Lahore Bench case, after examining several decisions of the superior courts on the point, the Court reached three major legal conclusions, namely-

> *"(i) The consensus of authorities is that sections 13, 14 and 15 of the Court Fees Act are not exhaustive on the question of the grounds for refund of court-fee;*
>
> *(ii) that the Court has inherent powers to refund the court fee; and*
>
> *(iii) that it is only discretionary with the Court to issue a refund certificate in its inherent jurisdiction. While exercising the discretion, some of the relevant factors which might be considered includes the length of proceedings vis-à-vis the proceedings and hearing of the matter ; the fault if any committed by any party ; and <u>the benefit, if any, derived by the party concerned through the filing of the proceedings"</u>.*
>
> (Underlines supplied)

10. At the time of hearing of this issue, Mr. Hafizullah, learned senior counsel present in Court, has made submissions that in such a situation the Court should also take into consideration whether the party derived any benefit from filing the case itself.

11. In the instant case, it appears that the suit was not even admitted formally and no notices were issued on the defendants. Therefore, so far as the record is concerned, the defendants did not have any knowledge of the suit. The settlement agreement, a copy of which has been furnished before this Court by the plaintiff, does not also make any reference to the instant suit. Therefore, we cannot hold that the plaintiff has derived any benefit from filing of the instant suit.

12. The provision of refund of Court fees though was not present in the Original Side Rules of this Court, which we inherited from the Calcutta High Court, the Calcutta High Court has subsequently in 1974 (vide Notification No. 44 published in the Calcutta Gazette part-1 dated 1st

August, 1974) added a new Chapter, being Chapter VIA, to it's Original Side Rules dealing with "Court Fees on Plaint Etc". Rule- 8 of the said Chapter of the Calcutta High Court Original Said Rules provides as follows:

"8. Where any order is made by the Court for refund of any Court-fees paid by a party or his advocate or advocate acting on the Original Side as the case may be, the Registrar shall grant a certificate in terms of the order made by the Court authorizing the party or his advocate or advocate acting on the Original Side to receive back from the Collector the amount directed by the Court to be refunded."

13. Therefore, it appears that though in case of order of refund of the Court fees under Section 89A it was the Court to issue certificate, the Original Side Rules of the Calcuta High Court has adopted a procedure to issue such certificate by the Registrar authorizing the party or its advocate of the original side to receive back from the Collector the amount of the refunded Court fees.

14. Therefore, since in the instant Admiralty Suit, which has not even gone beyond just filing, by applying the underlining principles of Sections 13, 15 and 16 of the Court Fees Act, 1870 and Section 89A (11) of the Court of Civil Procedure, this Court is of the view that the plaintiff has not at all used the apparatus of this Court, it is entitled to get back the entire Court fees deposited by it, namely Tk. 1,00,000/-(one lac), in the Sonali Bank Limited, Supreme Court Branch, Dhaka through Chalan No. 20 dated 12.03.2015 and, accordingly, a certificate in this regard should be issued by the Registrar/Marshal of this Court in favour of the plaintiff.

15. In view of above legal position and circumstances of the case, we find substance in the application for refund of the Court fees and, accordingly, the same is allowed. Thus, the Registrar/Marshall of this Court is directed to issue a certificate for refund of the aforesaid Court Fees of Tk. 1,00,000/-(one lac) in favour of the plaintiff or its advocate acting on his behalf authorizing the plaintiff or his advocate to receive back from the Collector of Dhaka the said Court fees, namely Tk. 1,00,000/-(one lac), within 30(thirty) days from the date of issuance of such certificate.

2 SCOB [2015] HCD 62

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 11346 of 2014

Khademuzzaman
..... Petitioner

-Versus-

The People's Republic of Bangladesh & others
... Respondents

Mr. Md. Hamidur Rahman, Advocate,

....For the petitioner

Mr. Md. Ashraful Arafat Sufian, Advocate

.....For respondent no. 8

Heard on: 16.06.2015, 25.06.2015 and Judgment on 02.07.2015.

Present:
Mr. Justice Md. Emdadul Huq
&
Mr. Justice Muhammad Khurshid Alam Sarkar

Article 102 of the Constitution:
The above conduct of the petitioner, as to non-disclosure of pendency of the representation before the Board, clearly suggests that he attempted to suppress the said fact before this Court and obtained this Rule by misleading the Court for which he deserves to be penalised. An aggrieved person, who wishes to come to this Court for seeking any remedy, must come with clean hands without attempting to hide any fact inasmuch as this Court in exercising the jurisdiction under Article 102 of the Constitution carries out its duty as an extra ordinary forum, unlike the other ordinary Courts. This Court, in essence, is an equity Court, for, the State has provided this provision in the Constitution for adjudication upon the bonafide claims of the citizens who will not have any forum, including civil Court, tribunal or a quasi-judicial body, for vindication of their rights. If a citizen seeks to abuse the said provision, this Court not only turns down his petition, but also penalises him. ...(Para 12)

JUDGMENT

MUHAMMAD KHURSHID ALAM SARKAR, J:

1. By filing an application under Article 102 of the Constitution, the petitioner questioned the legality and propriety of the Memo no. 2/Hp/732/6527/(5) dated 26.10.2014 (Annexure-F) issued by respondent no. 3 cancelling the Memo no. 2/Gm/732/6100 dated 10.09.2014 (Annexure-E) and, pursuant thereto, issuance of the Memo no. 2/Hp/732/6655/(5) dated 09.11.2014 Annexure-G issued by the same respondent no. 3 directing the Headmaster of the school to submit a proposal for the formation of an Ad-hoc Committee of the school for approval of the Board.

2. It is stated that the petitioner is serving as the acting Headmaster (Headmaster-in-charge) of Bakdokra Adarsha Uchcha Bidyalaya of Mirzaganj under Upazila Domar, District- Nilphamari and respondent no. 8 Jagodish Chandra Barman is the suspended Headmaster, who was suspended vide resolution of the Management Committee dated 21.07.2014, which was conveyed to the said suspended Headmaster on the same day by a letter signed and issued by the Chairman of the Managing Committee. Respondent no. 8 filed Other Class Suit no. 36 of 2014 challenging the above suspension order and the suit is still pending. The petitioner claims that he is performing functions of the Headmaster in absence of respondent no. 8 since the date of his suspension. The tenure of the Management Committee expired on 05.09.2014 and, accordingly, the petitioner, as the acting

Headmaster, took steps to form an Ad-hoc committee for regulating the affairs of the school and, pursuant thereto, respondent no. 3 vide Memo no. 2/Hp/732/6100(5) dated 10.09.2014 directed the petitioner to submit the names of the members of the Ad-hoc committee for approval of the Board. At this stage, respondent no. 5 by his letter dated 22.10.2014 nominated Mr. Robiul Islam, Assistant Teacher, as the representative of the teachers in the said committee, respondent no. 6 vide his letter dated 22.10.2014 nominated Mr. Md. Monirul Islam as the representative of the guardian category and the Member of Parliament by his letter dated 12.10.2014 nominated Mr. Md. Irtazul Islam as the Chairman of Ad-hoc committee. With the aforesaid names, the petitioner on 27.10.2014 submitted the said committee before the Board for its approval. Subsequently, respondent no. 3 vide memo no. 2/Hp/732/6527(5) dated 24.10.2014 withdrew the above-mentioned previous letter dated 10.09.2014 under memo no. 2/Hp/732/6100(5) dated 10.09.2014. Respondent no. 3, then, issued memo no. 2/Hp/732/6655/(5) dated 09.11.2014 asking the suspended Headmaster to submit the names of the persons to be included in the Ad-hoc committee so that the Board may approve it.

3. The petitioner being aggrieved with the withdrawal of the above-mentioned previous letter dated 10.09.2014 and issuance of the subsequent letter dated 09.11.2014, wherein the Headmaster was addressed and asked to submit the names of the Ad-hoc committee, approached this Court and obtained this Rule.

4. Respondent no. 8 contested this Rule and by filing affidavit-in-opposition contending, *inter-alia*, that he is no longer a suspended teacher and presently discharging his duty as the Headmaster of the school. The Chairman of the immediate past Managing Committee, which had earlier suspended him, had later on withdrawn the suspension order during the tenure of the said committee having asked him to resume his duties as the Headmaster. It is stated that before placing him on suspension, some notices were issued by the Chairman of the Managing Committee and this respondent replied to all the notices, but when the Chairman of the said Managing Committee was not receiving the replies, he sent the same by registered post to the Chairman of the Managing Committee. Eventually, a letter was issued on 21.07.2014 by the Chairman of the Managing Committee suspending this respondent and, at that point of time, he did not have any option other than taking resort to the Court and, accordingly, he filed Other Class Suit no. 36 of 2014 before the Court of learned Assistant Judge, Domar, Nilphamari.

5. Mr. Md. Hamidur Rahman, the learned Advocate appearing for the petitioner, takes us through the annexures to the writ petition as well as the supplementary-affidavit and submits that these papers strongly suggest that respondent no. 8 still remains on suspension and, thus, he is not in his service and, therefore, issuance of the letter dated 09.11.2014 by respondent no. 3 is a whimsical and arbitrary decision. In an endeavour to vitiate the operation of annexure-H, filed by respondent no. 8 before this Court, he submits that the Chairman of the Managing Committee alone has withdrawn the suspension of respondent no. 8 as there was no resolution of the past Managing Committee to undo the previous resolution dated 21.07.2014 by which he was suspended. He refers to annexure- J to the supplementary-affidavit and contends that till to-day the petitioner is serving as the acting Headmaster and, accordingly, argues that the statement made by respondent no. 8 claiming that he is functioning as the Headmaster is totally false. He next submits that respondent no.3 ought to have issued show cause notice to the petitioner before issuance of the impugned letter dated 09.11.2014 and thereby could have ascertained the true position of respondent no. 8.

6. By making the aforesaid submissions, the learned Advocate for the petitioner prays for making the Rule absolute.

7. Per contra, Mr. Md. Ashraful Arafat Sufian, the learned Advocate appearing for respondent no. 8, submits that the order of suspension was taken by the Chairman of the Managing Committee in violation of Rule 13(1) of the Recognized Non-Government Secondary School Teachers (Board of Intermediate and Higher Secondary Education, Rajshahi) Terms and Conditions of Service Regulation, 1979. However, subsequently, the said suspension order having been withdrawn by the same person of the Managing Committee of Bakdokra, Nilphamary, there cannot be any grievance by

the petitioner. He refers to annexure-1 and submits that when the Chairman of the Managing Committee directed the petitioner to return to his original post of the Assistant Headmaster upon informing the withdrawal of suspension of the respondent no. 8 on 04.09.2014, the petitioner did not raise any objection thereto, neither before the Chairman of the managing committee nor before the Board. Finally, he submits that the petitioner does not have any locus-standi to file the instant writ petition inasmuch as the issue with regard to formation of an Ad-hoc committee is an exclusive function of the Board. In an endeavour to elaborate his submission on this point, he submits that a committee would be formed only after the approval of the Board and the Board's decision and order is to be followed and complied with by the educational institution, otherwise, the Board is empowered to cancel the committee. He submits that the petitioner, being an acting Headmaster, does not have anything to be aggrieved with the impugned memo in the light of the fact that the acting Headmaster or Headmaster, whoever will be performing the functions of the Head of the institution, will simply be discharging the secretarial duty in the said committee holding the ex-officio post of the Member Secretary of the said committee. Finally, he submits that the petitioner ought to have approached the Board for resolving the dispute before directly jumping to this Court given that had the Board authority been updated with the contentious facts of both the parties, there would have been effective resolution of the matter.

8. After hearing both the sides, it appeared to us that the grievance of the writ petitioner is actually with regard to reinstatement of the suspended Headmaster by the Chairman of the immediate past Managing Committee, for, it transpires that issuance of annexure-G being a letter dated 09.11.2014, by which the Board has asked the Headmaster to send a proposal for formation of an Ad-hoc Committee, prompted the writ petitioner to approach before this Court.

9. Admittedly, the Chairman of the immediate past Managing Committee had suspended the Headmaster vide his letter dated 21.07.2014 and the same person, being the Chairman of the Managing Committee, has reinstated him on 04.09.2014 before the tenure of the said Managing Committee expired. The writ petitioner's claim is that the suspension of the Headmaster was done properly, but reinstatement of the Headmaster was done without observing the legal procedure.

10. Since the writ petitioner was serving as the acting Headmaster, the copy of both the resolutions (first one is- adopting resolution for suspension of the Headmaster and subsequent one is- withdrawal of the suspension) are supposed to be under his custody in the light of the fact that he was performing the functions of the Member Secretary of the Managing Committee by dint of holding the post of Headmaster-in-charge. The Headmaster would not be in a position to produce the subsequent resolution before this Court, if the writ petitioner does not cooperate with the former. In order to establish or controvert the writ petitioner's claim that there was no resolution of the Managing Committee, evidence of the Chairman and other members of the past committee are required to be taken. Also, whether the Headmaster is currently performing the functions of the Headmaster of the Bakdokra Model High School, appears to be a disputed question of fact in the light of the fact that while the Board by issuing annexure-G confirms that respondent no. 8 is currently carrying out the duties of the Headmaster of the said school, the petitioner is seeking to dispute the said fact by producing a piece of paper from the Upazilla Education Officer. The above scenario of this case led us to express our view in the open Court that the first option for the petitioner was either to approach the Board with a request to hear the dispute in presence of the writ petitioner, the Headmaster, Chairman and other members of the Committee and his second option was to seek declaration from the civil Court that the reinstatement of the Headmaster by the Chairman of the past Managing Committee was illegal, and, accordingly, at this juncture, this Court asked the learned Advocate for the petitioner whether the writ petitioner had availed the said forums. In reply thereto, the learned Advocate informed us that no civil suit has been instituted challenging the impugned memos and, also, he is not aware of any representation made by the petitioner to the Board.

11. However, on the date of delivery of this judgment, the learned Advocate for the petitioner informed this Court that the petitioner indeed has made a written representation to the Chairman of the Board on 13.11.2014, but the same has not been disposed of and in support of his submission a

photo copy of the said application was produced before us for our perusal and consideration. The learned Advocate for the petitioner could not satisfactorily explain as to why he did not produce this paper by way of annexing the same to the writ petition or by making any statement in the writ petition. Had this information been available before this Court at the time of issuance of the Rule, this Court instead of issuance of the Rule, would have been in a position to direct respondent no. 2 to dispose of the same as, in our opinion, there is no legal issue for examination of this Court, until a decision is made by the concerned authority on the factual issue as to whether the Headmaster's suspension has been withdrawn at all.

12. The above conduct of the petitioner, as to non-disclosure of pendency of the representation before the Board, clearly suggests that he attempted to suppress the said fact before this Court and obtained this Rule by misleading the Court for which he deserves to be penalised. An aggrieved person, who wishes to come to this Court for seeking any remedy, must come with clean hands without attempting to hide any fact inasmuch as this Court in exercising the jurisdiction under Article 102 of the Constitution carries out its duty as an extra ordinary forum, unlike the other ordinary Courts. This Court, in essence, is an equity Court, for, the State has provided this provision in the Constitution for adjudication upon the bonafide claims of the citizens who will not have any forum, including civil Court, tribunal or a quasi-judicial body, for vindication of their rights. If a citizen seeks to abuse the said provision, this Court not only turns down his petition, but also penalises him.

13. Accordingly, we are of the view that this is a fit case to penalise the petitioner for his mysterious conduct of non-production of the representation dated 13.11.2014 filed by him before the Board.

14. However, for proper resolution of the dispute, we are of the view that respondent no. 2 should be directed to dispose of the petitioner's representation within a stipulated time upon hearing the petitioner, Headmaster and the Chairman & other members of the immediate past committee.

15. In the result, the Rule is discharged with a cost of Taka 10,000/- (Ten Thousand) to be paid by the petitioner in the national exchequer by way of submitting Treasury Challan within 30 (thirty) days. The order of stay granted at the time of issuance of the Rule is hereby vacated.

16. We direct respondent no. 2 to dispose of the petitioner's application dated 13.11.2014 within 30 (thirty) days from the date of receipt of this judgment by asking the writ petitioner, the Headmaster (respondent no. 8) and if necessary the Chairman & other members of the immediate past Managing Committee.

17. Office is directed to communicate this order to respondent no. 2 at once.

18. Respondent no. 2 is directed to communicate its decision on the petitioner's application dated 13.11.2014 to the writ petitioner and also to respondent no. 8 immediately after disposing of the said application.

2 SCOB [2015] HCD 66

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ petition No. 12211 of 2012

Md. Kamal Mia and others
.....Petitioners
-Versus-

Ministry of Communication and others
..... Respondents.

Mr. ABM Siddiqur Rahman Khan Advocate.
.... For the petitioners.
None appeared
….For the respondents.

Heard on 25.02.2015
Judgment on 12.03.2015

Present:
Mr. Justice Quazi Reza-Ul Hoque
and
Mr. Justice Abu Taher Md. Saifur Rahman

Legitimate Expectation:
On the basis of several decisions passed by our Apex Court, now it has been established that generally the legitimate expectation may arise-

- **I. if there is an express promise given by a public authority; or**
- **II. because of the existence of a regular practice which the claimant can reasonably expect to continue;**
- **III. Such an expectation must be reasonable.**

However, if there is a change in the policy or in the public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise. ...(Para 9 & 10)

JUDGMENT

Abu Taher Md. Saifur Rahman,J

1. This Rule was issued on an application calling upon the respondents to show cause as to why a direction should not be given upon the respondents to absorb the petitioners in the revenue Sector and /or to make their job permanent by implementing the agreement dated 16.11.92 (annexure-"A") and 22.11.2000 (annexure "C") respectively and in the light of the judgement and order dated 04.05.2010 in writ petition No. 4856 of 2009 and /or pass such other or further order or orders as to this Court may seem fit and proper.

2. For the purpose of disposal of the Rule the relevant facts may briefly be stated as follows:

The petitioners have been appointed in the service of Bangladesh Railway as Wayman, Gate keeper, Valbeman, Khalashi etc on temporary basis. During their service an agreement was executed between the Ministry of Communication and the leaders of the Sramik Karmachari Sangram Parishad dated 16.11.1992 wherein it has been stated in clause 3 and 4 that the temporary employees would be regularized upon completion of five years service in regard to their respective post. Thereafter on the basis of the said agreement the concerned authority absorbed 18 employees under the revenue budget. Subsequently another agreement was also executed between the same dated 22.11.2000. In order to execute the said contract a committee was formed to prepare a final list from the TLR/Substitute and Project Employees of Eastern Zone after scrutinizing with necessary recommendation vide letter dated 04.12.2009. After scrutiny, the said committee finalized a list of 151 employees among the TLR/ Substitute and Project Employees. After long time the Cabinet Division issued a Government order No. MPB/Ka:B:Sha:/Ka-Pa-GA-11/2011-111 dated 03.05.2003 wherein it is mentioned in

clause No. 5 that after 3 years of service the temporary posts may be made permanent. Subsequently at the initiative of the Ministry of Communication a meeting was held on 29.08.2004 and decision was taken for requesting the concern authority for absorbing the temporary employees under the revenue set up. But no step was taken as yet regarding the said matter. In these circumstances, some of the temporary employees of Bangladesh Railway filed several writ petitions being No. 8456 of 2009, 2263 of 2011 and 5265 of 2011 before the High Court division. After hearing, those Rules were made absolute. Thereafter the concerned authority on the basis of the said judgement absorbed all petitioners of those writ petitions under the revenue set up. But so far the instant writ petitioners are concerned no step was taken as yet. Being aggrieved, the petitioners have preferred this application before this Court and obtained the instant Rule.

3. This Rule is being contested by respondent No.2-6 by filling an affidavit-in-opposition wherein it has been stated that the petitioners have been appointed in the service of Bangladesh Railway on daily and temporary basis. Regarding the matter of absorption a contract has been made between the authority and leader of Bangladesh Railway Sramik Karmachari Sangram Parishad on 16.11.1992. But there was a condition that the employee would be regularizes from 1st January of 6th year who had been recruited before 16.11.1992 and working uninterruptedly 5 years up to 25.01.2000. Accordingly the concerned authority regularised such 18 employees who worked uninterruptedly for the period of 5 years. It is further stated that subsequently another contract has been made between the Ministry of Communication and the Sramik Karmachari Sangram Parisha dated 22.11.2000. Subsequently a committee formed in order to execute the said contract and prepared a list of 151 persons. It is also stated that though several meeting was held with the concerned Ministry but no final approval has been made due to want of necessary papers. As result it is not possible to regularize the temporary employees of Bangladesh Railway. It is further stated the petitioners has no locus stand to invoke the writ jurisdiction, since the proper forum lies before the Administrative Tribunal and as such the instant Rule is liable to be discharged.

4. Mr. ABM Siddiqur Rahman Khan, the learned advocate appearing on behalf of the petitioners having led us through the writ petitions and other connected papers mainly submits that the petitioners are entitled to be absorbed under the revenue budget on the ground of legitimate expectation. In support of his contention he pointed out that the petitioners have been appointed in the service of Bangladesh Railway on temporary basis. During their service the concerned authority agreed by their agreements dated 16.11.1992 and 22.11.2000 that after completion of five years service they would be regularized under the revenue setup as evident from annexure “A” and “C” of the writ petition.

5. He further contended that this matter has already been settled by this Court in writ petitions No. 4856 of 2009, 2263 of 2011 and 5265 of 2011 filed earlier by some other temporary employees of Bangladesh Railway regarding the same matter. Accordingly pursuant to the judgement of those writ petitions, the petitioners are required to be absorbed under the revenue set up on the ground of legitimate expectation.

6. As against this no one appears to oppose the Rule.

7. We have considered the submissions of the learned Advocate for the petitioners and perused the writ petition and other connected papers thoroughly.

8. The only points for determination in this Rule is that whether the petitioners are entitled to be absorbed under the revenue budget on the ground of legitimate expectation.

9. In order to appreciate the contention raised by the learned advocate for the petitioners, it is necessary to examine the relevant doctrine of legitimate expectation. Legitimate expectation cannot be pressed as matter of legal right. It must be founded on sanction of law or custom or an established procedure followed in natural and regular sequence. Principle of legitimate expectation can be invoked only in a case where the aggrieved person was deprived of some benefit or advantage which in the past had been permitted to be enjoyed until he was given reasons for its withdrawal and

opportunity to comment on these reasons because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representation against the withdrawal. On the basis of several decisions passed by our Apex Court, now it has been established that generally the legitimate expectation may arise-

(i) if there is an express promise given by a public authority; or

(ii) because of the existence of a regular practice which the claimant can reasonably expect to continue;

(iii) Such an expectation must be reasonable.

10. However, if there is a change in the policy or in the public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise.

11. The principle of legitimate expectation is still at a stage of evolution. The principle is at the root of the rule of law and requires regularity, predictability and certainty in the government's dealing with the public. The substantive part of the principle is that if a representation is made that a benefit of substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced. The doctrine of legitimate expectation in substantive sense has been accepted as a part of law of this country. The decision maker can normally be compelled to give effect to his representation in regard to expectation based on the previous practice or past conduct unless the same overriding public interest comes in the way.

12. So far the question of legitimate expectation is concerned, our Appellate Division after reviewing all previous judgments and rules provide a guide lines in the case of Chief Engineer, the Local Government of Engineering Department and others vs Kazi Mizanur Rahman and others reported in 17 BLC (AD) 2012 at page 91 which are as follows:

(i) "Whenever any vacancy in LGED is created in the revenue set up, it shall consider for absorption of employees or officers of the development project within the meaning of section 2(ga) of the Rules, 2005, if the project in which she/working is completed subject to the condition that such employee or officer has requisite qualifications for the said post.

(ii) Whenever a vacant post is created in the revenue budget, the LGED shall absorb/transfer an employee or officer from the development project mentioned in clause (1) to fill up that post in accordance with Rules of 1985 and the ECNEC'S decision dated 10th January, 2008.

(iii) An officer or employee shall be absorbed if she/he was appointed in the development project within the meaning of rule 2(ka) of Rules, 2005 in accordance with the procedures prescribed for appointment in public employment.

(iv) An officer or employee must have requisite qualifications for the post in which he is seeking absorption.

(v) An officer or employee must have continuity in service in the project in which he is working.

(vi) An officer or employee must have satisfactory service record before his case is considered for regularization in the revenue budget.

(vii) If an officer and employee whose rank and status does not relate to the posts advertised by the impugned notifications on the day of its publications, such officer or employee would not be eligible for consideration for absorption.

(viii) The employees and officers who have been working in the development projects mentioned in clause (1) on monthly pay basis would only be eligible for consideration for absorption in the revenue budget.

(ix) Unless and until vacancies in the revenue budget in the LGED are created, the employees and officers of the development projects mentioned in clause (1) cannot claim as of right to be absorbed in the revenue budget;

(x) While considering and selecting an employee or officer of the development project for absorption in the revenue budget, the appointing authority shall maintain strictly the prevailing quota system for employment in the public employment being followed by the Government.

(xi) The LGED shall consider the cases of those working on master roll basis for absorption in the revenue budget by phases if they have requisite qualifications subject to availability if vacancies according to their seniority."

13. In view of the aforesaid principal of legitimate expectation and the guide lines passed by our Appellate Division, now we will see whether the petitioners are entitled to be absorbed in their respective post under the revenue budget.

14. On perusal of the instant writ petition it transpires that the petitioners have been appointed in different post on temporary basis in the service of Bangladesh Rail way. As per agreement dated 16.11.1992 as contained in annexure "A" it appears that during service of the petitioners an agreement was executed between the Ministry of Communication and the leaders of Saramik karmachari Sangram Parishad wherein it has been stated in clause 3 and 4 that the temporary employees would be regularized upon completion of 5 years service in regard to their respective post. When a public authority has promised to follow a certain procedure, it should be implement fairly for the interest of good administration. On the basis of the agreement dated 16.11.2011 the concerned authority has already absorbed 18 temporary employees under the revenue budget as evident from annexure "B". So the agreement dated 16.11.1992 has acted upon. On perusal of annexure "C" it also transpire that that subsequently another agreement was executed between the Ministry of Communication and the Somik Saramik karmachari Sangram Parishad dated 22.11.2000 wherein it is stated that all temporary employees would be regularized under the revenue budged. Moreover this matter has already been settled by this Court in writ petitions No. 4856 of 2009, 2263 of 2011 and 5265 of 2011 which were filed by other temporary employees of Bangladesh Railway regarding the same matter.

15. Under the aforesaid circumstances and the reasons as stated above we found substance in this Rule

16. In the result the Rule is made absolute without any order as to cost.

17. The respondents are hereby directed to consider the case of the petitioners subject to vacancy, if they are not found to be otherwise incompetent by law, in the light of the agreement dated 16.11.1992 and 22.11.2000 (annexure "A" and "C") before taking any steps of appointment afresh.

18. Let a copy of this judgment be sent to the respondents for information and necessary actions.

2 SCOB [2015] HCD 70

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 8152 OF 2009.

Msaharaf Hossain
Son of Sadek Dewan, Of 31/8. Block-C, Tajmohal Road, Mohammadpur Road, Mohammadpur, Dhaka .....Petitioner.

-Versus-

Dhaka City Corporation, represented by the Mayor, Nagar Bhaban, Fulbaria, Ramna, Dhaka and others ....Respondents.

Mr. Md. Abdul Malek, Advocate
... For the Petitioner.

Mrs. Sufia Ahmed with
Mrs. Afsana Rashid, Advocates
...For the Respondent No.2.

Heard on the 3rd September,2015.
&
Judgment on the 6th September,2015.

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

Article 102 of the Constitution:
Now it is well settled that the power of the High Court to issue an appropriate writ under Article 102 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent of the acquiescent and lethargic. If there is inordinate delay on the part of the Petitioner in filing a Writ Petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustice. ...(Para 8)

JUDGMENT

Mahmudul Hoque,J.

1. In this application under Article 102 of the Constitution of Bangladesh this Rule Nisi has been issued on 24.11.2009 at the instance of the petitioner calling upon the respondents to show cause as to why they shall not be directed to issue final allotment letter in favour of the petitioner in respect of the shop Room No. 190, 2nd floor , at Bonalata Kacha Bazar of Dhaka New Market Complex or any shop in the 2nd floor of the said Bonalata Kacha Bazar of Dhaka New Market Complex which is lying vacant and waiting for allotment and/or such other or further order or orders as to this Court may seem fit and proper.

2. Facts relevant for the disposal of this Rule is, in brief, are that the Respondent No. 1 Dhaka City Corporation published an advertisement on 14.8.1984 in the Daily "Janata" on 20.8.1984 and 21.9.1984 in the "Daily Ittefaq" respectively inviting application for allotment of shops in the Dhaka New Market Complex. The Petitioner as an evictee and affected person in response to the advertisement published in the dailies mentioned above applied for allotment of a shop by depositing an amount of Tk.20,000/- on 09.09.1984 in the account of Respondent No. 1 by a Pay Order dated 05.09.1984. Thereafter the Petitioner on a number of occasions requested the Respondent No.1 for allotment of a shop in favour of the petitioner but in vain. Subsequently the Petitioner by applications dated 15.7.2008 and 18.08.2009 requested the Respondent No.1 for allotment of shop No. 190 lying

vacant in the 2nd floor of the same market but the Respondent No.1 paid no heed to the request of the Petitioner. At this stage the Petitioner moved this Court by filing this writ petition and obtained the present Rule and Order of Stay.

3. The Respondent Nos. 1-3 contested the Rule by filing Affidavit-in-Opposition denying all the material allegations made in the writ petition contending, inter alia, that the Petitioner in response to the advertisement of 1984 applied for allotment of a shop in the New Market Complex by depositing a Pay Order for Tk= 20,000/- but after submission of the application there arise serise of litigation including contempt petition against the Respondent No.1 and in a Suit the Respsosndent No.1 was restrained by an order of injunction from allotting the shops of the market. For that reason the process of allotment of shops could not be materialized. Consequently, the allotment committee of the corporation has decided to return back the Pay Order to the applicants. Accordingly, all the Pay Orders were returned back to the applicants including the Petitioner. The Petitioner received back the Pay Order on 22.11.1989. Subsequently, Respondent No.1 after disposal of the cases again published notification in the Daily in the year 2000 inviting fresh application from the interested persons for allotment of shops in the New Market Complex. But in response to that advertisement the Petitioner did not submit any application seeking allotment of shop in the said market complex. Pursuant to the advertisement published in the year 2000 the persons who applied for the allotment of shops, the allotment committee by its decision dated 17.10.2006 allotted the shops in their names. In this situation since the Petitioner has taken back the money deposited in the year 1984 by Pay Order and having failed to apply for allotment of shop in the year 2000 afresh is not entitled to get any allotment. In the absence of any application for allotment of a shop afresh and acceptance of the same by the corporation the Petitioner cannot claim any right of allotment and as such the Rule is liable to be discharged.

4. Mr. Md. Abdul Malek, the learned Advocate appearing for the Petitioner submits that the Petitioner is an affected person and he is a member of the shop owners Samity and as an affected shop owner he is entitled to get allotment of a shop in the New Market Complex. He also submits that the Petitioner applied in response to a notification published in the Daily "Janata" dated 14.8.1984, Daily "Ittefaq" dated 20.8.1984 and 21.9.1984 and deposited Tk.20,000/-with the Respondent No.1 as per said advertisement. It is also argued that the Petitioner did not take back the Pay Order for the said amount deposited with the Respondent No.1 till today and as such the Petitioner is entitled to get allotment of a shop as prayed for.

5. Mrs. Sufia Ahmed, the learned Advocate appearing for the Respondent Nos. 1-3 submits that the Petitioner has come with the present writ petition after a long period of 25 years to enforce his right under writ jurisdiction, as such he is not entitled to get any relief. She also argued that from the annexures as annexed to the petition, it would be evident that the Petitioner submitted an application with deposit of an amount of Tk.20,000/- in the year 1984 in response to the notification dated 14.08.1984 and 20.08.1984. Subsequently, the process of allotment was abandoned due to various legal impediment. Consequently, all the applicants including the Petitioner took back the Pay Orders deposited with the Respondent No. 1. As such the petitioner acquired no right entitling him to get allotment of the shop for which he applied for. She also submits that the Corporation has not accepted the offer of the Petitioner in writing and as such the Petitioner acquired no right in law to get allotment of a shop in the market complex. Moreover, the Petitioner submitted no application seeking allotment of a shop afresh in response to the notification published in the year 2000 and as such the Respondent No. 1 is under no legal obligation to allot a shop in favour of the Petitioner in the absence of any application and deposit of earnest money like others. In support of her submissions she referred to the cases of Bangladesh Vs. Chairman, Court of Settlement of Bangladesh and another reported in 48 DLR (HC) 502, Jagannathpur Matshajibi Samabaya Samity Ltd. Vs. Lakshmanpur Fisherman Co-operative Society Ltd. and others reported in 1986 BLD(AD) 326, Mizan Howlader Vs. Bangladesh and another reported in 48 DLR (1996) 91 and Sahana Chowdhury (widow) and others Vs. Md. Ibrahim Khan and another reported in 21 BLD (AD) 79.

6. Heard the learned Advocates for the parties, perused the Application, Affidavit-in-Opposition and annexures annexed thereto.

7. In the instant Rule we may first consider the question of lachs or delay in filing the Writ Pertition because that is the question which is required to be decided in the instant Rule. Admittedly, the Petitioner applied for allotment of a shop in the year 1984. Said process of aucion subsequently abandoned for the reason of various litigation and order of injunction against the Respondent. The Petitioner for a long period remained silent and even not applied afresh when the Respondent published notice in the dailies in the year 2000 inviting application from the interested persons for allotment of shops.

8. Now it is well settled that the power of the High Court to issue an appropriate writ under Article 102 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent of the acquiescent and lethargic. If there is inordinate delay on the part of the Petitioner in filing a Writ Petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustice.

9. We do not think it necessary to burden this judgment with reference to various decisions of this Court where it has been emphasised time and again that where there is inordinate and unexplained delay the Court would decline to interfere even if the Petitioner has a good case. Accordingly, this Court refused to grant relief to the Petitioner on the ground that the Writ Petition had been filed by the Petitioner after 25 years.

10. On a consideration of the matter we think that apart altogether from the merits of the other grounds for rejection. The inordinate delay in preferring the calim before the Respondents as also the delay in filing the Writ Petition before this Court should, by themselves pursuade us to decline to interfere.

11. Apart from this, we find that the Petitioner merely submitted an application in response to an advertisement published in the dailies by the Respondent No.1 in the year 1984 inviting application from the interested persons for allotment of shop. It is now well settled that mere submission of application does not entitle the Petitioner to claim allotment of a shop as of right unless the application of the Petitioner is accepted by the authority and communicated such acceptance in writing to him. But in the present case no such communication was made by the Respondent No. 1 to the Petitioner and as such no right in favour of the Petitioner has accrued entitling him to get allotment of the shop.

12. In view of the above observations we do not find any merit in this Rule as well as in the application of the Petitioner.

13. In the result, the Rule Nisi is discharged. However, without any order as to costs.

14. The Order of stay granted at the time of issuance of the Rule is hereby recalled and stand vacated.

15. Communicate this Order at once.

2 SCOB [2015] HCD 73

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION N0. 8068 of 2005

PHP Steels Mills Limited
... Petitioner
-Versus-

The Commissioner, Customs Bond Commissionerate, Police Station- Double Mooring, Chittagong & others.
.... Respondents

Mr. Abdulla M. Hasan, Advocate
With
Mr. Ramjan Ali Sikder, Advocate
…… for the petitioner.
Mrs. Israt Jahan, D.A.G
Mrs. Nurun Nahar, A.A.G
.....for the Respondents.

Heard and Judgment on: 07.09.2015.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice J.N. Deb Choudhury.

The question whether a statute operate retrospectively, or prospectively only, in one of legislative intent. In determining such intent, courts observe a strict rule of construction against a retrospective operation, and indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it, to operate prospectively only and not retroactively. However, a contrary determination will be made where the intention of the legislature to make the statute retroactive is stated in express terms, or is clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously shown by necessary implication or terms which permit no other meaning to be annexed to them, and which preclude all question in regard thereto, and leave no reasonable doubt thereof. ...(Para 13)

JUDGMENT

J.N. Deb Choudhury, J :

1. Rule Nisi has been issued calling upon the respondents to show cause as to why the impugned actions of the respondents in not making final assessment of Hot Rolled Sheet in Coil imported under Letter of Credit No. 5645043505 dated 14.02.2005 (Annexure-A) and warehoused under the in-bond Bills of Entry being No. C-141257, C-141259, C-141263 and C-141260 all dated 23.05.2005 (Annexure- F to F-3) and withholding assessment of the said imported goods should not be declared to have been passed without lawful authority and why the respondents should not be directed to make final assessment of the petitioner's imported goods at the rate of 6% pursuant to SRO No. 248 dated 16.08.2005 and return the bank guarantee Nos. 11/2005, 12/2005, 13/2005 and 14/2005 representing 7.5% of the Customs Duty already furnished by the petitioner and received by the respondents within a specific period of time and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Relevant facts for disposal of the Rules, in brief, are that, the petitioner engaged in the business of manufacturing C.R. Coil from its imported raw material Hot Rolled Steel Sheet Coil. In course of its business, the petitioner company opened a letter of credit being LC No. 5645-043505 dated 14.02.2005 to import 5000 metric ton of its raw materials, Hot Rolled Steel Sheet in Coil from korea for an amount of US$ 3,420,000.00. The said imported goods arrived at Chittagong under Commercial Invoices No. ISB 5A3537K01, ISB5A3537K02, ISB5A3537K03, ISB5A3537K04 all dated 25.04.2005 and the related Bill of Lading being registration No. KZGN 001 to KZGN 004 dated 01.05.2005. The petitioner company was granted bonded warehouse facility in accordance with the provisions of the Customs Act. The petitioner imported the huge quantity of raw materials for its

factory so that the petitioner may ex-bond and release such quantity of goods as and when required for its factory and also pay the import duty thereon. At the time of in-bond of the imported goods, the statutory rate of import duty was at 7.5% as stated in the First Schedule of the Customs Act. The petitioner company submitted all the shipping documents including the in-bond Bills of Entry No. C-141257, C-141259, C-141263 and C-141260 all dated 23.05.2005 and the Customs authorities provisionally assessed Customs Duty representing 7.5% of the Import Duty. Thereafter the petitioner company furnished a bank guarantee Nos. 11/2005, 12/2005, 13/2005 and 14/2005 for an amount of Tk. 1,15,39,252.12, 1,17,60,416.43, 1,15,60,256.18 and 1,14,66,388.38 respectively and in-bonded its imported raw materials. The respondent No. 5, Ministry of Finance, by publishing a Gazette Notification being S.R.O No. 248-Ain/2005/2086/Shulka dated 16.08.2005 reduced the rate of customs duty from 7.5% to 6% for the imported goods. Thus the present rate of customs duty for the imported goods is 6% which is applicable for the petitioner's imported goods. It has been further stated that the amendment made in section 3 of the Finance Act, 2005 which came into force from 1st July, 2005 has no manner of application for the petitioner's imported goods. It has also been stated that in continuation of manufacturing process, required imported raw materials and thus for release/removal of imported goods from the in-bond warehouse. But the customs authorities refused to assess and release the said imported in-bond goods and orally informed that the in-bond imported goods of the petitioner would be assessed on the basis of 7.5% referring to the provisions of section 3 of the Finance Act, 2005.

3. Being aggrieved, the petitioner has come to this Court and obtained the Rule Nisi along with an interim order to release the said goods on payment of customs duty at the rate of 6% in Cash (pursuant to S.R.O No. 248 dated 16.08.2005) and furnishing a fresh bank guarantee on the difference between invoice value and the valued fixed by S.R.O. No. 248 dated 16.08.2005.

4. No affidavit-in-opposition has been filed on behalf of the respondents.

5. Mr. Abdullah M. Hasan, the learned advocate for the petitioner takes us through the writ petition and annexures thereto and submits that the petitioner imported the stated goods and in-bonded the same on 23.05.2005 long before passing the Finance Act, 2005, which came into force from 1st July, 2005 and as such the amendment of the provisions of section 30 of the Customs Act would not apply on the imported goods already in-bonded of the respective petitioners in compliance of the provisions of the Customs Act. Mr. Hasan further submits that vide Circular being S.R.O. No. 248-Ain/2005/2086/Shulko, which was issued pursuant to section 19 of the Customs Act and reduced the rate of import duty from 7.5% to 6% shall apply for the imported goods of the respective petitioners as on the date on which the goods will actually be removed from the warehouse. In view of such position Mr. Hasan finally submits that the action of the respondents in not making final assessment of the stated goods pursuant to S.R.O No. 248 dated 16.08.2005 are liable to be declared to have been taken without any lawful authorities and are of no legal effect and accordingly prays for making the Rule absolute.

6. Mrs. Israt Jahan, the learned Deputy Attorney General on behalf of the respondents submits that the writ petition involves disputed question of fact which cannot be decided by the court and the writ petition is not maintainable as there is alternative remedy and accordingly, prays for discharging the Rule.

7. We have heard the learned advocate for the petitioner and the learned Deputy Attorney General for the respondents and perused the writ petition along with the annexures, and other materials on record.

8. The points has to be decided, whether the amendment of clause (b) to section 30 of the Customs Act vide the Finance Act, 2005 and the reduced duty as per S.R.O. No. 248 dated 16.08.2005 are applicable to the petitioner's imported goods.

9. For better understanding we like to quote the relevant section 30 of the Customs Act before its' amendment as under:

"30. **Date for determination of rate of duty and tariff value of imported goods**- The rate of duty and tariff value, if any, applicable to any imported goods, shall be the rate of duty and tariff value in force:

(a) In the case of goods cleared for home consumption under section 79, on the date a bill of entry is presented under that section and the bill of entry number is allocated thereto.

(b) In the case of goods cleared from a warehouse for home consumption under section 104, on the date on which the goods are actually removed from the warehouse; and

(c) In the case of any other goods, on the date of payment of duty: Provided that if a bill of entry is presented in anticipation of arrival of a conveyance by which the goods are imported, the relevant date for the purpose of this section shall be the date on which the manifest of the conveyance is delivered after its arrival."

10. By section 3 of the Finance Act, 2005 clause (b) to section 30 of the Customs Act has been amended in the following term:

"on which the goods are actually removed from the warehouse" শব্দগুলির পরিবর্তে "a bill of entry was presented under section 79 and the bill of entry number was allocated thereto" f¢ËaØq¡¢fa হইবে।"

11. From a plain reading of clause (b) to section 30 of the Customs Act before its amendment shows that the Customs duty is applicable for the imported goods of the petitioner was the date on which the goods actually removed from the warehouse. Had it been so that no amendment made to clause (b) to section 30 of the Customs Act, the petitioners have to pay the prevailing Customs duty on the date, when the goods are actually removed from the warehouse. Now the question is whether the amendment of clause (b) to section 30 of the Customs Act would be applicable to the petitioners' imported goods? Admittedly the petitioner after import of the goods submitted bill of entry before the amendment of clause (b) to section 30 of the Customs Act came into force. It is the consistent view of our Apex Court that until specific intention expressed in the amendment made giving its retrospective effect the said amendment shall be always prospective in its force. In the case of Registrar D.U. Vs. Dr. Sajjad Hossain, reported in 1 BLD (AD) 348 Their Lordships held that, *"If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only"*. In the decision of Assessing Officer, Narayanganj Range and others vs. Burmah Eastern Limited, 1 BLD (AD) 450 their Lordships also held that, "*ordinarily a statutory provision is prospective in its operation and retrospective effect cannot be given, unless such effect is given to it in the Statute itself, either expressly or by necessary implication."*

12. In the case of Motiur Rahman and others Vs. Chowdhury Md. Mahfuzul Islam and others, 55 DLR (AD) 104, our Apex Court also held that, "*The general rule of law being, that unless there is a clear indication from the wording of the statute it is not to receive a construction retrospective in effect. The cardinal principle of construction is that every statute is prima facie prospective unless it is expressly, or by necessary implication, given a retrospective effect."*

13. The question whether a statute operate retrospectively, or prospectively only, in one of legislative intent. In determining such intent, courts observe a strict rule of construction against a retrospective operation, and indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it, to operate prospectively only and not retroactively. However, a contrary determination will be made where the intention of the legislature to make the statute retroactive is stated in express terms, or is clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously shown by necessary implication or terms which permit no other meaning to be annexed to them, and which preclude all question in regard thereto, and leave no reasonable doubt thereof.

14. In Maxwell on the interpretation of Statutes, 12th Edn. The statement of law in this regard is stated thus:

"*Perhaps no rule of construction is more firmly established than thus-that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. The rule has, in fact, two aspects, for it, "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.*"

15. In Garikapati Veeraya v. N. Subbiah Choudhury, AIR 1957 SC 540 it has been held that;

"*The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed.*"

16. In view of the above verdicts, observations and decisions, we are of the view that the amendment made regarding clause (b) to section 30 of the Customs Act, 1969 vide Finance Act, 2005 will be deemed to have application prospectively and cannot take away the right as has already exist with the petitioner in respect of imported goods; that is the amendment will not apply in assessing duties or taxes of the petitioner's imported goods. Moreover, the Finance Act, 2005, clearly stated that the same would come into force from 1st July, 2005.

17. Considering the facts and section 30 of the Customs Act, 1969 along with the amendment made by the Finance Act, 2005 this Court is of the view that the said amendment is not applicable to the imported goods of the petitioners, as the petitioner's imported goods were in-bonded on 23.05.2005.

18. Now the second question is whether the petitioner will get the benefit of S.R.O No. 248 dated 16.08.2005 (annexure-F to the writ petition). Had it been so that no amendment taken place, the petitioner have to pay prevailing Customs duties as per section 30 of the Customs Act, 1969 when the goods are actually removed from warehouse. In that view of the matter the S.R.O No. 248 dated 16.08.2005 would be applicable in the instant case for paying the Customs duty of the imported goods as amended clause (b) to section 30 of Customs Act has no manner of application so far the imported goods of the petitioner is concern. So, we are of the view that the petitioner will get the benefit of S.R.O No. 248 dated 16.08.2005.

19. Accordingly, we find substance in the arguments of the learned advocate for the petitioner and do not find substance in the arguments of the learned Deputy Attorney General for the respondents.

20. Similar view has also been taken by this Court in Writ Petition No. 7231 of 2005, Writ Petition No. 7394 of 2005 and Writ Petition No. 7395 of 2005.

21. In the result, the Rule is made absolute without any order as to costs.

22. The impugned action of the respondents in not making final assessment of the imported goods of the petitioner under in-bond Bills of Entry No. C-141257, C-141259, C-141263 and C-141260 all dated 23.05.2005 as per S.R.O. No. 248 dated 16.08.2005 are hereby declared to have been done without lawful authority and are of no legal effect.

23. The Customs authority is hereby directed to make final assessment of the petitioners' imported goods under in-bond Bills of Entry No. C-141257, C-141259, C-141263 and C-141260 all dated 23.05.2005 as per S.R.O. No. 248 dated 16.08.2005 and to return the bank guarantee as furnished by the petitioners on the difference value being 1.5% pursuant to the ad-interim order passed by this Court, within 30 (thirty) days from the date of receipt of this order.

24. Communicate the judgment to the respondent no.1 at once.

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HIGH COURT DIVISION
(CIVIL APPELLATE JURISDICTION)

First Appeal No. 77 of 2006

Delta Life Insurance Co. Limited
90-91 Motijhel,C/A Dhaka and another
.... Defendant /Appellants
VERSUS

Bangladesh Agricultural Development Corporation,
on behalf Secretary, Krishi Bhaban,
49-51 Dilkusha,Dhaka
….Plaintiff/ Respondent

Heard On.07.04.2015,08.04.2015,09.04.2015
and Judgment On 12 April, 2015

Present:
Mr. Justice AKM Asaduzzaman
and
Mr. Justice Md. Iqbal Kabir

Regarding the claim (No.viii) we find that the accident has taken place during the contract period and thereafter he took treatment and failed to succeed as a result he suffered a lot and finally he lost one of his legs, which was also held within the time frame of contract and MoU and claims was made within stipulated time mentioned in MoU. So there is nothing wrong to get the benefit of the insurance claim. ...(Para 30)

The court has no discretion in the matter awarding compensation. However considering the sufferings of the applicant as well as upon taking the considered view of agreement made by the appellants advocate, we are of the opinion that the interest of justice will be served if the appellants are directed to pay the claim of Abdul Motalib along with interest at the rate of 6% of his claim from the date of institution of the suit till date. ...(Para 31)

JUDGMENT

Md. Iqbal Kabir, J:

1. This appeal has been presented, at the instance of the defendants/appellants against the judgment and decree dated 31.01.2006 passed by the Joint District Judge, 5th Court, Dhaka in Money Suit No. 28 of 2003.

2. The facts relevant for disposal of the appeal are that the plaintiff filed the aforesaid Money Suit for compensation, stating inter alia that the plaintiff Bangladesh Agricultural Development Corporation here in after called BADC engaged with the development of agriculture under the Ministry of Agriculture entered into an agreement for Group Term Insurance on 05.08.1990 known as Contract No. 0181/90 with the defendant No.2, Delta Life Insurance Company Ltd. The Contract was initially effective from 01.07.1990 to 30.06.1993, extendable annually upon mutual consent of the parties. The said contract No. 0181/90 was remained in force until 30-06-1994 and thereafter, both the parties made a Memorandum of Understanding herein after called (MOU) and as per the MOU the said

contract was extended from 01.11.1994 to 30.06.1995. The plaintiff corporation demanded some claim against their employees. But the settlement of the aforesaid claims having remained unsettled, thereafter, a tripartite meeting was held amongst the plaintiff corporation and the company that is the defendant No.1 and the Controller of Insurance (defendant No.3). The meeting was convened at the instance of the plaintiff Corporation and it was Chaired by the defendant No.3.

3. Pursuant to the decisions the defendants made settlement of 11 claims out of 19, remaining 8 claims which amounting of Tk. 5,01,165/, remained un settled, while company do not make such payment the plaintiff made representation for the same. The defendants are also responsible to pay the said amount as per clause 2 of the contract, though it has also mentioned in the tripartite agreement. While defendants failed to settle the claims as per the tripartite agreement and contract, then the plaintiff made several remainder about the payment. This inaction of the defendants hampered the livelihood of the poor employees of the plaintiff. Thereafter, on 31-07-01 the plaintiff corporation issued a legal notice upon the defendants, demanding payment of the amount of Tk. 5,01,165/- on insurance claims and Tk.6,00,000/- as compensation for having not been paid the claims money to the poor staff members of the plaintiff corporation intentionally, which led to their suffering and harassment and by this notice threatened to take legal action. In response to the reply of the notice the plaintiff corporation issued another notice stating that since defendants failed to pay the insurance claims made by the plaintiff corporation, there is no scope to renew the new insurance contract. On the contrary the defendants were in breach of the contract for which they became liable to pay damages to the Corporation having not executed the terms and obligation laid down in the contract and MOU. Subsequently one legal notice was published in 'the Daily Inquilab' dated 17.02.2002 by the plaintiff corporation asking to pay the insurance claims along with compensation money all together Tk. 11, 01, 165/ within 15 days from the receipt of the notice.

4. The suit was contested by the defendants by filing the written statements contending inter alia that the plaintiff company entered into a contract for Group Term Insurance on 05.08.1990 known as contract no. 0181/90 with the defendant No.2, Delta Life Insurance Company Ltd. which was effective from 01.07.1990 to 30.06.1995, extendable annually upon mutual consent of the parties. The said contract No. 0181/90 was remained in force until 14.11.1994 and by a Memorandum of Understanding the said contract extended from 01.11.1994 to 30.06.1995, subject to the condition that if any claim had not been submitted by the plaintiff corporation within 31.01.1995 it would not qualify for settlement. The defendant No.1 has made a settlement of 374 claims totaling an amount of taka 3,84,79,005/- of the plaintiff corporation and when only 22 claims remained outstanding the said defendants paid 14 of those claims whereby only 8 claims were left for settlement.

5. The plaintiff corporation submitted eight claims for settlement to the defendant No.1, the particulars of which are as follows: i) Atul Tudu, Tk. 58,680/; ii) Shukra Chandra, Tk.95,130/; iii) Sultan Ahmed, Tk.89,460/, iv) Habibullah Kazi, Tk.1,25,820/; v) Khoka Mia, Tk.17,325/, vi) Emadul Haq, Tk.50,400/,; vii) Abdul Khaleque, Tk.16,200/,; and viii) Abdul Motaleb,Tk.48,150/- all together Tk. 5,01,165/- (Taka five lac one thousand one hundred and sixty five) only.

6. Out of the above mentioned eight claims (i) to (v) were submitted to the defendant No.1 beyond the time limit prescribed in MOU, which is part of the Contract No.0181/90; claims mentioned at no (vi) and (vii) could not be settled as the plaintiff Corporation demanded payment at an enhanced rate, without making payment of the increased premium at the applicable rate corresponding to the said demand of enhancement, and the claim shown at item (viii) as aforesaid was made for the reason of amputation of one leg of the assured due to Buerger's disease which does not fall within the purview of the contract as it is stipulated therein that such claim could be made only for disability arising from accident.

7. The trial court examined one witnesses on behalf of the plaintiff and one witness on behalf of the defendants and by the impugned judgment decreed the suit.

8. The plaintiff examined only one witness who is Mr. Mohammad Ismail stated in his examination in chief that plaintiff has filed money suit calming Tk. 11, 01,165/. The Group Term contract No. is 58/90. This contract was remained in force until 30-06-93, later on it was extended for further one year. As per contract the defendants are responsible for all risk. This witness further stated that as per fixed rate they gave the premium. Since defendant refused to pay the insurance claims, hence on 15.11.94 a MoU has been made in between plaintiff and defendants. As per the said MoU, it has decided that plaintiff made all his claim within 31st January, 95 and defendant will pay the claim with 28th February, 95. But defendant failed to pay. As per MoU the defendant settled 11 insurance claims and reaming 8 were not settled. On 25th January 97, a tripartite meeting was held amongst the plaintiff corporation and the Company, this meeting had decided about payment, but defendant not willing to pay the claims. The plaintiff corporation submitted eight claims for settlement and all together the claim is Tk, 5,01,165/. As per the contract dated 28th February, 95 the defendants are responsible to pay the claim within that period but when they failed, the corporation made two separate representations before the controller of insurance. Thereafter,a tripartite agreement was signed on 25th January, 97 and 22nd February, 97 wherein it was decided that defandent will pay the insurance claims, failing which the plaintiff made several remainder letter. Thereafter, on 31-07-01 the plaintiff corporation issued a legal notice upon these defendants demanding payment of the amount of Tk. 5, 01,165/- against insurance claims and Tk.6, 00,000/- as compensation for having not been paid the claim money of the poor staff members of the plaintiff corporation intentionally. On 16th September, 01, the defendants refused to pay the said amount. Then to reduce the damage of the employees of corporation legal advisor of the plaintiff corporation issued another legal notice on 04th December, 01 claiming Tk. 11, 01, 165/. Thereafter, plaintiff corporation published the said legal notice in the daily news paper namely 'The Daily Inquilab' on 17. 02.2002, but the defendant did not pay heed to it, hence this suit. To support the claim, he submitted some documents.

9. In his cross examination this witness stated that he is an accounts officer and service holder of BADC. After obtaining the consent from the concerned authority he made this witness. He stated that on 5th August, 90 the contract was executed in-between plaintiff corporation and Delta Life Insurance Ltd, at that time he was not present. He informed that the total claim including the compensation was of Tk. 11,01,165/, out of that Insurance claim was of Tk. 5,01,165/. He also denied the defence suggestions that the contract would be failed if the claim dose not made in specific time; new Group Term insurance contract would be made; plaintiff breach the condition of the contract; as per the condition of the contract plaintiffs failed to make the claims in time. Claims are not acceptable.

10. The defendants examined only one witness, who is Mr. Asif Iqbal, Joint Vice-President of the Company stated in his examination inchief that for the employees and the officers of the Corporation, Insurance Contract was made in between the BADC and Delta Life Insurance Ltd. The Group Term contract No. is 181/90 dated 5th August, 90. (Exhibit-(L), The contract began on 1st July, 1991, remain valid until 30th June, 93. After this contract another MOU was made in between the plaintiff corporation and the defendant on 1st November, 94 (exhibit-M) and that was remain valid till 30th June, 94. Condition No.2 of the MOU suggest that every claim have to be made within stipulated time. But the claims were not submitted with in that stipulated time. The plaintiff corporation issued the legal notice and the company on 16th September, 01, made reply against on it (Exhibit-N), On 17th, February, 02, that legal notice was published in daily Inquilab, against which on 21st February, 02 defendants made a protest through publishing a Notice in daily Inquilab. (Exhibit-.O).The defendant made payment against 11 claims out of 19 claims. Out of eight claims (i) to (v) were submitted their claims beyond the time limit prescribed in MOU which is part of the Contract.; claims no (vi) and (vii) could not be settled as the plaintiff Corporation demanded payment at an enhanced rate: since they failed to make payment of the premium in enhence rate, the claim (viii) as aforesaid was made for the reason of amputation of one leg of the assured due to Berger's disease which does not fall within the purview of the contract as it is stipulated therein that such claim could be made only for disability arising from accident. In support certificate was produced, (Exhibit-P). On 11th October, 98, it was duly informed to the Controller (Exhibit-Q),There is no reason to file this suit. This suit has been filed only to harass the defendants; plaintiff cannot get any relief from this suit. This DW also

denied the suggestions made by the plaintiff that the plaintiff is entitled the get the relief from this suit.

11. In his cross examination he stated that the Company has been registered under Joint Stock Company, and have Article of Association. BADC and Delta Life Insurance Ltd entered into a contract, which was effective from 01.07.1990 to 30.06.1993. Lateron it was extended for one year that is till 30th June, 94. MOU has been signed on 1st November, 94. It was remained valid from 1st November, 94, to 30th June, 95. As per MOU the defendant made their payment within 28th February, 95, if plaintiff submitted their claims within time. It is not true that the claims have not submitted as per schedule time. Plaintiff submitted their claims before the Controller of Insurance and through him a contract has been signed in between the plaintiff and defendants. It is not true that 8 claims out of 19 have not purposely been fulfilled by the defendants. The defendants made reply against the letters submitted by the plaintiff, it is not true that company have breach the conditions of MOU and contract. It is not true that company have to fulfill the 8 claims. The claims made by Hossain Gazi has been fulfilled later on. It is not true that Motaleb Miah may get his claim as because he fall in an accident but due to operation has fallen in Buerger's disease.

12. The trial court examined the witnesses as well as documents produced by the plaintiff and the defendants, the fact and circumstances of the case and evidence both oral and documentary on record and found that plaintiff has succeeded to prove his case. Upon consideration of the evidences on record the trial court, decreed the suit.

13. Being aggrieved by the impugned judgment and decree the contesting defendant Nos. 1 and 2 have preferred this appeal.

14. We have heard the learned Advocate Mr. M A Azim Khair along with Mr.Abul Kalam Azad who appeared on behalf of the appellants and submitted that trial court erred in law in passing the impugned judgment and decree.

15. Learned advocate for the appellant, submitted that contract No. 0181/90 was remained in force until 30-06-1994 and by a MoU the said contract was extended from 01.11.1994 to 30.06.1995, subject to the condition that if any claim had not been submitted by the plaintiff corporation those have to be made and submitted within 31.01.1995, otherwise it would not qualify for settlement. It is evident from the record that alleged 5 claims out of 8 the plaintiff corporation submitted to the defendant No.1 for settlement of late Atul Tudu (Exbt. 1N) on 06.05.1995, Shukra Chadra Ray (Exbt.1O) on 06.05.1995, Sultan Ahmed (Exbt-1P), Habibulah Kazi (Exbt. -1(Q) both on 18.06.1995, and Khoka Mia (Exbt.1(L) on 18.06.1995 respectively, which apparently have claimed after long times from due times in breach of the contractual time limit set in MOU and accordingly claims are barred by limitation.

16. The learned advocate for the appellant further submits that the claims no (vi) and (vii) could not be settled as the plaintiff Corporation demanded payment at an enhanced rate but against those they did not deposit the yearly premium in enhance rate, in such a situation their claims are premature one, in such a situation they have not come with a clean hand. He further submits that the claim no. (viii), against Md. Abdul Motalib (Exbt.1(M), was made for the reason of amputation of one leg of the assured due to Buerger's disease which does not fall within the purview of the contract as it is stipulated therein that such claim could be made only for disability arising from accident.

17. The learned advocate further submits that the defendant had made settlement of 374 claims totaling an amount of Tk. 3,84,79,005/ of the plaintiff corporation and when only 22 claims remained outstanding the said defendant paid 14 of those claims where by only 8 claims were left for settlement as because those claims does not fulfill the legal requirement as per the contract and Memorandum of Understanding.

18. In connection with the compensation claims he submits that when they are not entitled to get their principal amount the question of compensation does not arise at all. Moreover, this amount has made out hypothetically; there is no specific law or rules to assess the compensation and the court bellow did not apply its judicial mind in fixing the compensation.

19. The learned advocate lastly submits that as per the tripartite contract the plaintiff corporation agreed to execute contract of group term insurance with the company defendant No. 1, in view of sustaining of substantial loss by the defendant No. 1, but they do not comply those, considering all the aspect of the case they cannot compel the company to comply with the defendants part, though their claims are barred by limitation.

20. We have gone through the evidences on record, heard the learned advocate for the appellants and examine the relevant facts and circumstances and evidences. On the other hand no one appears to oppose the appeal, although this item was in the list since long along with the name of the learned lawyers of both the parties.

21. On our careful scrutiny it is found from the MoU that:

evsjv‡`k KwI.Dbqb K‡cv‡ikb I †gmvm †WjUv jvBd Bbwm I‡i›m †Kv¤úvwb wjwg‡UW-Gi g‡a¨ wØcw¶K mg‡SvZvc‡Îi

2| †h‡nZy Dfq c‡¶i g‡a¨ e‡Kqv `we I e‡Kqv exgv wcwgqvg cwi‡kv‡a AP jve¯v wbimbK‡í GB mg‡SvZvc‡Îi DØe nq, †m‡nZy 23-10-94 Bs Zwi‡L Dfq c‡¶i cwZwbwa‡`i Dcw¯‹Z we¯—vwiZ Av‡jvPbv‡Š– wbgwjwLZ kZvax‡b Dfq c‡¶i সম্মতিক্রমে অত্র সমঝোতাপত্র সম্পাদনের ব্যবস্থা গ্রহণ করা হইল।

(L) mg‡SvZv c‡Îi kZve¡x‡t

1| GB Py³ bvgv 01/11/94 Bs ZwiL nB‡Z 30/06/95 Bs ZwiL chš e¡eZ _vwK‡e| c‡qvRb‡ev‡a cieZx‡Z Dfq c‡¶i সম্মতিক্রমে অত্র সমঝোতাপত্রের সময় সীমা বৃদ্ধি করা যাইবে।

2| c‡qvRbxq KvMR cÎ Ges Z_¨vw` mwVK cv Iqv †M‡j †Kv¤úvwb cwZ mßv‡n M‡o 5 (cuP) wU exgv `we Ki‡cv‡ikb কর্তৃক দাখিলকৃত তালিকার ক্রমানুযায়ী পরিশোধ করিবে এবং *28/02/95 Bs Zwi‡Li g‡a¨ e‡Kqv exgv `we cwi‡kva Kwi‡e|*

exgv `wei †¶‡Î †Kvb ARi AvcwË _vwK‡j, `we cwßi 10 (`k) w`‡bi g‡a¨ †Kv¤úvwb mybw`ó AvcwË m‡gZ Dnv Ki‡cv‡ikb Gi wbKU cvVvB‡eb| Ki‡cv‡ikb D³ AvcwË cwßi 10(`k) w`‡bi g‡a¨ AvcwË h_vhZ fv‡e wb®úwËceK c‡qvRbxq KvMRcÎ I Z_¨vw`mn †Kv¤úvwbi wbKU cvVvB‡eb|

AvcwË wgUv‡bvi 7 (mvZ) w`‡bi g‡a¨ †Kv¤úvwb exgv `we cwi‡kva Kwi‡Z eva¨ _vwK‡e| Ki‡cv‡ikb KZ,K †Kvb exgv `we BwZg‡a¨ †Kv¤úvwbi wbKU `wLj Kiv bv nBqv _vwK‡j me‡kl 31‡k Rvbyqvix, 95 Bs Gi g‡a¨ Aek¨B `wLj Kwi‡Z nB‡e|

22. Apart from that the contract as well as the MoU suggested that if there is any dispute raised between the parties they are at liberty to settle the matter through arbitration and in this connection the Contract and MoU stated as follows:

Ô Mfxi mvgwqK Rxeb exgv Py³ bs 0181/90Õ

Abyf¨Q`-16 ga¨¯—ZvKvix wb‡hvMt 1940 mv‡j gi ga¨¯—ZvKvix AvBb Abyôvb‡i GB Py³ bvgvq †h †Kvb kZ /kZmgn (AvswkK Ges* /অথবা সামগ্রিক) বা গ্রুপ সাময়িক জীবন বীমা সংক্রান্ত– *†Kvb wel‡q Dfq c‡¶i g‡a¨ gZv‰bK¨ nB‡j mswkó Abyf¨Q`‡i mwVK e¨vL¨v Ges/ A_ev Ji¦c gZv‰bK¨ wbim‡bi Rb¨ Dfq c‡¶i mg‡SvZv m‡c‡¶ GKRb ga¨¯—ZvKvix,Avi hw` Dfq c¶ GKgZ nB‡Z bv cw‡i Z‡e Dfq c¶ GKRb Kwiqv †gvU `jRb ga¨¯—ZvKvix wb‡qvM Kwi‡e| D³ wel‡q ga¨¯—ZvKvix (MY) Gi ivq/ wm×vš Dfq c¶ gwbqv jB‡Z eva¨ _vwK‡e|

(L) mg‡SvZvc‡Îi kZve¡x‡t

5| mg‡SvZvcÎ ev Dnvi mwnZ mswkó wel‡q Dfq c‡¶i g‡a¨ †Kvb we‡iva ev gZ‰ØZZv †`Lv w`‡i Dfq c‡¶i g‡a¨ m¤úvw`Z M‡c mvgwqK Rxeb exgv Py³ (Py³ bs-0181/90) Gi 16 bs Abyf¨Q` Abyôvqx Dnv wbimb Kiv nB‡e| mwj‡ki ïbvbx Ab¨ ‡Kv_vI wbawiZ bv nB‡j, XvKv‡ZB Abyôv nB‡e|

23. We have carefully examine the claim No. viii relating to Abdul Motaleb, his total claim is of Tk.48,150/. In support of his claim the plaintiff made an application exhibits 1(M). The contained of this exhibit stated as follows:

mÿviK bs wnmve/†h‡ex/317/95/275 ZwiLt-30.01.1995Bs

ei¥ei,

Gw·wKDwUf fvBm ‡cwm‡WvU,

†WjUv jvBd Bbmvl‡ibm †Kv¤úvbx wjt,
DËiv e¨vsK feb,
90-91, gwZwSj evwYwR¨K GjvKv|
XvKv-1000|

welqt- জনাব মোঃ আব্দুল মোতালিব, সহকারী মেকানিক,গফরগাও জোনের পংগুত্ব/ অংগহানী বীমা দাবী পরিশোধ সংক্রান্ত।

wcq g‡nv`q,

Rbve, †gvt Avãyj †gvZvwje,mnKvix †gKwbK MdiMvl †Rvb, weGwWvm, weMZ 20-03-91Bs ZvwiL‡L KgiZ Ae¯vq evg Mv‡q AvNvZ cvß nb Ges Gici wewfb ¯v‡b wPwKrmv K‡i Av‡ivM¨ jvf bv Kivq Zvi Mv‡q cPbRwbZ Kvi‡b cv-wU nvUychš †K‡U †djv‡bv nq| d‡j wZwb A×vsM/ cO¸Z Rxeb hvcb K‡i‡Qb| GiRb¨ Avcbv‡`i mv‡_ m¤úwK`Z Pyi kZ †gvZv‡eK wZwb Asnvbx exgv cvc¨Ñ hvi cwigvb 267598=48,150/= (AvU Pwj-k nvRvi GKkZ cÂvk) UvKv, D³ `weimg_‡b c‡qvRbxq KvMRcÎ I cgvbvw` GZ`m‡½ †cib Kiv n‡jv| wPwKrmvq `xNwb`b mgq jvMvq Ges A½nvbx exgv `vex cwßi e¨vcv‡i msMk-ó e¨w³/ wbqšbKvix Awd‡mi A¶gZvi Kvi‡b `vexwU †ci‡b wKQyUv wej¤ n‡q‡Q- hvi Rb¨ Avgiv `yLZ| †m hvÎ nDK, cwiw¯wZi †cw¶‡Z gvbweK Kvi‡Y we‡ePbv cekK `vexwU cwi‡kvaKvi e¨e¯v †bIqvi Rb¨ Avcbv‡K Abyhvqx Kiv nBj|

24. In this connection the provision of the contract stated as follows:

L) `yUbv exgvt `yUbvq cwZZ nBqv m¤úbœ ewn¨K Ges `k¨gvb AvNv‡Zi Kvi‡Y Zvr¶wbK Ges/ A_ev `NUbvi mwVK mgq nB‡Z 90 w`‡bi g‡a¨ K‡cv‡ikbi exgvKZ..†Kvb m`‡m¨i gZvq`ynB‡j †Kv¤úvbx `yUbv gZvq`vexi mgcwigvY UvKv K‡cv‡ikb †K AwZwi³ cwi‡kva Kwi‡e| Ges Zr¶bvr gZ exgvKZv m`‡m¨i exgv S‡Ki cwimgwß NwU‡e|

গ) পঙ্গুত্বের বীমা ঃ যদি বীমাকৃত কোন সদস্য দুর্ঘটনাজনিত কারণে সম্পূর্ণ বাহ্যিক এবং দৃশ্যমান আঘাতে আক্রান্ত হন এবং দুর্ঘটনার সময় nB‡Z 90 w`b cil `yUbv RwbZ AvNvZ wbivgq bv nq Ges `yUbv RwbZ mivmwi AvNv‡Zi Kvi‡Y Ges/A_ev GB AvNv‡Zi mwnZ Ab¨‡Kvb e¨vwdi সম্পর্কযুক্ত না হইয়া শুধুমাত্র দুর্ঘটনায় আক্রান্ত– nBqv †h AvNv‡Zi mvjó nBqwQj †mB Kvi‡Y †Pv‡Li `vjó kw³ m¤úY¨ †jvc cvB‡j Ges/A_ev Ab¨‡Kvb AsM †Lvqv ev m¤úbœ bó nB‡j c†i ewYZ mvaviY wbqgvejxi AvIZvq †Kv¤úvbx wb‡g ewYZ exgv AsK ev AvswkK exgv AsK K‡cv‡ikb‡K cwi‡kva Kwi‡et

_____হাত এবং পা নষ্ট/ খোয়া বলিতে যথাক্রমে কব্জি এবং গোড়ালিতে অস্থিসন্ধির উপর কেটে ফেলা এবং চক্ষুর দৃষ্টি বলিতে সম্পূর্ণ Ges ¯vqx `vjónxbZv eySvB‡e|

25. We have examined the record and found that there is no tripartite agreement, but there is a meeting minutes and the decision of the meeting does not support to meet up the claims in favour of the plaintiff beyond the scope of MoU. The decision of the meeting as follows:

ÔÔwelqt †Wëv jvBd Bbmvj‡i›m †Kv¤úvbx wjwg‡UW I evsjv‡`k Kwl.Dbqb K‡cv‡ik‡bi g‡a¨ M"P বীমার দাবী পরিশোধ সংক্রান্ত– MZ 25.01.97 Ges cieZx‡Z 22.02.97 Bs ZvwiL‡i Abyôv‡Z ewaZ mfvi Kvh wewiYxt

mfvq mwnK wel‡q Av‡jvPbv‡Š– সর্বসম্মতিক্রমে এই সিদ্ধান্ত– Mp¸‡jvK nq †h, †Wëv jvBd Bbmvj‡i›m †Kv¤úvbx wjwg‡UW 30.06.94 Bs ZvwiL chš– mg‡qi g‡a¨ weGwWvm KZ©K DÌvwcZ mKj exgv `vwe cwjwmi/ Pyi kZ †gvZv‡eK AbwZwej‡¤ c‡i‡kv‡ai e¨e¯v MnY Kiv‡e Ges weGwWvm fwel¨‡Z Zv‡`i mKj Mªc exgv †Wëv jvBd Bbmvj‡i›m †Kv¤úvbi mv‡_ m¤úv`b Kivi Rb¨ h_vmva¨ †Póv Ki‡eb GB Rb¨ †h, weGwWvmi G hver DÌvwcZ `vexmgn-cwi‡kv‡a †Wëv jvBd Bbmvj‡i›m Awl_Kfv‡e †ek ¶wZM¨ n‡q‡Q| ÕÕ

26. On our careful scrutiny it is evident from the statement made by the P.W. that plaintiff deposited their claims within stipulated time mentioned in the MoU, plaintiff witness also denied the suggestion made by the defendants lawyer that they do not deposited claims within time, in this connection P.W. produced some documents. But the oral evidence does not supported by the documentary evidence shown as exhibits. Those documents suggested that claims have been submitted after expiry of the time limited mentioned in the MoU. On the other hand the defence witness stated that the plaintiff failed to submit their claims within time and they do not deposite their premium in an enhanced rate. In support thereof this defendant's witness produced some documents which were shown as exhibits, those exhibit also support the oral evidence made by the DW.

27. The finding of the trial court is that since there was a contract and MoU and the plaintiff submitted their claims and made several reminder as a results defendants have to settle their claims and have to make payment. But the records suggested that the oral evidence of the plaintiff does not support the documentary evidence produced by the plaintiff. On the other hand defendant case has been proved through the exhibits produced by the defendant as a result we can say mere submitting of claims and

issuance of reminder are not enough to settle the claim. The finding of the trial court is thus not correct hence it is necessary to interfere.

28. From the above circumstances, examining the rules, law and contract. We find that the plaintiff made the claims No.I-V, on 31.01.95. But as per the provision of the contract and MoU these claims ought to have been submitted within 31st January, 95. For the others claim the plaintiff claimed in an enhanced rate without depositing their premium at the enhanced rate. Apart form that they do not comply with the other obligations which are also laid dawn in the contract.

29. In support of the claims no (i) to (vii), we find that nothing was wrong in not adjusting the claims by the defendant and the submission made by the advocate for the appellants are the valid submissions and we find substance in his submission. It is found that contract No. 0181/90 was in force until 30-06-1994. By the MoU the said contract was extended from 01.11.1994 to 30.06.1995, it needs to mention here that the MoU has been signed only to resolve the previous claim to which premium was paid, wherein a condition was laid down that any remaining claim have to be submitted by the plaintiff corporation within 31.01.1995, otherwise it would not qualify for settlement. It is evident from the record that alleged 5 climes out of 8 the claim of (i) Atul Tudu, Tk. 58,680/; dated 06.05.95, Exhibit-1(N) ii) Shukra Chandra, Tk.95,130/; dated 06.05.95,Exhibit-1(O) iii) Sultan Ahmed, Tk.89,460/,dated 09.05.95 Exhibit-1(P) iv) Habibullah Kazi, Tk.1,25,820/; dated18.06.95 Exhibit-1(Q) v) Khoka Mia, Tk.17,325/, dated 18.06.95 Exhibit-1(L) respectively, were made after long times from due date, in breach of the contractual time limit set in MoU. The claims no (vi) and (vii) the plaintiff Corporation demanded payment at an enhanced rate but against those they do not deposit their premium in enhanced rate, as a result they cannot claim those at enhanced rate and the defendant has rightly refused to pay the enhance amount.

30. Regarding the claim (No.viii) we find that the accident has taken place during the contract period and thereafter he took treatment and failed to succeed as a result he suffered a lot and finally he lost one of his legs, which was also held within the time frame of contract and MoU and claims was made within stipulated time mentioned in MoU. So there is nothing wrong to get the benefit of the insurance claim. At the same time the advocate for the appellant also agreed to pay the claim No viii. In such situation, we are of the opinion that Abdul Motaleb is entitled to get his claim. In this connection we further observed that his claim was made within time in the year 1995, but it was refused illegally and thereby he suffered a huge loss.

31. We further observed that the court has no discretion in the matter awarding compensation. However considering the sufferings of the applicant as well as upon taking the considered view of agreement made by the appellants advocate, we are of the opinion that the interest of justice will be served if the appellants are directed to pay the claim of Abdul Motalib along with interest at the rate of 6% of his claim from the date of institution of the suit till date.

32. On an overall consideration of the entire matter, we find that the trial court committed illegality in decreeing the suit in full. We find substance in the appeal. In the result, the appeal is allowed in part with the observation and direction made herein above.

33. In the result, the appeal is allowed in part. The impugned judgment and decree dated 31.01.2006 (decree drawn on 06-02-06) passed by the Joint District Judge, 5th Court, Dhaka in Money Suit No. 28 of 2003 is hereby set aside in part.

34. The defendant appellant are directed to pay the claim against claim No. viii of Abdul Motalib in terms of decree along with interest at the rate of 6% of the decretal amount from the date of institution of the suit up to realization of the claim.

35. Let the lower Court record along with the copy of this Judgment be transmitted down and the order also be communicated to the authority concern at once.

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HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 3606 of 2010
With
WRIT PETITION NO.1909 of 2013
WRIT PETITION NO.12357 of2013
WRIT PETITION NO.12358 of 2013
WRIT PETITION NO. 7980 of 2013
WRIT PETITION NO. 7982 of 2013
WRIT PETITION NO. 9355 of 2013
WRIT PETITION NO. 7979 of 2013
WRIT PETITION NO. 5175 of 2013
WRIT PETITION NO.7981 of 2013
WRIT PETITION NO. 3184 of 2013
WRIT PETITION NO. 7766 of 2013
WRIT PETITION NO. 3210 of 2009
WRIT PETITION NO. 991 of 2012
WRIT PETITION NO. 6056 of 2014
WRIT PETITION No. 227 of 2014
WRIT PETITION No. 2672 of 2014
WRIT PETITION NO. 1192 of 2014
WRIT PETITION NO. 335 of 2014
WRIT PETITION NO. 7768 of 2014
WRIT PETITION NO. 1956 of 2014
WRIT PETITION NO. 5065 of 2014

Singer Bangladesh Limited.
..…… Petitioner
(In writ petition No.3606 of 2010)

British American Tobacco Bangladesh Company Limited
..…… Petitioner
(In writ petition No. 1909 of 2013)

Buildtrade Engineering Limited.
..…… Petitioner
(In writ petition No. 12357 of 2013)

Buildtrade Color Coat Limited.
..…… Petitioner
(In writ petition No. 12358 of 2013)

Akij Biri Factory Limited
..…… Petitioner
(In writ petition No. 7980 of 2013)

Akij Biri Factory Limited
..…… Petitioner
(In writ petition No. 7982 of 2013)

M/S. Al Noor Paper and Board Mills.
..…… Petitioner
(In writ petition No. 9355 of 2013)

Akij Biri Factory Limited.
..…… Petitioner
(In writ petition No. 7979 of 2013)

DAF Packaging Industries Ltd.
..…… Petitioner
(In writ petition No. 5175 of 2013)

Akij Biri Factory Limited
..…… Petitioner
(In writ petition No. 7981 of 2013)

British American Tobacco Bangladesh Company Limited
..…… Petitioner
(In writ petition No. 3184 of 2013)

Nitol Motors Limited
..…… Petitioner
(In writ petition No. 7766 of 2013)

Unilever Bangladesh Limited.
..…… Petitioner
(In writ petition No. 3210 of 2009)

Al-Amin Metal and Re-Rolling Mills (Pvt.) Ltd.
..…… Petitioner
(In writ petition No. 991 of 2012)

British American Tobacco Bangladesh Company Limited
..…… Petitioner
(In writ petition No. 6056 of 2014)

Bank Asia Limited
..…… Petitioner
(In writ petition No. 227 of 2014)

Jayson Pharmaceuticals Limited
..…… Petitioner
(In writ petition No. 2672 of 2014)

Appollo Ispat Complex Limited (Unit-2)
..…… Petitioner
(In writ petition No. 1192 of 2014)

Akij Biri Factory Limited
..…… Petitioner

(In writ petition No. 335 of 2014)

Otobi Limited
..…… Petitioner
(In writ petition No. 7768 of 2014)

Niloy Cement Industries Limited
..…… Petitioner
(In writ petition No. 1956 of 2014)

Grameenphone Limited
..…… Petitioner
(In writ petition No. 5065 of 2014)

-Versus-

National Board of Revenue and others
..... Respondents

Mr. Moudud Ahmed,
Mr. Hasan Arif, the learned Senior Advocates with
Mr. Ahsanul Karim,
Mr. Khairul Alam Chowdhury,
Mr. Kabir Iqbal Hossain,
Mr. Aminul Hoque,
Mr. Tanveer Hossain Khan,
Mr. M. A. Qayyum Khan,
Mr. Abu Taleb,
Mr. Md. Ramzan Ali Sikder,
Mr. Abdullah M. Hasan,
Mr. Khan Mohammad Shameem Aziz,
Mr. A.M. Amin Uddin,
Mr. Munshi Moniruzzaman,
Mr. Md. Sadullah,
Mr. Raziuddin Ahmed,
Mr. Mubina Asaf,
Mrs. Shathika Hossain,
Mr. Akhtar Farhad Zaman,
Mr. A. K. A. Mamun,
Mr. M Ataul Gani ,
Mr. Sakib Rezwan Kabir and
Mr. Meah Mohammed Kausar Alam,
Advocates …… For the petitioners

Mr. S.M. Moniruzzaman, D.A.G with
Mosammat Kairun Nessa,
Mr. S.M. Quamrul Hasain and
Mr. Shams-ud-Doha Talukder, A.A.Gs.
….For the Respondents.

Heard on 04.12.2014, 08.12.2014, 10.12.2014 and
Judgment on 15.12. 2014.

Present:
Mr. Justice Md. Ashfaqul Islam
And
Mr. Justice Md. Nazrul Islam Talukder

VAT Act, 1991

No provision of the said Act of 1991 empowers the VAT authority to direct the petitioner as a VAT registered person to deliver any documents or records directly to any third party authority, i.e. Local and Revenue Audit Directorate. Neither a notice can be issued either directing and deposit of revenue or under section 55(1) of VAT Act on that Count. ...(Para 45)

Thus the authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. The authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do.
...(Para 46)

JUDGMENT

Md. Ashfaqul Islam, J:

1. All these Writ petitions are heard together and disposed of by a single judgment as there involved common question of fact and law.

2. In writ petition No.3606 of 2010 on an application under Article 102 of the Constitution filed by the petitioner Singer Bangladesh Limited, the Rule was issued in the following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the proceeding vide Order under Nothi No. *4/Gj wUBD(gyw¤K)/273/wm½vi/¯vbxq I ivR¯ AwWU/mv‡Kj-3/10/332* dated 18.04.2010 (Annexure- D) by the respondent No.3 rejecting the prayer of the petitioner and making demand under Section 55(1) of the Value Added Tax Act, 1991should not be declared to have been passed without any lawful authority and is of no legal effect."

3. If we sum up the terms of all the Rules we find that the respondents of all the petitions have been asked to show cause as to why the different Memos in the petitions issued by the respondents, the VAT Authority, directing the petitioner company to pay the amount as revenue, calculated on the basis and at the behest of audit report submitted by Local Audit team and audit directorate not shall be declared unlawful being violative of mandate of the Constitution.

4. Be it mentioned that for the sake of proper disposal of all the writ petitions three categories of the same have been made. In the first one the notices in which the direct demand of revenue from the petitioners by the VAT authority issued at the instance of the Local Revenue Audit Directorate, are challenged. All the Rules were made absolute by declaring the notices of such direct demand to be illegal.

5. In the second category, the notices in which the demand of documents and papers from the petitioners by the VAT Authority as directed by the Local and Revenue Audit Directorate were impugned. All the Rules have been made absolute by declaring the demand illegal.

6. And the third category deals with the present writ petitions which calls in question the sustainability of the notices issued by the respondents VAT Authority under section 55(1) of the VAT Act, 1991 but that even under the direction of the Local and Revenue Audit Directorate.

7. Since we have already decided the first and second category, we think it would be easier to appreciate the issue involved in third category of writ petitions. For the proper analysis let us first reproduce the impugned order from one of the petitions. In writ petition No.3606 of 2010 Annexure-'D' is the impugned order issued under the signature of the respondent No.3, Deputy Commissioner, Large Tax Payer Unit (LTU), Customs, Excise and VAT, Office, Dhaka upon the petitioner which has been quoted below:-.

" †ciK: wefvMxq KgKZv
cvcK: e¨ve¯vcbv cwiPvjK
†gmvm wm½vi evsjv‡`k wj:
Svgyj, ivRdzjevwWqv, mvfvi, XvKv|

welq : ¯vbxq I ivR¯ AwWU Awa`ßi KZ,K 2007-2008 A_ eQ‡ii AwWU wi‡cv‡U Avcwë Dìwc Z Uv: 52,01,768.17 (evqvb j¶ GK nvRvi mvZ kZ AvUlwÆ UvKv m‡Zi cqmv) UvKv †URvixRgv/PjvZ wnmv‡e mg¤q Ki‡Yi Rb¨ `vexbvgv m¤wjZ Kv iY `kv‡bv †bwUk Rvix KiY cm‡½|

mÎ: 1| .....

02| ¯vbxq I ivR¯ AwWU Awa`ßi, XvKv KZ,K 2007-2008 A_ eQ‡ii Avcbv‡`i cwZôv‡bi wnmve wbix¶v K‡i Avcbvi cwZôvb KZ,K DcKi‡bi g‡¨ e„Ï cvIqv m‡Ë I cybivq g‡¨ †Nvlbv bv w`‡q AwZwiË Mp,xZ †iqvZ eve` 29,33,330.99 UvKv Abyôgvw`Z g‡j¨i †P‡q weRvcb e¨q †ekx †`wL‡q AwZwi³ Mp,xZ †iqvZ eve` 15,48,804.18 UvKv Ges Dr†m KZbKZ. f¨v‡Ui †URvix Rgv PjvZ wnmv‡e Rgv †`wL‡q 7,19,633.00 UvKv Mnb Kivq me‡gvU 52,01,768.17 UvKv gyw¤K dwiKi Avcwë Dìvcb Kiv n‡q‡Q|

03| B‡Zvc‡e m‡Îvl 4 bs, 6 bs I 7 bs c‡Îi gva¨‡g Dchy³ we‡q `wjwjK cgvbmn Avcbv‡`i gZvgZ Pvlqv n‡qwQj| †cwiZ Reve m‡Š–vlRbK bv nlqvq Ges G‡Z g‡¨ ms‡qvRb Ki AvBb, 1991 Gi aviv 5(2) I 9(1) (QQ) jw•NZ nlqvq D³ Avcwë KZ. UvKv Av`v‡qi Rb¨ g‡¨ ms‡hvRb Ki, 1991 Gi aviv 55(1) †gvZv‡eK `vexbvgv Rvix Kiv n‡jv|

`vexbvgv Rvixi 10(`k) Kvhw` e‡mi g‡a¨ `vexKZ.A_ miKvwi †KvlvMv‡i ‡URvix Pvjv‡bi gva¨‡g Rgv/PjwZ wnmv‡e mgšq K‡i G `ßi‡K AewnZ Kivi Rb¨ Abyiva Kiv n‡jv|"

04| `vexKZ.A_ Avcbv‡`i cwZôvb n‡Z Av`vq Kiv n‡e bv Zvi m‡švlRbK Reve D³ wbawiZ mg‡qi g‡a¨ wb¤¨v¶iKvixi `ß‡i ‡ciY Kivi Rb¨ Abyiva Kiv n‡jv|

05| G e¨vcv‡i Avcbvi / Avcbv‡`i †Kvb e³e¨ _vK‡j ev e¨w³MZ ïbvbx‡Z AskMnb Ki‡Z AvMnx n‡j Zv AvMvgx 10 (`k) Kvhw` e‡mi g‡a¨ wjwLZfv‡e Rvbv‡bvi Rb¨ Abyiva Kiv n‡jv| wbaweZ mg‡qi g‡a¨ m‡švlRbK Reve cvlqv bv †M‡j cieZx‡Z AvBbvbyl e¨e¯v †bqv n‡e|

†Wcyl Kwgkbvi "

8. As it could be found in paragraph 3 of the impugned order that the Deputy Commissioner of VAT department made a demand to the assessee company (the petitioner) under section 55 of the VAT Act allowing 10 (ten) days time to deposit the amount asked by them in the government treasury by challan. Notably as it appears from the said notice that the petitioner was also given a chance to defend himself on a hearing.

9. Mr. Moudud Ahmed, the learned Senior Advocate appearing for the petitioners in his submissions unequivocally endorsed the earlier view taken by this Division in the case of Sekander Spinning Mills vs. Customs, Excise and VAT and others 63 DLR 272 and the unreported decision of Bombay Sweets Co. Ltd. Vs. National Board of Revenue and others in Writ Petition No.9441 of 2007. He contends that in all the cases whether there is a direct demand for depositing the amount or asking for documents or merely a notice served under section 55(1) of the VAT Act if they are tainted being done in express direction of Local Audit Directorate, or so to say issued under the flagrant direction of Local audit Directorate are not sustainable being inconsistent with the provisions of Constitution and the VAT Act of 1991.

10. Mr. A.F. Hasan Arif, the learned Senior Advocate for the petitioners while deliberating on different Articles of our Constitution in comparison to those of the Indian Constitution on the issue also submits that the Local Audit Directorate can enquire and audit the National Board of Revenue and other statutory authorities but for all practical reason the notices impugned against certainly suffer from inherent defect even though issued under section 55 of the VAT Act, 1991. Since those are issued at the instance of the Local Audit Directorate.

11. Mr. S.M. Moniruzzaman, the learned Deputy Attorney General for the respondents on the other hand highlighted a decision reported in the case of Aftab Automobiles Ltd. –vs- Superintendent of Customs, Excise & VAT and others 18 BLC 138 and tried to impress upon us that the said decision has answered the issue in hand in a different manner. But on our query we have found that the issue whether a notice by the VAT Authority served upon a petitioner company at the instance or direction of the Local and Revenue Audit Directorate can be held to have been justified or legally passed was not addressed in that decision. Moreover, the said decision was ultimately given on the point of maintainability of the petition itself. Therefore, we do not think it necessary to take into account of that decision to arrive at our own decision on the point.

12. Now the question that calls for consideration by us is whether even where the VAT Authority has merely issued a notice upon the petitioner under section 55(1) of the Act, the same should be declared illegal for the incurable defect being done under the direction of Local Revenue Audit Directorate as it appears in the notice itself.

13. The answer would certainly depend upon the discussion of some relevant aspect of laws under the VAT, Act, 1991 conjunct with the interpretation of some of the Constitutional arrangements focused on the issue.

14. First of all let us see what are the provisions under which the Constitution framed the function and establishment of the office of Constitutional body, the Comptroller and Auditor General. Chapter 8 of the Constitution in particular deals with this part. Article 128 of the Constitution postulates functions of Auditor General as under:-

> " 128 (1) The public accounts of the Republic and of all courts of law and all authorities and offices of the Government shall be audited and reported on by the Auditor-General and for that purpose he or any person authorized by him in that behalf shall have access to all records, books, vouchers, documents, cash, stamps, securities, stores or other government property in the possession of any person in the service of the Republic.
>
> (2) Without prejudice to the provisions of clause (1), if it is prescribed by law in the case of any body corporate directly established by law, the accounts of that body corporate shall be audited and reported on by such person as may be so prescribed.
>
> (3) Parliament may by law require the Auditor-General to exercise such functions, in addition to those specified in clause (1) as such law may, prescribe and until provision is made by law under this clause the President may, by order, make such provision.
>
> (4) The Auditor-General, in the exercise of his functions under clause (1) shall not be subject to the direction or control of any other person or authority. "

15. Article 131 is also relevant in this regard which runs thus:

> "The public accounts of the Republic shall be kept in such form and in such manner as the Auditor-General may, with the approval of the President, prescribe."

16. Further Article 132 says:

> "The reports of the Auditor-General relating to the public accounts of the Republic shall be submitted to the President, who shall cause them to be laid before President."

17. On a combined reading of all these Articles of the Constitution we get a notion that the pivotal role of the Comptroller and Auditor General relates to audit of the public accounts of the Republic and of all courts of law and authorities and offices of the Government.

18. Under Article 128(3) of the Constitution parliament can make laws enabling the Comptroller General Audit Directorate to perform additional functions. Be it mentioned that pursuant to Article 128(3) of the Constitution the Comptroller and Auditor General Additional Function Act, 1974 came into being. This Act categorized the additional functions to be performed by the office of the Auditor General. In section 5 of the Act it has been stated that:

> "(1) Notwithstanding anything contained in any other law for the time being in force [or in any memorandum or articles of association or in any deed], the Auditor General may audit the accounts of any statutory public authority [public enterprise] or local authority and shall submit his report on such audit to the President for laying before Parliament.
>
> (2) For the purpose of any audit under sub-section (1) the Auditor-General or any person authorized by him in that behalf shall have access to all records, books voucher, documents, cash, stamps, securities, stores or other property of the statutory public authority [public enterprise] or local authority concerned."

19. Hence the Constitutional body of the Comptroller and Auditor General can certainly audit as it's additional function the departments mentioned in the above section. Statutory public authority is one of those departments under which the National Board of Revenue (NBR) functions. The Local Audit directorate can authoritatively look into the papers and documents of the NBR and do the needful to ascertain whether the thinks are in the right direction or not. Deviation of any kind if could be ascertained by the audit department in the process, the statutory public body (like NBR) would certainly account for that.

20. But what then is the jurisdiction of the audit department as a whole (?) Their jurisdiction has been clearly spelt out in Article 128 and 132 of the Constitution. They will just submit their annual report to the President prepared in terms of Article 128 of the Constitution and the President in his

turn would place the same before the Parliament. That is the fine line and periphery where the Office of the Comptroller and Auditor General shall tread in.

21. It would be worthwhile to quote here an extract focused on the issue by the Senior Advocate Mr. Mahmudul Islam in his book "Constitutional Law of Bangladesh", 3rd Edition. In paragraphs 6.12.and 6.13 the of the book author succinctly narrated:-

> " The office of Comptroller and Auditor-General is a constitutional office of considerable importance. On him is cast the duty of maintaining, compiling and checking the accounts of the Republic and also of such public statutory bodies as may be prescribed by an Act of Parliament. With the approval of the President he has to prescribe the form and the manner in which the public accounts shall be kept."

22. The author pin pointed:-

> "Every year Parliament appropriates specific sums for specific works and services. It is the duty of the Comptroller and Auditor-General to examine and ensure that the administration does not exceed the approved sum and has spent the money for the works and services for which it was approved by Parliament. He is responsible for having all the receipts and expenditures audited and he is to examine whether the money spent were legally available for and applicable to the works and services for which it has been spent. He has to see that the expenditures have been made by the authorities competent under the law to make it and that all the legal rules and formalities governing such expenditures have been complied with. In the absence of all these checks parliamentary authorization will lose its meaning and it will be impossible for Parliament to have effective control over the finance. The Comptroller and Auditor-General has to satisfy himself on behalf of Parliament as to the wisdom faithfulness and economy of the expenditures. He thus performs the useful job of preventing waste of public fund. He can disallow any expenditure which is in violation of the Constitution and the laws and thereby he upholds the Constitution and the laws in the financial sector of the administration."

23. The identical Article like that of Article 128 of ours is Article 149 of the Indian Constitution Article 149 of Indian Constitution enumerates the duties and powers of the Comptroller and Auditor-General. It says:-

> " The Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively"

24. In India Comptroller and Auditor General's duties powers and condition of service Act, came into force in 1971. Section 10 of the Act, maintained :-

> "Comptroller and Auditor-General to compile accounts of Union and States-
>
> (1) Comptroller and Auditor General shall be responsible -
>
> (a) for compiling the accounts of the Union and of each State from the initial and subsidiary accounts rendered to the audit and accounts offices under his control by treasuries, offices or departments responsible for the keeping of such accounts, and
>
> (b) for keeping such accounts in relation to any of the matters specified in clause (a) as may be necessary."

25. The existing order as stated above provide(s) that the Comptroller and Auditor General in India shall be responsible for keeping the accounts of the Union and of each State.

26. The position in this regards as it could be found in the Constitution of ours resembles almost in its entirety to that of India. In both the Constitutions the functions and periphery of the said Constitutional body have been crystallized without any ambiguity.

27. Let us now digress on the mode of collecting revenue by VAT Authority, Under the Act. The VAT Act 1991 is a self-contained Act making provisions for collecting VAT together with the provisions of assessment and others. Section 26(ka) 35, 36 of the said Act have direct bearing on the issue. Drawing our attention to the said aspect Mr. Ahsanul Karim the learned Advocate submits that Under section 26Ka of the said Act of 1991, a VAT officer having the status of Joint Commissioner or Joint Director can make an audit and enquiry of activities of a VAT registered person as per order and direction made by the National Board of Revenue, Section 26Ka of the said Act of 1991 reads as follows:

" 26Lz Llc¡a¡l Ll pw¢nø L¡kH²j ¢el£r¡ Hhw Aepå¡ez- (1) kNÀ

L¢jne¡l h¡ kNÀf¢lQ¡mL fcjkদার নিম্নে নহেন এমন কোন মূল্য কর্মকর্তা, এই আইনের অধীন প্রদেয় করের যথার্থতা নিরপনের উদ্দেশ্যে সংশ্লিষ্ট কার্যএক্রম নিরীক্ষা বা অনুসন্ধানের জন্য যে কোন নিবন্ধিত বা নিবন্ধনযোগ্য ব্যক্তিকে নির্বাচন করিতে পারিবেন।

(2) .. .. ..

(৩) এই ধারার অধীন নিরীক্ষা বা অনুসন্ধান কার্যএক্রম পরিচালনার উদ্দেশ্যে বোর্ড এই আইন এবং বিধির বিধানাবলীর সহিত সামঞ্জস্যপূর্ণ রীতি ও পদ্ধতি নির্ধারণকল্পে প্রয়োজনীয় হইলে উহা মূল্য সংযোজন কর কর্মকর্তা কর্তৃক অনুসৃত হইবে।"

28. Section -35 says:-

" c¡¢Mmfœ ®fnLlZ- প্রত্যেক করযোগ্য পণ্য প্রস্তুতকারক বা উৎপাদক বা ব্যবসায়ী বা করযোগ্য সেবা প্রদানকারী বিধি দ্বারা নির্ধারিত ফরম ও পদ্ধতিতে সংশ্লিষ্ট কর্মকর্তার নিকট নির্ধারিত তারিখের মধো প্রতিটি করমেয়াদের জন্য এই আইনের অধীনে তাহার সকল করদায়িতার বিবরণ সম্বলিত দাখিলপত্র পেশ করিবেন।

29. Further Section – 36 says:-

"দাখিলপত্রের পরীক্ষা- (১) সংশ্লিষ্ট কর্মকর্তা কোন ব্যক্তি কর্তৃক ধারা ৩৫ এর অধীনে পেশকৃত দাখিলপত্র বিধি দ্বারা নির্ধারিত পদ্ধতিতে যথাশীঘ্র সম্ভব পরীক্ষা করিবেন এবং পরীক্ষান্তে যদি প্রমাণিত হয় যে, উক্ত ব্যক্তি কর্তৃক পরিশোধিত মূল্য সংযোজন কর বা, ক্ষেত্রমত, মূল্য সংযোজন কর ও সম্পূরক শুল্ক তৎকর্তৃক এই আইনের অধীন প্রদেয় মূল্য সংযোজন কর বা, ক্ষেত্রমত, মূল্য .সংযোজন করা ও সম্পূরক শুল্ক অপেক্ষা কম, তাহা হইলে সংশ্লিষ্ট কর্মকর্তা উক্ত ব্যক্তিকে আদেশ দ্বারা, আদেশ প্রপ্তির সাত দিনের মধ্যে-

(ক) পণ্য সরবরাহের ক্ষেত্রে, চলতি হিসাবে সমন্বয়ের মাধ্যমেব, এবং

(খ) সেবা প্রদানের ক্ষেত্রে, তৎকর্তৃক এতদুদ্দেশ্যে নির্ধারিত পহ্নায়, অপরিশোধিত পরিমাণ মূল্য সংযোজন কর বা, ক্ষেত্রমত, মূল্য সংযোজন কর ও সম্পূরক শুল্ক পরিশোধ করার নির্দেশ দান করিবেন।"

30. Here for better understanding it would be profitable to quote from the the case of Sekandar Spinning Mills Ltd. Vs. Commissioner, Customs Excise and VAT and others reported in 63 DLR 272. While declaring the under mentioned impugned order illegal this Division held:-

"¯vbxq I ivR¯ wnmve wbix¶v Awa`ßi XvKv ¯v: bs ewnbx/wm 2003-04/4 A_ ce/`j-7/5665 (Bs ZwiL 116-05-05 Bs I mv‡Kj Gi cÎ bw_ bs 3q (12)8/ ev: wn:wb:/2004-5/ivû05/1103 ZwiL 19-06.05 Bs †gvZv‡eK cKZ Drcv`b A‡c¶v Kg Drcv`b c`kb Kivq 10.90,595/- (`k j¶ beŸB nvRvi cvP kZ cPvbeŸB) UvKv mgšq mwab Kiv n‡jv|

31.There after issued the impugned letter dated 25.4.2006 being Nothi No. 4rth /A(12)57/Rangu/Sekandar Spinning/Ab/98/830 dated 25.4.2006 restraining the petitioner form release of the manufactured foods and directing the petitioner to make the closing balance as credit balance and then to take release of the goods.

32. We have heard the learned Advocates, perused the writ petition, the impugned order and the annexures thereof. In the instant writ petition the respondent No. 3 issued the demand notice without initiating the proceeding under section 55 of the VAT Act, but only on the basis of the report and request of the Local Audit Agency. The law provides that the VAT authority ought to have issued notice under section 55(1) of the VAT Act on account of any discrepancy for paying VAT by any company or person who is registered under VAT authority. The VAT authority without complying with the procedure as laid down under section 55 of the VAT Act issued the demand notice is not sustainable in law. The respondent VAT Authority issued several notices upon the petitioner directing to deposit the demanded money which was revealed by the Local Audit Agency during their audit. The law dos not provide that the respondent VAT authority can issue any demand notice on the request of the audit team but it is their absolute power in case of any discrepancy found, it may initiate proceeding under section 55 of the VAT Act. But in the instant case the VAT authority did not follow the said procedure."

33. Further in the unreported decision of Bombay Sweets and Company Ltd. as refered to above it has been observed:

> "The authority without considering the said reply and without hearing the petitioner illegally directed the petitioner to deposit the said demanded amount whereas no notice under section 55 of the VAT Act had ever been served upon the petitioner."
>
> "It also appears to us that the authority subsequently issued the demand notice only to carry out the direction of the " ¯vbxq I iv‡R¯ AvIwU Avmva`ßi " who is not the proper VAT authority as per VAT law. Thus it is clear that respondent No.5 did not issue demand notice independently but upon the direction of others which was illegal and malafide action of the Vat authority and as such the same should be declared to have been issued without lawful authority and is of no legal effect. Thus we find merit in the Rule."

34. Mr. Ahsanul Karim on the point cited some authorities. In the case of vice chairman Export Promotion Bureau Government of Bangladesh –vs- Acqua Foods Limited and others 50 DLR (AD) 113 while upholding the decision of the High Court Division which declared the impugned notification unlawful as the same being passed merely under the direction of the Government, our Appellate Division maintained:

> "From the admitted facts of the case it is seen that there had been violation of natural justice in not giving a hearing to the writ petitioners and that the Controller of Imports and Exports had acted at the behest of the Government without himself taking the necessary steps under articles 6, 8 and 9 of the Importers, Exporters and Indentors (Registration) Order,1981. In these circumstances the impugned Public Notification (Annexure-A to the writ petition) cannot stand, even without a challenge of the Governments action."

35. In the celebrated case of Authorised Officer D.I.T. Dacca – vs- Mr. A.W.Mallik and others 20 DLR (SC) 229 the Supreme Court held the sanction to the erre ction of the Cinema, under section 75(2) of the Town Improvement Act, obtained by the respondent and the High Court's order directing the Authorised Officer to apply his mind afresh to the plan submitted by the respondent to be justified. The refusal to sanction the plan was not, therefore, a legal exercise of direction and unlawful as the same being done at the behest of the provincial Government.

36. The Indian Supreme Court came down heavily in the well-known decision of Purtabpur Company Ltd. –vs- Cane Commissioner, Bihar AIR 1970 SC 1896 where it was raised that though the orders purported to have been made by the Cane Commissioner, were in fact not so; the Cane Commissioner merely acted as the mouth-piece of the Chief Minister; in truth he had abdicated his statutory functions and therefore the orders are bad. The Indian Supreme Court held us under:

> "We have earlier seen that the Cane Commissioner was definitely of the view that the reservation made in favour of the appellant should not be disturbed but the Chief Minister did not agree with that view. It is clear from the documents before us that the Chief Minister directed the Cane Commissioner to divide the reserved area into two portions and allot one portion to the 5th respondent. In pursuance of that direction, the Cane Commissioner prepared

two lists 'Ka' and 'Kha'. Under the orders of the Chief Minister, the villages contained in list 'Ka' were allotted to the appellant and in list 'Kha' to the 5th respondent. The Cane commissioner merely carried out the orders of the Chief Minister……..

…….……..……..……

The power exercisable by the Cane Commissioner under cl 6(1) IS A STATUTORY POWER. He alone could have exercised that power. While exercising that power he cannot abdicate his responsibility in favour of anyone - not even in favour of the State Government or the Chief Minister. It was not proper for the Chief Minister to have interfered with the functions of the Cane Commissioner. In this case what has happened is that the power of the Cane commissioner has been exercised by the Chief Minister, an authority not recognized by cl. (6) read with cl. (II) but the responsibility for making those orders was asked to be taken by the Cane Commissioner."

37. A similar question arose again in chandrika -v- State of Bihar AIR 1984 SC 322. The relevant statute empowered the Registrar, Cooperative Societies to extend the term of the Board of Directors. An order extending the term was passed by the Registrar as directed by the Chief Minister.

38. Though the attention of the Supreme Court was not invited to purtabpur Co. Ltd Case, as referred to above the Court independently held the section illegal and said – "The action of the Chief Minister meant the very negation of the beneficial measures contemplated by the Act."

39. Again in Anirudhsinhji Jadija -v- State of Guzrat AIR 1995 SC 2390, an offence was committed under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA). The District Superintendent of Police did not give approval on his own but requested the Additional Chief Secretary to accord permission to proceed under the Act, which was granted.

40. Setting aside the order the Supreme Court of India said: "The present was thus a clear case of exercise of power on the basis of external dictation. The dictation that came on the prayer of the DSP will not make any difference to the principle. The DSP did not exercise the Jurisdiction vested in him by the Statute and did not grant approval to the recording of information under TADA in exercise of his discretion."

41. In Commissioner of Police, Bombay -v- Gordhandas Bhanji AIR 1952 SC 16 the order purported to have been passed by the Commissioner of Police in the exercise of his power under Bombay Police Act, 1902and the rules made thereunder by a granting a license for the construction of a cinema theatre. But later on cancelled it at the direction of the State Government. The Supreme Court of India set aside the said order as the commissioner acted illegally in doing so on the dictate of the Government.

42. Further the Supreme Court of India reiterated the said proposition in State of Punjab -v- Hari Kishan Sharna, AIR 1966 SC 1081. Therein Supreme Court of India held that the State Government was not justified in assuming jurisdiction which had been conferred on the licensing authority by Section 5(1) and (2) of the Punjab Cinemas (Regulation) Act. For the reasons mentioned above it was held that the impugned orders are liable to be struck down as they were not made by the prescribed authority.

43. In U.P. –V- Maharaja Dharmendra AIR 1989 SC 997 when an authority, at the dictation of the government, issued revocation of a building plan earlier approved, the India Supreme Court quashed the notice.

44. In Manseeklal Vithalas Chaohan –v- State of Gujrat AIR 1997 SC 3400, the Government did not grant sanction to prosecute the appellant (public servant) under the Prevention of Corruption Act. The complainant filed a petition in the High Court and the High Court 'directed' the authorities to

grant sanction. The appellant was prosecuted and convicted. The conviction was setaside by the supreme Court.

45. Let us revert back to cases in hand again. Local and Revenue Audit Directorate (¯‹bxq I iƒR¯ AWU Awa`ßi) is internally set up by and under the authority of Comptroller and Auditor- General for the purpose of conducting audit as required under Article 128 of the Constitution and any other law, if so prescribed. As already discussed that the local Audit directorate can authoritatively look into the papers and documents of the NBR and do the needful to ascertain whether the thinks are in the right direction or not. Deviation of any kind if could be ascertained by the audit department in the process, the statutory public body (like NBR) would certainly account for that. On the other hand the respondent VAT authority pursuant to the Memo issued by the Audit Office issued the impugned Memos. But as it has been stated above, no provision of the said Act of 1991 empowers the VAT authority to direct the petitioner as a VAT registered person to deliver any documents or records directly to any third party authority, i.e. Local and Revenue Audit Directorate. Neither a notice can be issued either directing and deposite of revenue or under section 55(1) of VAT Act on that Count.

46. Thus the authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. The authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do.

47. Finally to sum up the principle of law propounded as already discussed exhaustively, profitably I can quote from Halsbury's Laws of England. In Halsbury's Laws of England, 4th Edn. Vol-1 P. 35 Para 33 it has been stated: "A body entrusted with a statutory discretion must address itself independently to the matter for consideration. It cannot lawfully accept instructions from or mechanically adopt the view of another body as to manner of exercising its discretion in a particular case, unless that other body has been expressly empowered to issue such direction or unless the deciding body or officer is a subordinate element in an administrative hierarchy within which instructions from above may properly he given on the question at issue."

48. That being the position all the Rules merit substance. The irresistible conclusion is that for any practical purpose whatsoever, the office of Comptroller and Auditor General so to say Local Audit Directorate in particular shall not peep into the domain of the VAT Authority in such a manner as it has happened in the cases in hand. The VAT Authority cannot issue any notice of a kind making a demand on behalf or at the behest of the Local Audit Directorate. The Notices shall have to be issued independently following the provisions laid down in the VAT Act, 1991. In all the cases where there is a direct demand for depositing the amount or asking for documents or even merely a notice served under section 55(1) of the VAT Act if found to be tainted being done under express direction of Local Audit Directorate, or so to say issued under the flagrant direction of Local audit Directorate, can not legaly sustain having curtailing effect on the provisions of Constitution and the VAT Act of 1991. The Constitutional mandate and the VAT, Act if considered conjunctively do not allow issuing notices of this kind since the fine line between Article 128 of the Constitution and the provisions of VAT, Act in this respect is distinct, vivid and well circumscribed.

49. The practice and propensity of issuing notices of this kind have become rampant and we are receiving numerous writ petitions on that score. Lest it develops into an infectious disease let us nip this unhealthy trend in the bud. Henceforth, the VAT authority shall not issue any notice in whatever form (either direct demand or notice under section 55(1) of the VAT, Act) under the direction or at the dictate or behest of local and Revenue Audit Department Directorate clear and simple. Only the procedure laid down in the VAT Act shall apply in so doing. Failure shall result in a dire consequence.

(All the underlinings are mine)

50. In the result, all the Rules are made absolute without any order as to cost. The notices impugned against are declared to have been made without lawful authority having no legal effect and hereby set aside.

51. However, the VAT authority can indecently issue notices or take steps in accordance with the law governing the field.

52. Let a copy of this judgment be sent to the office of the comptroller and Auditor General for future reference and guidance.

2 SCOB [2015] HCD 95

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 2412 OF 2007

First Money Changers Limited
..... Petitioner

-Versus-

The Bangladesh Bank and others
.....Respondents

Mr. M. Qumrul Haque Siddique, Advocate
.....For the petitioner.
Mr. M. Sakhawat Hossain, Advocate
….For the respondents.

Heard on 07.05.2015, 21.05.2015 and 16.06.2015.
Judgment on 21.06.2015.

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

Foreign Exchange Regulation Act, 1947
Section 3:
and
General Clauses Act
Section 16:
According to Section 16 of the General Clauses Act, where, by any Act of Parliament or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power. As the suspension of licence is not there in Section 3 of the Act of 1947, in our opinion, the provisions of Section 16 of the General Clauses Act can definitely be invoked in order to give a complete and harmonious interpretation of Section 3 of the Act of 1947. What we are driving at boils down to this: the authority making any appointment has the power to suspend the licence of any person appointed. ...(Para 12)

JUDGMENT

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution filed by the petitioner, a Rule Nisi was issued calling upon the respondents to show cause as to why the Memo No. ®hje£ (Ah¡) 144/128/2000-141 dated 13.01.2000 issued by the respondent no. 3 suspending the licence of the petitioner should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

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

The petitioner is a private company limited by shares. Anyway, the respondent no. 1 issued licence no. ®hje£ (Ah¡) 144/97-1622 dated 17.09.1997 under Section 3 of the Foreign Exchange Regulation Act, 1947 (hereinafter referred to as the Act of 1947) in favour of the petitioner. After obtaining the licence under Section 3 of the Act of 1947, the petitioner started money changer business at 16, Atish Dipankar Sarak, Maddhya Bashabo, Dhaka. Subsequently when the business flourished, the petitioner shifted the location of his business at 62/1, Purana Paltan (Ground Floor), Dhaka with the permission of the licensing authority. At one stage, one Mr. Md. Iqbal bearing Pakistani Passport No. G-704225 dated 17.07.1999 with valid visa came over to Bangladesh on

26.09.1999 who brought 1,96,250 Iraqi Dinars which were duly declared by him to the Customs Authority at Hazrat Shah Jalal International Airport. On 06.10.1999, Mr. Md. Iqbal through his business partner in Bangladesh Mr. Md. Akter Hossain placed the aforesaid 1,96,250 Iraqi Dinars to the petitioner for Bangladesh Currency in exchange along with a photocopy of his passport and declaration in FMJ Form. But the rate of exchange of Iraqi Dinar was not instantly available for which the petitioner had to tell them to hang on till exchange rate could be collected and they agreed. However, a few minutes later, one police Inspector of Detective Branch of Dhaka Metropolitan Police came to the office of the petitioner and seized the Iraqi Dinars and arrested Mr. Md. Mostafa Khan, Managing Director of the petitioner-company. By the impugned Memo No. ®hjeÉ (Ah¡) 144/128/2000-141 dated 13.01.2000, the respondent no. 3 directed the petitioner to show cause within 10 (ten) days as to why the money changer licence should not be cancelled alleging that the petitioner held 1,96,250 Iraqi Dinars illegally without issuing any encashment certificate to the seller and keeping proper record of purchase and at the same time suspended the money changer licence of the petitioner until further orders. On 30.01.2000, the petitioner by letter No. FMCL 03/2000 submitted their explanation to the show cause notice and prayed for withdrawal of the order of suspension of the money changer licence contending, inter alia, that on 06.10.1999, the police seized 1,96,250 Iraqi Dinars, though instantly a photocopy of the passport and FMJ Form of the seller was shown. But for want of exchange rate, exchange money or encashment certificate could not be issued to the seller and recorded in the relevant register. The Iraqi Dinars were not illegally held and possessed by the petitioner. On 18.01.2000, Md. Rezaul Karim, Inspector of Detective Branch, lodged Motijheel Police Station Case No. 66 under Section 25B of the Special Powers Act, 1974 against Mr. Md. Mostafa Khan, Managing Director of the petitioner-company concerning the occurrence. After investigation, the police submitted charge-sheet and the case was sent to the Special Tribunal No. 12, Dhaka and the same was registered as Metro Special Tribunal Case No. 526 of 2001. In the Metro Special Tribunal Case No. 526 of 2001, Mr. Md. Iqbal, owner of the seized Iraqi Dinars, submitted an application praying for return of the seized money to him on 24.05.2000; but that application was turned down. Eventually Mr. Md. Mostafa Khan was charged with the offence punishable under Section 25B of the Special Powers Act by the Special Tribunal on 28.04.2002. Thereafter the petitioner filed Criminal Miscellaneous Case No. 9274 of 2004 in the High Court Division under Section 561A of the Code of Criminal Procedure for quashing the proceedings of the Metro Special Tribunal Case No. 526 of 2001 and after initial hearing, the High Court Division by its order dated 29.11.2004 issued a Rule and stayed all further proceedings of the case pending disposal of the Rule. The petitioner-company has been adversely affected by the order of suspension of the money changer licence as a result of which the petitioner-company has been incurring a whopping loss in their business. However, the respondent no. 3 cannot suspend the money changer licence of the petitioner under Section 3 of the Act of 1947 and that being so, the impugned order is without lawful authority and of no legal effect.

3. The respondents have filed an Affidavit-in-Opposition opposing the Rule. Their case, as set out in the Affidavit-in-Opposition, in short, is as follows:

A team of Detective Branch of Dhaka Metropolitan Police, Dhaka headed by Mr. Rezaul Karim, acting on a tip-off, moved to the office of the petitioner and found that the Managing Director of the petitioner-company, that is to say, Mr. Md. Mostafa Khan was holding and possessing Iraqi Currency to the tune of 1,96,250 Dinars illegally and consequently they seized the Iraqi Dinars together with the Cash Book Register and Buying Register of the petitioner-company and also arrested its Managing Director Mr. Md. Mostafa Khan. Subsequently Mr. Rezaul Karim lodged a First Information Report (FIR) with Motijheel Police Station being Motijheel Police Station Case No. 66 dated 18.01.2000 against Mr. Md. Mostafa Khan under Section 25B of the Special Powers Act which was ultimately registered as Metro Special Tribunal Case No. 526 of 2001 by the Special Tribunal concerned. Before disposal of the Metro Special Tribunal Case No. 526 of 2001 by the Special Tribunal concerned, there is no scope to withdraw the order of suspension of the money changer licence of the petitioner-company. As per Section 16 of the General Clauses Act, 1897, the authority is empowered to suspend the money changer licence of the petitioner-company. By suspending the licence of the petitioner-company, the Bangladesh Bank Authority did not commit any illegality. So the impugned Memo No.

®hje£ (Ah¡) 144/128/2000-141 dated 13.01.2000 issued by the respondent no. 3 suspending the licence of the petitioner-company is valid and sustainable in law.

4. At the outset, Mr. M. Qumrul Haque Siddique, learned Advocate appearing on behalf of the petitioner-company, submits that the petitioner-company was granted licence by the Bangladesh Bank Authority under Section 3 of the Act of 1947 for money changer business on 17.09.1997 and the licence may be revoked by the Bangladesh Bank for reasons appearing to it sufficient and as Section 3 of the Act of 1947 does not contemplate suspension of the licence of any money changer business, the Bangladesh Bank Authority exceeded its jurisdiction in suspending the licence of the petitioner-company and that being so, the impugned order dated 13.01.2000 is ex-facie without lawful authority and of no legal effect.

5. Mr. M. Qumrul Haque Siddique further submits that as Section 3 of the Act of 1947 does not specifically provide for suspension of any licence, the provisions of Section 16 of the General Clauses Act can not be invoked as an aid to the interpretation of Section 3 of the Act of 1947 and had the Legislature really contemplated suspension of any money changer licence by the Bangladesh Bank, the Legislature would have definitely made a provision for suspension of the same in Section 3 of the Act of 1947.

6. Mr. M. Qumrul Haque Siddique also submits that although the petitioner-company was a licensee of the Bangladesh Bank, yet it cannot be said that the company was an agent of the principal (Bangladesh Bank) and the observation made by the Appellate Division in this regard in the decision in the case of Mustafa Zamil Ahmed…Vs…Governor of Bangladesh Bank and others reported in 53 DLR (AD) 66 is in the nature of an 'obiter dictum'.

7. Per contra, Mr. M. Sakhawat Hossain, learned Advocate appearing on behalf of the respondents, submits that as per Section 16 of the General Clauses Act, 1897, where, by any Act of Parliament or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power and by virtue of the provisions of Section 16 of the General Clauses Act, the Bangladesh Bank is competent to suspend the licence of the petitioner-company; albeit there is no specific provision in that behalf in Section 3 of the Act of 1947.

8. Mr. M. Sakhawat Hossain also submits by referring to the decision in the case of Mustafa Zamil Ahmed…Vs…Governor of Bangladesh Bank and others reported in 53 DLR (AD) 66 that the petitioner-company being the licensee was the agent of the principal, that is to say, Bangladesh Bank and the principal has always the right to suspend the licence of its agent.

9. We have heard the submissions of the learned Advocate Mr. M. Qumrul Haque Siddique and the counter-submissions of the learned Advocate Mr. M. Sakhawat Hossain and perused the Writ Petition, Affidavit-in-Opposition and relevant Annexures annexed thereto.

10. In the facts and circumstances of the case and in view of the submissions and counter-submissions of the learned Advocates, the bone of contention that emerges is that whether the Bangladesh Bank has the right to suspend the licence of the petitioner-company in the absence of any specific provision to that effect in Section 3 of the Act of 1947. In order to resolve the bone of contention, the relevant provisions of Section 3 of the Act of 1947 are quoted below verbatim:

"3. (1) The Bangladesh Bank may, on application made to it in this behalf, authorize any person to deal in foreign exchange.

(2) An authorization under this Section-

(i) may authorize dealings in all foreign currencies or may be restricted to authorizing dealings in specified foreign currencies only;

(ii) may authorize transactions of all descriptions in foreign currencies or may be restricted to authorizing specified transactions only;

(iii) may be granted to be effective for a specified period, or within specified amounts, and may in all cases be revoked for reasons appearing to it sufficient by the Bangladesh Bank.

……..”

11. From a bare reading of the aforementioned provisions of Section 3 of the Act of 1947, it seems that it does not provide for suspension of any licence in so many words; rather it expressly provides for revocation of any licence for reasons appearing sufficient to the Bangladesh Bank. In other words, the Bangladesh Bank, for sufficient reasons, may revoke licences in all cases.

12. At this juncture, the all-important question that arises is this: can the Court call in aid the provisions of Section 16 of the General Clauses Act in interpreting Section 3 of the Act of 1947? The General Clauses Act is an Interpretation Act. This is often called the ‘grammar’ or ‘dictionary’ of law. According to Section 16 of the General Clauses Act, where, by any Act of Parliament or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power. As the suspension of licence is not there in Section 3 of the Act of 1947, in our opinion, the provisions of Section 16 of the General Clauses Act can definitely be invoked in order to give a complete and harmonious interpretation of Section 3 of the Act of 1947. What we are driving at boils down to this: the authority making any appointment has the power to suspend the licence of any person appointed.

13. In this respect, our view stands fortified by the decision in the case of Mustafa Zamil Ahmed…Vs…Governor of Bangladesh Bank and others reported in 53 DLR (AD) 66 relied on by Mr. M. Sakhawat Hossain. In that decision, paragraphs 6 and 7 appear to be very relevant for our purpose and those 2(two) paragraphs are reproduced below:

> “6. It has been argued that the criminal case started against the petitioner and others has been pending for long and the petitioner is suffering huge financial loss on account of rent for the premises, salary of staff, etc. on account of the order of suspension. Furthermore, he argues that Bangladesh Bank, the principal, had no right to suspend the licence of its agent lawfully appointed.
>
> 7. We find no substance in the submissions. The principal has always a right to take action against his agent for misdemeanour, specially when it is of criminal nature.”

14. In the cited case, an argument was placed before the Appellate Division that the principal, that is to say, the Bangladesh Bank had no right to suspend the licence of its agent lawfully appointed; but that argument was negatived; rather the Appellate Division in categorical, unequivocal and unmistakable terms held that the principal (Bangladesh Bank) had the right to take action against its agent for misdemeanour, specially when it is of criminal nature.

15. Indisputably the Managing Director of the petitioner-company Mr. Md. Mostafa Khan is an accused in the Special Tribunal Case No. 526 of 2001 which is pending in the Special Tribunal. It is further admitted that the proceedings of the case have been stayed by the High Court Division in Criminal Miscellaneous Case No. 9274 of 2004 under Section 561A of the Code of Criminal Procedure. Having regard to the facts and circumstances of the case, we think, it would be advisable on the part of the petitioner-company to take necessary steps for early disposal of the Criminal Miscellaneous Case No. 9274 of 2004 on merit.

16. From the foregoing discussions, we find no merit in the Rule. The Rule, therefore, fails.

17. Accordingly, the Rule is discharged without any order as to costs.

2 SCOB [2015] HCD 99

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 3716 OF 2014.

Mst. Halima Khatun and another
..... Petitioners
-Versus-

Government of the People's Republic of **Bangladesh**, represented by the Ministry of Mass and Primary Education, Bangladesh Secretariat Building, Ramna, Dhaka-1000 and others.
..... Respondents

Mr. Mohammed Hedayet Hossain, Advocate
… For the Petitioners.
Mr. A.S.M. Nazmul Haque, D.A.G. with
Mr. Md. Osman Gani Khan, A.A.G.
… For the Respondent No. 2.

Heard on: The 9th, 16th and 23rd August, 2015 and
Judgment on: The 24th August, 2015.

Present:
Mr. Justice Md. Rezaul Hasan
And
Mr. Justice Farid Ahmed

Registered Private Primary School Teachers (appointment, promotion, discipline and welfare) Rules 2009:
We have also consulted the rules and, in our considered opinion, a show cause notice, as required under clause (Ka) of Rule- 5.4 giving 7 days time to explain the allegations brought, if any, and further asking, in the same notice, the petitioners as to whether they were willing to appear before the enquiry committee were mandatory on the part of the respondents and such notices ought to have been issued upon the petitioners. We also find that, as per clause (Kha) of Rule 5.4, it is also mandatory that appointing authority should form a 3(three) members enquiry committee and the enquiry committed shall dispose of the disciplinary proceedings, if initiated, within 60 days. But, we find nothing on record to show that any notice was issued upon the petitioners or any enquiry committee was formed required by clause (Kha) or clause (Kha) of Rule 5.4 of the said rules and the impugned memo was not issued following the procedure laid down in clauses (Ka) and (Kha) of Rule 5.4. ...(Para 8)

Principle of natural justice:
We are also of the opinion that the government portion of the salary of the petitioners has conferred vested rights in them and this cannot be taken away arbitrarily, violating the principle of natural justice. ...(Para 11)

JUDGMENT

Md. Rezaul Hasan, J:

1. In this application, filed under Article 102 of the Constitution of the People's Republic of Bangladesh, a Rule Nisi has been issued calling upon the respondents to show cause as to why the impugned Memo No. *DËkZv/ AvGvB/ bIMv/ 2013/ 296* dated 14.05.2013 issued by the Respondent No. 6 stopping the Monthly Payment Order (M.P.O.) to the petitioners (Annexure-G) on the ground of illegality in appointing the petitioners and others should not be declared to have been made illegally and without lawful authority and as to why they (Respondents) should not be directed to allow M.P.O

to the petitioners and/ or pass such other or further order or orders as to this Court may seem fit and proper.

2. It has been stated in the petition, amongst other, that the petitioners are law abiding citizens of Bangladesh. They are serving and discharging their duty regularly as Assistant Teachers in the Registered Primary school; that due to retirement and death of some teachers in some registered Primary School in Atrai Upazila some posts of Assistant Teacher had been declared vacant and the respondents invited circular for appointment of those posts and the petitioners being eligible candidate applied for the same; that the respondents and others after scrutinizing the applications the respondents found the applications of the petitioners are correct and valid for appointment to their respective posts; that, thereafter, through competitive examination held by the respondents and on the basis of merit the petitioners qualified for appointment in their respective posts; and the respondents issued appointment letters, dated 03.06.2009 and 02.06.2009 as Assistant Teacher of Horipur Registered Primary School and Joynathpur Registered Primary School (Atrai, Naogaon), respectively, to the petitioners; that it is further stated that the petitioner No.1 having received the appointment letter joined the Horipur Registered Primary School, Atrai, Naogaon on 06.06.2009 as Assistant Teacher and the petitioner No.2 Joined the Joynathpur Registered Primary School, Atrai, Naogaon on 07.06.2009 as Assistant Teacher; that the petitioners have been performing their functions regularly as Assistant Teacher since the date of their joining. In this connection it may be noted that the petitioners got their portion of salary from Government by Monthly Payment Order (M.P.O.) from March 2010 and May-2010, respectively, and had been paid regularly till the month of May-2013; that all on a sudden and without serving any Notice whatsoever and holding any enquiry, one Mohammad Shahhadat Hossain, Director (Admin and Finance) of Primary and Mass Education Ministry submitted an inquiry report with a recommendation for stopping the Government portion of salary of the petitioners on 14.03.2013; that the Respondent No.3 issued a letter dated 06.05.2013 requesting the Respondent No.07 to explain cause regarding the appointment of the petitioners and others; that thereafter the Respondent No.3 on behalf of Respondent No.2, Director General, issued a letter dated 06.05.2013 stopping the Government portion of salary of the petitioners and others; that thereafter the Respondent No.7 by his letter, dated 21.05.2013 made an explanation of show cause notice issued by the Respondent No.3; that thereafter the Respondent No.6 issued the impugned Memo No. *DwkZv/ AvGvB/ bIMv/ 2013/ 296* dated 14.05.2013 issued by the Respondent No. 6 stopping the Monthly Payment Order (M.P.O.) to the petitioners on the ground of illegality in appointing the petitioners and others.

3. The petitioners have filed this writ petition challenging the impugned Memo No. *DwkZv/ AvGvB/ bIMv/ 2013/ 296* dated 14.05.2013 issued by the Respondent No. 6 sopping he Monthly Payment Order (M.P.O) to the petitioners.

4. Mr. Mohammat Hedayet Hossain, learned Advocate having placed the petition along with the relevant rules, first of all has drawn our attention to Rule- 5.4 of the " Registered Private Primary School Teachers (appointment, promotion, discipline and welfare) Rules 2009" (the Rules in brief) and submits that clause –(Ka) of Rule 5.4 mandatorily requires that notice upon the petitioner should be served specifying the allegations, if any, brought against the petitioners and proposed punishment as well as they (the petitioners) should be asked, in the said notice, as to whether they are willing to appear for any personal hearing. Then, as per clause (Kha) there member committee shall be formed and they shall disposed of the disciplinary proceedings within 60 days. The learned Advocate next submits that although in an investigation report *(Z`š)* dated 14.3.2013 has been enclosed to a *mvwiK bs - evcwk/ cwiPvjK, (ckvmb I A_)/ Z`š/ 2012/217 ZwiL 14/3/2013*, addressed to the concerned Officials authority, however, it will be evident from the forwarding letter and the enclosed report that no copies of the forwarding letter to the enquiry report *(Z`š)* (Annexure-C) was sent to the petitioners. The said Memo, Annexure- C, was addressed to the Director General, Compulsory Primary Education Finalized Monitoring Unit. Besides it will be evident from the said investigation *(Z`š)* report dated 14.3.2013 that none of the petitioners were asked to attend at the time of holding said investigation *(Z`š).* The learned Advocate submits that the proper word should be *cv_wgK Z`š,* not *Z`š* Then

referring to Rule 5.4, the learned Advocate submits that no notice was served at all upon any of the petitioners giving 7 days time to explain as to why the government portion of their salary should not be stopped/ curtailed from their monthly salary nor any opportunity was given to them to submit their explanation. Neither any Enquiry Committee was formed nor any enquiry at all was held as required under clauses (Ka) and (Kha) of Rule 5.4 of the said Rule and as such the impugned Memo under reference No. *DwkZv/ AvGvB/ bIMv/ 2013/ 296 ZwiL 14/5/2013* (Annexure- G) has been passed without any lawful authority and in an unlawful manner. Next, drawing our attention to the judgment and order passed in Writ Petition No. 9724 of 2013 filed by Most. Sultana Nazneen and 7 others against the Government of the People's Republic of Bangladesh, in which the same Memo No. *DwkZv/ AvGvB/ bIMv/ 2013/ 296 ZwiL 14/5/2013* (Annexure- G) was impugned before a Division Bench. The petitioners and 7 other teachers are named against Sl. No. 1-8 of the said impugned Memo. A Bench of this Division, by a judgment and dated 6.7.2014 has declared the impugned memo to have been passed without lawful authority and is of no legal effect and a direction was given upon the respondents to pay the petitioners (of that writ petition) the government portion of salary under the M.P.O Scheme from 1.3.2013 with all arrear within 60 days from the date of receipt of the said judgment and order. He next submits that, as referred to in paragraph No. 6 of the supplementary affidavit filed by the petitioners sworn on 23.8.2015, the Government filed C.P.L.A. No. 1529 of 2014 against the said judgment and order dated 6.3.2014 passed in Writ Petition No. 9724 of 2013, but the Appellate Division was pleased to dismiss the CPLA by judgment and order dated 30.7.2015, as such this dispute has been set at rest by the apex court, so far as the Memo No. *DwkZv/ AvGvB/ bIMv/ 2013/ 296 ZwiL 14/5/2013* (Annexure- G) is concerned in respect of 8 petitioners, named against serial Nos. 1-8 in the impugned Memo. He, therefore, asserts that the petitioners i.e. whose name appear against serial Nos. 9-10 are also entitled to get the similar relief. Besides, he also submits that this government portion of the salary has become vested right of the petitioner and this cannot be taken away arbitrarily or in violation of the principle of natural justice. Accordingly he has prayed for making the rule absolute.

5. Mr. A.S.M. Nazmul Haque, learned Deputy Attorney General appearing along with Mr. Md. Osman Gani Khan, learned Assistant Attorney General, on the contrary submits that the government portion of the petitioner's salary has have been rightly stopped by the impugned Memo, inasmuch as the reason has been stated for taking such action in an enquiry report dated 14.3.2013 (Annexure- C). He further submits that though the petitioners were not present at the time of enquiry, however, the Head Mistress of the School was present, but she could not submit any documents before the Director (Admin & Finance). Since, he continues, the government portion of the salary of the two petitioners was correctly stopped after holding inquiry, therefore, this rule has no merit and the same is liable to be discharged.

6. We have heard the learned Advocate appearing for both sides, perused the petition, supplementary affidavit along with documents annexed and the concerned Rule. We have also consulted the (unreported) judgment placed before us.

7. We find from the documents, vide Annexure- A series and B series, that there were orders for appointment of teachers and both the petitioners were appointed, being selected as they had qualified in the examination taken for that purpose and accordingly the petitioner No. 1 has joined on 6.6.2009 and petitioner No. 2 has joined on 7.6.2009 in the school, by submitting joining letters Annexure- B series and still they are continuing their services and performing functions as teachers in the schools.

8. We have also consulted the rules and, in our considered opinion, a show cause notice, as required under clause (Ka) of Rule- 5.4 giving 7 days time to explain the allegations brought, if any, and further asking, in the same notice, the petitioners as to whether they were willing to appear before the enquiry committee were mandatory on the part of the respondents and such notices ought to have been issued upon the petitioners. We also find that, as per clause (Kha) of Rule 5.4, it is also mandatory that appointing authority should form a 3(three) members enquiry committee and the enquiry committed shall dispose of the disciplinary proceedings, if initiated, within 60 days. But, we

find nothing on record to show that any notice was issued upon the petitioners or any enquiry committee was formed required by clause (Kha) or clause (Kha) of Rule 5.4 of the said rules and the impugned memo was not issued following the procedure laid down in clauses (Ka) and (Kha) of Rule 5.4.

9. The enquiry report, which should be called an investigation report, annexed to Memo No. *DwkZv/ AvGvB/ bIMv/ 2013/ 296* dated 14.05.2013 (Annexure- C) cannot be the basis for passing the impugned order, nor does this investigation by one person namely, Director (Admin and Finance) and done in absence of the petitioners without giving them opportunity of being heard, is authorized under clause (Ka) and (Kha) of Rule 5.4.

10. The impugned Memo No. *DwkZv/ AvGvB/ bIMv/ 2013/ 296* dated 14.05.2013, therefore, in our considered opinion, is liable to be declared to have been issued without any lawful authority and is of no legal effect. We, therefore, concur with the view taken by a Bench of this Division, in their judgment and order (unreported), passed in Writ Petition No. 9724 of 2013 and subsequently upheld by the Appellate Division, in that CPLA No. 1529 of 2014 filed by the government –writ respondent was dismissed on 30.7.29015.

11. We are also of the opinion that the government portion of the salary of the petitioners has conferred vested rights in them and this cannot be taken away arbitrarily, violating the principle of natural justice**.** Similar views were taken in 60 DLR 712, Emdadul Haque Vs. D.G, Secondary and Higher Secondary Education and others and in 18 BLT 303: Md. Shawkat Ali Vs. Director General and others.

12. Before, parting of, we should record that, hundreds and thousands of writ-petitions have been filed and are pending, before this court, on identical causes of action. Ultravires acts are seen to have done in many cases, resulting in making the Rule absolute. Lack of accountability seems to be the reason for doing malafide or unlawful acts and colourable exercise of power in many cases. This not only causes hardship to the teacher's and the peace loving members of public, but dragging them to the court proceedings and also overwhelmingly burdening this court with thousands and laks of writ petitions and other proceedings. Hence, time has arisen to ascertain as to whether the impugned act is done in bad faith, for which, if established, the person concerned shall be deprived of the immunity and may be held individually responsible to pay cost and/ or compensation. For, instance, doing an act contrary to the settled law/ decisions of the Supreme Court, acting in violation of the principle of natural justice or overlooking that a matter is subjudice etc. may (though not necessarily or in all cases) lead to drawing inference of bad faith and imposition of fine/ cost, to be borne individually by the person responsible, otherwise the excesses done by some may exceed the limit. It is to be noted here that every person, exercising statutory power, must ascertain. 1. If he/ she is invested with that power, 2. If he/ she is following the proper procedure, 3. If he/ she is acting bonafide and in good faith, 4. If the acts done is covered by relevant law, rules, regulations etc. 5) If he/ she is violating the principles of natural justice. 6) If she / he has taken extraneous matter into consideration or refused to take into consideration relevant matters; 7) If he/ she is free from any kind of bias; 8) If she/ he is acting under dictation or misusing his/ her discretion; 9) If he/ she is doing what is legally prohibited or is refraining from doing what is legally required to do, and 10) if he/ she is respectful to the peoples fundamental, statutory and customary rights recognized by law.

13. Since, we indicated about providing guidelines for exercising discretion and powers by the officials at field level, because the writ petitions of thousands of M.P.O listed teachers and of thousands of other persons are pending, for years together, at the cost of untold suffering of theirs, we therefore, consider it proper also to record that fair, equal and equitable treatment is one of the pre-conditions to convert the population into human resource, whether employed, unemployed or self-employed. Similarly, an ordered society, stability and respect to the Rule of Law is sine quo non for achieving all development goals, where the judiciary, as one of the three organs of the state, shall contribute from its own jurisdiction, in a concerted effort of all the organs, to achieve those goals. In its proper sense, administration of justice is a part of governance done by the judiciary, as other

components of the governance are within the province of two other organs. Here the Supreme Court is not a mere constitutional court. It is the judicial organ of the state, at the same time. Though, the functions of the three organs, created by the constitution are different and defined, however, there is oneness in the three, so far as the resolution to achieve the development goals and welfare of the people are concerned. It is further to be noted here that all the organs are of co-ordinate jurisdiction. The manner or procedure of assuming office, whether by election or otherwise, does not give superiority to one above the others inasmuch as it is the nature of the functions to be performed that determines the manner or procedure in assuming an office. The three organs shall work together, with aroma of reciprocal cooperation and respect amongst themselves, to secure the public good, in the manner permitted by law, and towards acquiring the ultimate goal to be a developed, prestigious and peace loving nation.

14. In view of the foregoing facts and circumstances, recorded herein above, considered alongwith the submissions made by both the sides, we find merit in this rule. The same merits to be made absolute with appropriate directions.

O R D E R

15. In the result, the Rule is made absolute. The impugned Memo No. *DwkZv/ AvGvB/ b1Mv/ 2013/ 296* dated 14.05.2013 is hereby declared to have been issued without lawful authority and is of no legal effect, so far as the petitioners are concerned. The respondents are directed to pay the petitioners government portion of their monthly salary, under the MPO scheme, from 01.03.2013 with all arrear benefits, within 60 (sixty) days from the date of receipt of this judgment and order. However, the respondents shall be at liberty to proceed, following the procedure as laid down in the aforesaid Rules, 2009, if taking step against the petitioners is bonafide required in the interest of the institution.

16. No order as to costs.

17. Communicate the judgment and order to the respondents at once.

18. Let copies of this judgment be sent to the Honourable Chairperson of the 'Parliamentary Standing Committee on the Ministry of Public Administration' Sangsad Bhaban, Sher-e-Bangla Nagar, Dhaka, to the Honourable Minister, Ministry of Public Administration, Bangladesh Secretariat, Dhaka, to the Honourable Minister, Ministry of Education, Bangladesh Secretariat, Dhaka, to the Honourable Minister, Ministry of Primary & Mass Education, Bangladesh Secretariat, Dhaka; to the Director General, Directorate of Secondary & Higher Education, Shikha Bhaban, Ramna, Dhaka and to the Director General, Directorate of Primary Education, Mirpur, 2, Dhaka-1216, Bangladesh, for their appraisal and, if they deem fit, for issuing office orders or circulars bearing appropriate guide lines to be followed by the officials concerned.